

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
CIVIL APPEAL NO. 011 of 2016

KIVUMBI BASHIR:.....:APPELLANT

VERSUS

- 1. ALI MUYANGU**
- 2. NAGIRA NAMUDDU:.....: RESPONDENTS**

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

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JUDGEMENT

The Appellant, **Kivumbi Bashir**, appealed to this Court against the judgment and orders of her worship, Jacqueline Kagoya delivered on 8/4/2015 in land civil suit No. 001 of 2013. The Respondents were **Ali Muyangu and Nagira Namuddu**.

The grounds of appeal were:-

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1. That the learned trial Magistrate erred in overruling the preliminary points of law on jurisdiction of the Court raised by the Appellant attorneys.
2. That the learned trial Magistrate erred in fact and in law when she contradicted herself in her judgment and thus came to a wrong decision.
3. That the learned trial Magistrate erred in law and fact on basing her judgment on erroneous assumptions and reaching conclusions which are not supported by evidence.
4. That the trial Magistrate occasioned gross injustice to the appellant by:
 - a) Failing to ascertain the extent of alleged trespass by a no locus in quo.
 - b) Casually and wrongly disregarding the Respondent's departure from pleading.
5. That the trial Magistrate erred in passing judgment in utter disregard of the law on the burden and standard of proof and the parole evidence rule.
6. That the learned trial Magistrate erred in law and fact in finding that the appellant was a trespasser on the land when she failed to take into account the relevant fact that the

Appellant had an interest in the land bylaw and was in possession of the land way before the Respondents acquired any interest in the suit land.

7. That the learned Magistrate erred in law in holding that there was no fraud on the part of the Respondents.
8. That the award of general damages with interest is harsh, unjustified and unconscionable.

The Appellant was represented by M/s Jingo, Ssempijja & Co. Advocates, while the Respondents were represented by M/s Kibeedi & Co. Advocates.

Both sides filed written submissions.

Brief background facts:

- 10 The 1st and 2nd Respondents/Plaintiffs being registered proprietors of land comprised in Kyadondo Block 92B Plot1064 land at Matugga filed civil Suit o. 1 of 2013 against the appellant/Defendant for trespass to land and pleaded fraud. The Plaintiffs/respondents brought four witnesses to prove their case. The appellant/Defendant filed a written statement of defence and a counter claim stating that he has a kibanja interest on the suit land and alleging fraud on the part of the Respondents. During the filing of submissions former counsel for the appellant raised a preliminary objection that court lacked pecuniary jurisdiction. The Defendant/Appellant brought three witnesses to prove his case. The trial Magistrate decided the suit against the defendant/Appellant; declared him a trespasser and made orders of permanent injunction, vacant possession, general damages of Ug shs 3,000,000/= with interest from date of judgment till payment in full and costs of the suit. The Appellant being dissatisfied with the judgment and orders of the trial Magistrate brought this appeal.
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Counsel for the Appellant chose to urge ground (1) Alone, the grounds 2,3,5 and 6 together touching on evaluation of evidence, and grounds 7 and 8 separately. Ground 4 of appeal was abandoned.

Ground I:

That the learned trial Magistrate erred in overruling the preliminary points of law on jurisdiction of the Court raised by the appellant attorneys.

Counsel for the Appellant submitted that the trial Magistrate overruled the preliminary objection as follows:

- i) That the defendant/appellant strongly submitted to this Court's jurisdiction.
- ii) The valuation report wasn't recently made the Defendant did not know of the value prior to his filing of the defence
- iii) It's premised on the developments on the suit land and not the land itself where the plaintiffs/ Respondents allege trespass.
- iv) The Defendant is stopped having also filed another suit inform of a counter claim in this very court.

10 Counsel for the Appellant emphasized that the above reasons were erroneous as the lower court had no jurisdiction in view of section 207 of the Magistrates Courts Act.

He added that Jurisdiction is a creature of statute and that a Magistrate Grade One has jurisdiction where the value of the subject matter does not exceed Ug X 20,000,000/=.

Counsel went on to submit that the subject matter in this case was in respect of land comprised in Block 92 B Plot 145 situated at Matugga which the Respondents alleged that the appellant trespassed on, the Plaintiff bought it at a sum of Ug shs 26,000,000/= (P Exhibit No. 2), the acts of trespass complained of by the Respondents were the developments/ houses the Appellant constructed on the suit land whose value was tendered in court as D Exhibit No. 5 which put the Appellants developments at a sum of Ug shs 57,000,000/= these facts were reflected on
20 the parties pleadings and in evidence during the trial of the case. Counsel added that all these showed that the value of the land (subject matter) alleged to be trespassed upon by the Appellant was above Ug shs 20,000,000/=the pecuniary jurisdiction of Magistrate Grade One and also given the fact that Magistrate Grade One do not have unlimited jurisdiction in disputes of trespass. He concluded that the trial Magistrate lacked jurisdiction to hear this matter.

In reply, Counsel for the Respondent submitted that the objection to the jurisdiction of the trial Magistrate was not raised as a preliminary point of law before the commencement of the trial. He added that it was raised at the level of submissions, which was prejudicial to Respondent's

case. Under **O. 6 r 28 of the Civil Procedure Rules**, a party is entitled to raise by his or her pleading any point of law, and any such point raised shall be disposed of by the court at or after the hearing. Then **Order 6 rule 29** of the Civil Procedure Rules provides that if in the opinion of the Court, the decision on the point of law substantially disposes of the whole suit, the court may there upon dismiss the suit or make such orders in the suit as may be just. So without going into the detailed submissions of both sides, the preliminary point of law concerning jurisdiction of the Court should have been raised and disposed of at the beginning of the trial, **and not during submissions.**

Furthermore, in the case of **Justine E.M.N. Lutaaya vs Sterling Civil Engineering Company LTD, Supreme Court Civil Appeal No. 11 of 2002**, the tort of trespass was defined as follows:-

“Trespass to land occurs when a person makes an authorized entry upon land, and thereby interferes, or portends to interfere, with another’s lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land....”

page 8 paragraph 2 of the lead judgment of Mulenga J.S.C.

Trespass is therefore a wrong which is impossible of monetary or pecuniary estimation and it would not be proper to remove the jurisdiction of the Court basing on the monetary value of the land trespassed upon. Trespass falls in the category of cases of battery, assault and defamation which are incapable of pecuniary estimation unless the Plaintiff pleads damages.

So in view of the supreme court decision in **Justine E.M.N. Lutaaya** case above, I find and hold that Court properly exercised Jurisdiction in this matter.

Ground No. 1 of appeal is accordingly hereby rejected.

Grounds 2,3,4,5 and 6, merged to read:-

That the trial Magistrate erred in law and fact when she failed to properly evaluate the evidence hence coming to the wrong conclusion and judgment.

Counsel for the appellant submitted that the finding of the trial Magistrate that the Defendant/appellant was a trespasser did not take into account what constitutes trespass in her Judgment. He made reference to the case of **Lutaaya vs Sterling Engineering Co; SCCA NO. 11 of 2003**, where it was stated that Trespass to land occurs when a person makes an authorized entry upon land and thereby interferes with another person's possession of the land. He therefore stated that the Appellant could not be said to have trespassed on the Respondents/Plaintiffs land in 2008 when the Appellant/Defendant was already in his kibanja. Counsel for the Appellant went on to submit that whereas the trial Magistrate in her judgment found that the suit land belonged to PWI (see page 9 paragraph 3 of the Judgment) according to the evidence of PWI, the Appellant who is her grandson came onto the suit land where PWI was staying in 1999 (page 20 paragraph 6 of the record) when he was sick and when the Defendant recovered he did not go back but PWI put him in small house where he started staying. Counsel therefore added that according to that evidence the entry of the appellant onto the suit land was not unlawful, the person who was in possession of the suit land PWI whom court found to be person to whom the land belonged to allowed him to stay there.

Counsel for the appellant therefore challenged the testimony of PWI as lies and that she should not have been believed by the trial Magistrate. The Advocate also wondered who bought the land in dispute as between PWI and her daughter PW4, Nalongo Hadija Nakiyagga, and in the end concluded that PWI's evidence was full of lies, contradictions and inconsistencies and unreliable.

Counsel for the appellant invited this court to find and hold that DW1's entry on the suit kibanja was with the permission of PWI. It was further submitted that the Appellant (DW1), together with PW4 paid some money to the land lady as per exhibits 3 and 4 on the authority of PWI.

Counsel also wondered why the Respondent tried to compensate the appellant for the developments on the suit land when they deemed him as a trespasser and having no interest in the suit property.

Lastly, counsel for the Appellant submitted that the Respondent's argument that the suit kibanja was owned by PW4 and that PW1 was just a caretaker was not supported by documentary evidence. And that since the Respondents did not adduce evidence to prove that PW4 purchased the suit kibanja and from whom she bought and the year of buying, then the trial Magistrate erred to have decided in their favour.

Counsel for the Respondent on the other hand submitted that the trial Magistrate properly evaluated the evidence and came to the correct conclusion. He quoted a passage on page 9 of the Lower court Judgment which read as follows:-

10 ***“I have considered the above evidence, submissions and also perused the exhibits on record plus authorities cited above. I noticed upon considering all the above, that the land as an agreed position belonged to PW1 and all the payments made to both DW3 and then landlady Sauda Nabanakulya were made by PW1 albeit some were through other persons.....”***

Counsel also added that the contradictions pointed out by counsel for appellant were very minor, compared to the contradictions in own case.

It was also submitted that DW3, a witness of the appellant in the lower court turned to support the Respondent/Plaintiffs case to the effect that the former owner of the suit land (Sauda Nabanakulya) sold to Salima Namirembe (PW1). Counsel made reference to pages 5-6 of the proceedings where PW1 denied having given the suit kibanja to Defendant/appellant, contrary to
20 what appellant alleged.

Counsel for the Respondents also submitted that the appellant did not come into possession before Respondents purchased. That instead and according to the testimony of PW1, Hajati Namirembe Salima, the appellant forcefully took possession of the suit land, and cannot assert lawful possession prior to Respondents' purchase. He concluded that the findings of the trial Magistrate about the credibility of a witness should be accorded the due weight and not be interfered with.

I have considered the submissions on both sides with regard to the combined grounds of appeal No. 2,3, 4, 5 and 6. They basically touch on the evaluation of evidence in the lower court and whether the findings and conclusions of the lower Court should be upheld or not.

It is now trite law that the duty of the first Appellate Court is to re-appraise or re-evaluate the evidence of the trial court and subject it to fresh scrutiny. The cases of **D.R. Pandya vs R [1957] E.A and Banco Arabe Espanol vs Bank of Uganda, SCCA NO. 8 of 1998** , are in point. The gist of the Appellant's claim is that he was given the land in question by his grandmother, Hajati Namirembe Salima (WI1) in 2000. His case was that he first resided with the grandmother, but later he was given a plot on part of the Kibanja to construct his own house
10 which he did. And that by 2005, he had four rooms and another residential house.

The Appellant, DW1 added that in 2005, Mumbejja Sauda Nabanakulya, the landlady approached and that together with the grandmother (PWI) they pleaded with Mumbejja and they agreed to pay in his grandmother's names. The appellant (DW1) testified that he paid shs 600,000/= and before the balance out of UgX 1,750,000/= was completed, Hajjati Hadija Nakiyaga, the mother of the Plaintiffs/Respondents approached the land lady and paid off the balance. Then in 2012, he was asked to vacate and that efforts to compensate him failed.

Whereas the basis or backbone of the appellant's claim is on Hajat Namirembe Salima, PWI, PWI in her testimony stated that whereas the Appellant /Defendant is a grandson to her, she has never given the defendant land at Matugga. PWI added that when appellant fell sick, he went to
20 her house as a grandson to be looked after. For avoidance of doubt and on page 9 of the proceedings, PWI added:- ***“He eventually recovered. He didn't go back. He remained in some place in Kampala but it is not his or mine. I was caretaker of Nalongo Hadijah Nakiyegga. I have never owned land or Kibanja at Matugga. I was just a caretaker. I have never given defendant any Kibanja or plot.....”***

In my view, the testimony of PWI, from whom the Defendant/Appellant claims to have got the land is completely contradictory and does not assist the appellant at all. PWI does not only deny owning the land in dispute or any part thereof, but she is categorical that she never gave any land to the appellant. That evidence of PWI leaves the appellant's case naked and not clothed with any supportive evidence. And I also agree with the findings and holding of the trial

Magistrate on page 10 of her Judgment that the defendant/Appellant now had no documentary evidence to prove his alleged contribution to the land lady.

DW2, **Okello John Livingstone** was a valuation surveyor who valued the buildings of Defendant/Appellant for purposes of compensation.

DW3, **Nava Kironde**, who received the money alleged to have been paid by Defendant (now Appellant), stated that she received the money from PW1 and that she knew and confirmed it was PW1 who was purchasing the land. DW3's further testimony was that by the time she met PWEI and the Defendant, the Defendant was staying in a two roomed house.

I therefore again agree with the judgment of the lower court that the Defendant/Appellant developed the land in dispute without any interest in the same. Even when he was confronted by PW2 and PW3, the Respondents he only told them he had been given by PW1, who unfortunately disowned him. The case for the Respondents on the other hand was very consistent throughout and tallied with what PW1, Hajati Namirembe salima stated. The 1st Respondent Ali Miyangu testified as PW2. He confirmed that the land in dispute, Plot 92 B Block 1064 at Matugga is registered in their names and that they bought the same from Nakiyaga. PW2 added that Hajat Hadija Nakiyaga is the landlady who sold to them and that by the time they bought, the title was in the names of Sauda Kanakulya. The Certificate of Title in the names of the Respondents was tendered in as exhibit NO. I".

PW2's testimony was corroborated by Namuddu Nagira who testified as PW3. She confirmed that they bought the land in dispute on 7.2.2008, and that thereafter they procured a certificate of title. She concluded that the Defendant/Appellant started claiming interest after they had bought the land. PW3 during cross examination added that the Defendant/Appellant was stopped by local council officials from construction and that they at one time wanted to compensate him but instead the Appellant turned against them .

PW4, Hajati Hadijah Nakiyaga Nalongo confirmed having sold the registrable interest in the land to the Respondents and that she took the Respondents direct to the landlady who transferred into their names.

PW4 also confirmed that the Defendant did not make any contribution towards the purchase of the land in dispute.

In my view, and as I have already stated, since the Defendant/Appellant's claim was arising from PWI's interest in the land, and PWI totally denied, then the claim of the appellant is baseless and cannot succeed.

Furthermore and throughout the record, the Appellant did not adduce any evidence of fraud against the Respondents, as pleaded in the counter claim, and as the basis of that claim was Appellant's alleged contribution towards the acquisition of the land in dispute, which claim was refuted by PWI, PW4 and the Respondents, then the case for the appellant collapses. I am
10 therefore unable to disturb the findings and judgment of the lower Court as it was arrived at after a proper evaluation of evidence on record. The Plaintiff/Respondents were very consistent and ably supported by their witnesses and therefore proved their case to the required standard under the law. Counsel for the Appellant tried to rely on the doctrine of "**Proprietary Estopped**," an equitable doctrine as was applied in the case of **Hajji Musa Kigongo vs Olive Kigongo, HCCS NO. 295 of 2015**.

However, in the above case, the parties were husband and wife who lived together and later separated. The situation is different in the present case where Appellant tried to cling on PW1, Hajati Namirembe Salima who rejected him. That leaves the Appellant as a trespasser as correctly held by the trial Magistrate. So grounds No. 2,3,5 and 6 of appeal are hereby rejected.

20 **Ground 7:**

That the learned Magistrate erred in law in holding that there was no fraud on the part of the Respondents.

Counsel for the Appellant submitted that fraud was pleaded against the Respondents but the same was slightly considered by the trial Magistrate.

Counsel further submitted that the Respondents had prior notice of the Appellant's interest and intentionally decided to transact so as to defeat Appellant's claim. He quoted the case of **David Sejjaka vs Rebecca Musoke, Civil Appeal No. 12 of 1985**, where court held that fraud must be attributable to the transferee, either directly or by necessary implication.

Counsel for the Respondents submitted that the alleged fraud was not proved.

I am inclined to agree with counsel for Respondents and the trial Magistrate because if any problem, then Appellant should have blamed PWI, Hajati Namirembe Salima, the grandmother who disowned and rejected Appellant's claims, and not the Respondents. Ground No. 7 of appeal therefore fails.

Ground No. 8

That the award of general damages with interest is harsh, unjustified and unconscionable.

Counsel for the appellant submitted that the award of UgX 3,000,000/= as damages was unjustified as the Respondents did not suffer any damage. He quoted the case of **British Transport Commission vs Gourley [1956] A.C 185**. Where it was held that the tribunal should award the injured party such sum of money as will put him in the same position as he would have been if he had not sustained the injuries.

Counsel for the Respondents on the other hand submitted that the award of **Ugx 3,000,000/=** was to compensate the Plaintiff/Respondents for the infringement of their user rights over the suit land since purchase in 2008. Otherwise he called upon this court to revise the sum upwards.

I have considered the issue of general damages and I find that the same were justified in view of the arrogant behavior of the Appellant. The Appellant knew very well that he had no interest in the disputed land, but went ahead to remain there adamantly and construct houses thereon illegally.

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In the case of **Crown Beverages LTD vs Sendu Edward, Civil Appeal No. 01 of 2005**, it was held that the Appellate Court can interfere with the Lower Court's decision in the award of damages if that decision was based on wrong principles of law or if the award is excessive.

I have considered the circumstances of this case and I find the award of Ugx 3,000,000/= in damages as justified. Ground No. 8 of appeal equally fails.

Having rejected all grounds of appeal, I do hereby proceed to dismiss the appeal and uphold the judgment and orders of the lower Court.

I also award costs to the Respondent.

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W. Masalu Musene

Judge

13/10/2017