THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL APPEAL NO 2144 OF 2016

(ARISING FROM CIVIL SUIT NO. 025 OF 2010)

1. **KIWANUKA**
2. **NALONGO MUSANJE:::APPELLANTS**

VERSUS

YAKOBO NTATE MAYANJA::RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This appeal arises from the judgment of Her Worship Nabafu Agnes at the Chief Magistrates Court of Mpigi at Wakiso wherein Court decreed in favour of the Respondent.

The brief background of the appeal is that the Respondent sued the Appellants claiming for *inter alia*;

i) a permanent injunction,

ii) general damages,

iii) mesne profits arising out of trespass on land comprised in Busiro Block 295 Plot 51 Katolingo which is registered [*hereinafter the suit land*] in his name. Both Appellants did not enter appearance. However, on the 28th November, 2011, the 2nd Appellant brought an application for leave to enlarge time within which to file her defence.

According to the record of proceedings, by 29th March, 2012, this application had not been prosecuted. On this very date, being before Court, the 1st Appellant intimated a desire to defend the suit whereupon Court directed both Appellants to file a defence by the next adjourned date that is; 12th April, 2012. On this date, no defence had been filed though the 2nd Appellant was in Court. Eventually, judgment was entered against the 1st Appellant and; Court proceeded to read the plaint to the 2nd Appellant who orally disputed the Respondent's claim. On a later date, Counsel for the Respondent prayed to Court that the matter also proceeds *exparte* against the 2nd Appellant under O.9 r10 of the Civil Procedure Rules and the prayer was granted.

At the end of the Respondent's case, Court visited *locus* on the 11th July, 2013. Subsequently, the 2nd Appellant filed her written statement of defence on the 19th September, 2013; just 11 days before Court delivered its judgment.

Being aggrieved with the judgment, the Appellants appealed to this Court on the following grounds;

1. That the trial Magistrate erred in law and in fact when she failed to properly evaluate evidence available thereby reaching a wrong decision hence occasioning a miscarriage of justice.

2. That the trial Magistrate erred in law when she held that the Appellants are trespassers on the subject land.

3. That the trial Magistrate erred in law and in fact when she failed or ignored the fact that the late Musanje Daniel; husband to the 2nd Appellant had kibanja interest on the suit land.

Counsel for both parties filed written submissions in support of the respective parties which I shall consider accordingly. As rightly submitted by Counsel for the Appellants; this being a first appeal, this Court has a duty to subject the entire evidence on record to an exhaustive scrutiny and to re-evaluate and make its own conclusion, while bearing in mind the fact that it never observed the demeanor of the witnesses. In arguing so, Counsel relied on ***Fr. Nasensio***

***Begumisa & 3 Others versus Eric Kibebaga SCCA No.17 of 2002; Chepteka Samuel versus Mangusho Shadrick HCCA No.6 of 2016; Kifamunte Henry versus Uganda SCCA No. 10 of 1997; Augustine Kiiza versus Katusabe Vicent HCCA No.60 of 2013*.**

In their submissions, both Counsel argued ground two and three together, and ground one separately. I shall as well do the same.

Ground two:

That the trial Magistrate erred in law when she held that the Appellants are trespassers on the subject land.

Ground three:

That the trial Magistrate erred in law and in fact when she failed or ignored the fact that the late Musanje Daniel, husband to the 2nd Appellant had kibanja interest on the suit land.

In making his point, Counsel premised his argument as regards these grounds on two premises that is;

1) That the Appellants were condemned unheard, and;
2) That trespass to land was not proved.

This was vehemently disputed by Counsel for the Respondent who argued that the Appellants were afforded a right to be heard but chose not to file their respective defences hence put themselves out of Court and had no locus standi. He relied on the case of ***Kalyesubula Fenekansi versus Luwero District Land Board & 2 Others Misc. Application* No.2011.** Further, he also argued that there was sufficient evidence to prove trespass to the suit land by the Appellants.

Having carefully studied the entire record, I also disagree that the Appellants were condemned unheard. It is clear that the Appellants were given an opportunity to defend the suit but none bothered to enter appearance. As Counsel for the Respondents argued, they effectively put

themselves out of Court and had no locus before it. It was in fact procedurally irregular that the trial Court allowed their appearance despite having no locus. That said, I do not believe that this had any effect on the substance of the trial Court's finding.

Further, there is also evidence to prove that the Appellants trespassed on the suit land which evidence was confirmed by the trial Court at *locus*. The Respondent's evidence on this point was undisputed. Considering all this, I am unable to fault the trial Court's finding.

The above two grounds therefore fail.

Ground One:

That the trial Magistrate erred in law and in fact when she failed to properly evaluate evidence available thereby reaching a wrong decision hence occasioning a miscarriage of justice.

In regard to this ground, Counsel for the Appellants raised two procedural queries that is; that there was no scheduling conference held at trial; that there were procedural errors during the locus proceedings. According to Counsel, it is difficult to understand whether it was a scheduling conference or hearing on the on 19th June, 2012, on the second appearance when judgment was entered against the 1st Appellant. He also wondered what kind of judgment it was on ground that the record does not specify the law under which it was passed.

Further, he wondered why on that date the 2nd Appellant was allowed to make oral statements, which he considered evidence, despite having made no defence. As regards the locus proceedings, he argued that the proceedings thereat were also abortive since the trial Magistrate allowed that participation of the Appellants who had never entered appearance. In support of his submissions, he relied on the case of; ***Yeseri Waibi versus Lusi Byandala [1982] HCB 28; Safina Bakulimya & Anor versus Yusuf Musa Wamala HCCA No.32 of 2016 and Obima Ama versus Yumes d/o Stanley Udo & 2 Ors HCCA No.01 of 2012***.

All these cases are to the effect that locus visits are for the purpose of enabling Court get clarity on what the witnesses testified about during trial. Ultimately, he argued that there was a

miscarriage of justice occasioned to the Appellants. In doing so, he relied on the case of ***Chepteka Samuel versus Mangusho Shadrick*** *(supra)* which connotes that a miscarriage of justice occurs where there has been misdirection by the trial Court on matter of fact relating to the evidence tendered or where there has been unfairness in the conduct of the trial resulting in an error being made.

On the other hand, Counsel for the Appellant submitted that what happened on that date was a hearing because on the preceding appearance, on the 29th March, 2012, he had prayed to Court to allow the Respondent to proceed *ex parte* under O.9 r10 of the Civil Procedure Rules. Further, that the failure of the trial Court to the law under which the judgment was entered was not erroneous especially since the record shows under what law Counsel had prayed to proceed under.

It was also his submission that the Appellants did not show how this occasioned a miscarriage of justice. Regarding locus proceedings, he argued that it is the Respondent who ought to have raised this ground. That because it is not clear whether the Appellant attended locus as friends of Court, or witness or parties, one cannot conclude that they participated in the proceedings. He then submitted that the Appellants have not shown how their participation prejudiced their case.

Having looked at the record, I am unable to find how the learned trial Magistrate failed to evaluate the evidence on record and hence occasioning a miscarriage of justice. I do agree that a miscarriage, as defined in the case cited by Counsel, can result from where there has been unfairness in the conduct of the trial leading to an erroneous conclusion. This is, however, not the case in the case at hand. I have already established that the Appellants had no *locus* before the trial Court. It then becomes difficult to see how the trial proceeding would be unfair them after choosing never to participate in it.

On whether there was a procedural error at the commencement of the trial, it is indicated on the record that Counsel for the Respondent had earlier on prayed to Court to allow the Respondent to proceed under O.9 r.10 of the Civil Procedure Rules**.** This prayer was allowed by Court which indicated that the Respondent shall proceed as prayed on the adjourned date unless the

Appellants filed a defence. On the adjourned date, 19th June, 2012, Counsel again prayed that the Respondent proceeds as earlier on prayed.

What is disturbing, however, is that the trial Court just entered judgment against the 1st Appellant without indicating the law under which this was done, and instructed that scheduling notes be filed. This was of course a procedural error as O.9 r10 of the Civil Procedure Rules, as relied on by Counsel for the Respondent, does not permit preliminary judgments. All that said and done, this in my view, is not fatal to the entire proceedings especially since there is evidence to support the trial Court's finding. This conclusion also applies to the proceedings at *locus*.

Having already indicated that the Appellants had no *locus* before the trial Court, it was irregular for the trial Court to allow them to participate at *locus* yet they had no evidence to clarify on. Ultimately, I am unable to find that there was any miscarriage of justice occasioned to the Appellants. This ground therefore fails also.

Consequently, the appeal fails.

The appeal is dismissed with costs.

I so order.

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Henry I. Kawesa

JUDGE

21/08/2019

21/08/2019

Namande Assumpta; holding brief for Paul Mukiibi for the Appellant.

Sandra Mask holding brief for Mamale David for the Respondent.

Appellant:

Kiwanuka Appellant present.

Nalongo Musanje Appellant present.

Yakobo; Respondent absent.

Court: Judgment delivered to the parties above.

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Henry I. Kawesa

JUDGE

21/08/2019