

5

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 181 OF 2015

(Arising out of Mbarara High Court Civil Appeal No.73 of 2014)

(Arising out of Mbarara Civil Suit 0042 OF 2008)

10 **HILDA MUTASHWERA:.....APPELLANT**

VS

CONSTANCE RYANGOMBE:.....RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. LADY JUSTICE HELLEN OBURA, JA

15 **HON. MR. JUSTICE CHEBORION BARISHAKI, JA**

JUDGMENT

Introduction

This is a second appeal arising from the decision of David Matovu, J delivered on 17th August, 2015 in which he entered judgment in favor of the respondent
20 in the following terms;

- 1) *The respondent is the undisputed owner of the land at Block 2 Plot 125 land at Ishanyu Kashari.*



- 5 2) *The house constructed by the late Lt.Ryangombe on the above described land should be left intact.*
- 3) *A permanent injunction is hereby issued to restrain the appellant or her agents from trespassing on the land at Block 2 Plot 125 land at Ishanyu Kashari, but this order does not apply to the beneficiaries of the Estate of*
- 10 *Lt. Ryangombe*
- 4) *Since the acts complained of were allegedly committed by a one Lt. Ryangombe who is not party to this suit or appeal there are no general damages awarded.*
- 5) *In the same spirit considering that the parties to this appeal are both widows*
- 15 *locked into a land dispute originally not their own, let each party bear their own costs in the lower Court and for this appeal.*

Background

The facts giving rise to this appeal are that, the respondent (the plaintiff in that suit) sued the appellant (the defendant in that suit) in Mbarara District Land

20 Tribunal vide claim No.30 of 2006 seeking for the following orders;

- a) A declaration that the land belongs to the plaintiff and therefore the defendant's occupation of the land amounts to trespass.
- b) An order evicting the defendant from the plaintiff's land.
- c) A permanent injunction restraining the defendant by herself or through
- 25 her agents from ever trespassing on the defendant's land by way of fencing, cultivating, grazing or ever claiming it as hers.



5 d) Costs of the suit.

e) Any other remedy this Honorable Court may deem fit.

The respondent claimed to be the lawful owner and user of land at Ishanyu, Kafunjo, Nyarubanga, Kakiika, Kashaari in Mbarara District. In her defence, the appellant contended that she was the registered proprietor of the suit land
10 comprised in Block 2, Plot 125, Kashaari having obtained Letters of Administration of the estate of the late A.B Mutashwera. She counterclaimed for;

a) A permanent injunction restraining the respondent, her agents, servants, employees or otherwise from further trespass

b) General damages

15 c) Costs of the suit

d) An eviction order

e) Interest on b) and c) above at court rate, from the date of judgment till payment in full

f) Any other or further relief this court may deem necessary to grant.

20 Before the matter could be concluded, District Land Tribunals were dissolved and the dispute was subsequently referred to the Chief Magistrate's Court of Mbarara which conducted a trial and judgment was entered in favor of the appellant and an eviction order was issued against the respondent and a permanent injunction restraining her from further trespass, awarded general
25 damages of Ug. Shs 10,000,000 (Uganda Shillings Ten Million) to the defendant and costs of the counter claim.

5 Being dissatisfied with the decision of the Chief Magistrate, the respondent appealed to the High Court at Mbarara which partially allowed the appeal and set aside the orders of the lower Court in the terms already set out above. Being dissatisfied with the orders of the High Court, the appellant appealed to this Court.

10 The grounds of appeal as they appear in the Memorandum of Appeal are;

1. *The learned Judge erred in law in deciding the appeal on entirely new basis and not on the basis of the grounds of appeal before him.*
2. *The learned Judge erred in law in holding that the house constructed on the appellant's land by the late Lt Ryangombe should be left intact.*
- 15 3. *The learned Judge erred in law when he held that his order of permanent injunction does not apply to the beneficiaries of the estate of the late Lt Ryangombe*
4. *The learned Judge erred in law when he interfered in the exercise of the discretion of the trial Court to award the appellant general damages and*
20 *costs of the suit.*
5. *The learned Judge erred in law when he denied the appellant costs of the appeal.*

At the hearing of the appeal, Mr. Kizito Kasirye appeared for the appellant while Mr. Simon Peter Kinobe represented the respondent.

25 On ground 1 of the appeal, counsel for the appellant faulted the learned Judge for deciding the appeal on an entirely new matter and not on the grounds of



5 appeal before him thereby occasioning a miscarriage of justice. He submitted
that on appeal in the High Court, 7 grounds of appeal were formulated and none
of the grounds of appeal required the High Court to discuss the developments
put on the suit land by Lt. Ryangombe. Counsel invited Court to look at page 8
of the Record of Appeal where the learned Judge held that the problem was with
10 the developments put on the suit land by the late Lt. Ryangombe and argued
that the effect of the learned Judge's holding was to allocate part of the suit land
to the beneficiaries of the estate of the late Lt. Ryangombe without allowing the
appellant to contest the said interest allowed by O.43 R2 (2) of the Civil Procedure
Rules (CPR) which provides that the High Court on appeal shall not confine itself
15 to the grounds of objection set forth in the Memorandum of Appeal and the High
Court shall not rest its decision on any other ground unless the party affected
by that decision is given sufficient opportunity to contest the case on that
ground. He relied on ***MS Fang Min and another V Belex Tour and Travel
Limited, Supreme Court Civil Appeal No.6 of 2013 consolidated with Civil
20 Appeal No.1 of 2014, Crane Bank Limited V Belex Tours and Travel
Limited.***

On ground 2 of the appeal, counsel faulted the learned Judge for holding that
the house constructed on the appellant's land by the late Lt. Ryangombe should
be left intact. He submitted that the suit land belonged to the appellant under
25 the freehold land tenure system as indicated on exhibit 2 at page 81 of the record
of appeal which confers full powers of ownership of land including using and
developing the land for any lawful purpose.



5 Counsel further argued that the learned Judge on appeal having stated that the respondent (now appellant) was the undisputed owner of the land situate at Block 2 Plot 125 land at Ishanyu Kashari, there was no basis upon which she could be restrained from dealing with the land that had been decreed to undisputedly belong to her.

10 Counsel faulted the learned Judge for holding that his order of permanent injunction did not apply to the beneficiaries of the estate of the late Lt. Ryangombe. He submitted that the learned Judge having held that the respondent (now appellant) was the undisputed owner of the land at Block 2 Plot 125 land at Ishanyu, Kashari, he had determined the status in terms of
15 ownership of the land and having done so, the resultant judgment was a judgment in rem thus binding on the beneficiaries of the estate of the late Lt. Ryangombe.

The trial Judge was faulted for interfering with the exercise of the discretion by the trial Court to award the appellant general damages and costs of the suit.

20 Counsel submitted that the trial Judge awarded the appellant general damages of UGX 10,000,000 Million after coming to a conclusion that the respondent had carried on activities on the suit land and on appeal to the High Court, the learned Judge set aside the award of general damages on the basis that the acts complained of were committed by the Lt. Ryangombe who was not a party to the
25 suit.



5 Counsel submitted that it is trite law that the award of general damages and costs of the suit is at the discretion of Court and an appellate Court may only interfere with the trial Judge's discretion in awarding general damages and costs if the trial Judge acted on a wrong principle of law or where the amount awarded is so high or so low to amount to a miscarriage of justice. He further submitted
10 that the learned Judge having confirmed the respondent's activities on the suit land and in effect issued a permanent injunction, it cannot be said that the trial Judge acted on a wrong principle to justify the interference by the appellate Court in the exercise of that discretion. He relied on **Crown Beverages Ltd V Sendu Edward, Supreme Court Civil Appeal No.01 of 2005** to support his
15 submission.

On ground 5 of the appeal, counsel faulted the learned Judge for denying the appellant costs of the appeal. Counsel submitted that the respondent appealed to the High Court which confirmed that she had no interest in the suit land and the said finding meant that the respondent had lost the appeal which entitled
20 the appellant to costs of the appeal as the successful litigant. Counsel further submitted that there was no evidence of any conduct by the appellant that would have avoided the appeal filed by the respondent. Thus denying the appellant costs of the appeal was erroneous which amounted to a miscarriage of justice. He relied on **SDV Transami (U) Ltd V Nsibambi Enterprises (2008) ULR 497 (CA)** to support his submission.
25



5 Counsel for the respondent opposed the appeal. On ground 1 of the appeal, he submitted that O.43 R2 (2) empowers the High Court to consider other aspects outside the Memorandum of Appeal and the decision of the High Court was not based on new facts or new evidence as the said facts and evidence were brought to the attention of the trial Court but were never assessed. He invited Court to
10 look at page 45 of the record of appeal where the respondent during cross examination stated that what was in dispute was where she grazed from, part of the banana plantation, graves and her husband's house; the late Ryangombe. He further submitted that the said facts having been brought to the attention of Court during cross examination, the appellant had a right to respond to the said
15 assertions.

Submitting on ground 2, counsel argued that the Land Act was promulgated to protect the interests of people who had been in occupation of the land in issue for more than 12 years before the 1995 Constitution. This would be with or without the knowledge of the registered proprietor. He submitted that section 3
20 of the Land Act which provides for forms of land tenure systems was not conclusive on all the incidents of freehold system.

Counsel further contended that the learned Chief Magistrate should have been mindful of section 29(2) of the Land Act in determining the interest of the respondent who had been on the suit land since 1943. To counsel, the appellant
25 being a registered proprietor, could not take away the rights of the respondent



5 who had been on the said land for over 12 years before the coming into force of the 1995 Constitution.

Counsel argued that the land in dispute was being used by the estate of the Lt. Ryangombe who was not party to the suit nor his estate in which case the learned Judge was right in holding that the house of the late Lt. Ryangombe should be
10 left intact as he was not party to the suit. Such orders could not be made against him or his estate without being heard. He relied on ***Housing Finance Bank Limited & Anor V Edward Musisi, Court of Appeal Miscellaneous Application No.158 of 2010.***

Regarding ground 4 of the appeal, counsel submitted that the learned Judge
15 rightfully set aside the award of general damages by the trial Court as the same were excessive and not justified. In denying general damages, the Judge stated that since the acts complained of were committed by the late Lt. Ryangombe who was not a party to the suit, there were no general damages to be awarded and the trial Magistrate having applied the law selectively to hold as he did without
20 taking into account the interests of the respondent was unwarranted. He relied on ***Crown Beverages Limited V Sendu Edward, SCCA No.1 of 2005*** to support his submission.

Referring to the provisions of section 27 of the Civil Procedure Act, counsel submitted that an award of costs in a suit is at the discretion of Court and the
25 learned Judge having properly re-evaluated the evidence rightly decided that each party was to bear its own costs.



5 We have carefully considered the Court record from the lower Courts, the submissions of counsel for and against the appeal and the authorities availed to us.

This being a second appeal, we are guided by **Rule 32(2)** of the Rules of this Court to appraise the inferences of fact drawn by the trial Court, but not to hear
10 additional evidence.

While dealing with a matter which required determining the jurisdiction of a second appellate Court in **Ongom John Bosco V Uganda, Criminal Appeal No.21 of 2007**, the Supreme Court held that a second appellate court is to resolve issues of law only and is thus precluded from questioning the concurrent
15 findings of facts by the trial Court and first appellate court, provided that there was evidence to support those findings, though it may think it possible or even probable, that it would not have come to the same conclusion. A second appellate court can only interfere with such finding where there was no evidence to support the finding because this is a question of law.

20 **Ground 1**

The learned Judge was said to have erred in deciding the appeal on entirely new basis and not on the basis of the grounds of appeal before him.

Counsel for the appellant submitted that on appeal in the court below, 7 grounds of appeal were formulated and none of the grounds of appeal required the
25 appellate Court to discuss the developments put on the suit land by Lt. Ryangombe yet the learned trial Judge went ahead and made a decision that the



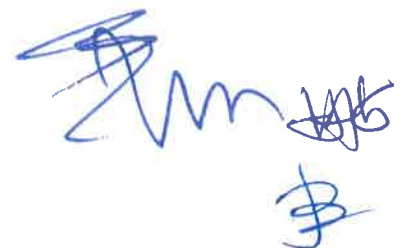
5 problem was with the developments put on the suit land by the late son Lt. Ryangombe.

To the respondent's counsel, the decision of the High Court was not based on new facts or new evidence as the said facts or evidence were brought to the attention of the trial Court but were never assessed by the Chief Magistrate. The
10 said facts having been brought to the attention of Court during cross examination, then the appellant had a right to respond to the assertions.

We find it relevant to emphasize the duty of the High Court as the first appellate Court before delving into the merits of this ground of appeal. In ***Father Nasensio Begumisa & 3 others V Eric Tebebuga SCCA No.17 of 2002***, Court held:

15 *“The duty of the 1st appellate court is to subject the entire evidence on record to an exhaustive scrutiny, re-evaluate it and come to its own conclusion. The Court must then make up its own mind not disregarding the judgment of the trial Court but carefully weighing it in full consideration.”*

O.43 R 2 of the Civil Procedure Rules prohibits an appellant save with leave of
20 Court from being heard on any ground of objection which is not contained in the Memorandum of Appeal. The same Rule however, allows the High Court in deciding an Appeal, not to be confined to the grounds of objection in the Memorandum of Appeal or those included by leave of the Court. The Court is precluded from resting its decision on any other ground unless the party who
25 may be affected by the decision has had sufficient opportunity to contest the case on that ground.



5 Counsel for the appellant invited Court to look at page 8 of the Record of Appeal
where the learned Judge held that the problem was with the developments put
on the suit land by the late Lt. Ryangombe and added that the effect of the
learned Judge's holding was to allocate part of the suit land to the beneficiaries
of the estate of the late Lt. Ryangombe without allowing the appellant to contest
10 the said interest by the late Lt. Ryangombe.

During cross examination, the respondent stated that *"My late son Lt. Lyangombe built his house on his father's land. The same applies to the banana plantation and graves."*

We find that the learned appellate Judge did not decide the appeal on entirely
15 new basis as this was neither new evidence nor new facts. He subjected the entire
evidence on record to an exhaustive scrutiny, re-evaluated it and came to his
own conclusion which he was entitled to as a first appellate court. He found that
the issue of the developments by the late Lt. Ryangombe were ignored by the
learned Chief Magistrate in his judgment although it had been brought to his
20 attention during the hearing.

Therefore ground 1 of the Appeal fails.

Grounds 2 and 3 are interrelated in that they deal with where the learned Judge
is said to have erred in holding that the house constructed on the appellant's
25 land by the Late Lt Ryangombe should be left intact and his order of permanent



5 injunction did not apply to the beneficiaries of the estate of the late Lt. Ryangombe.

Counsel for the appellant contended that the suit land was owned by the appellant as Freehold land created by Article 237 (3) (b) of the Constitution and the house constructed by the late Lt. Ryangombe on the suit land was not found
10 to fall under any of the exceptions in section 3(2) of the Land Act.

Article 237(3) of the Constitution provides that Land in Uganda shall be owned in accordance with the following land tenure systems: Customary, Freehold, Mailo and Leasehold.

Section 3(2) (b) of the Land Act, CAP 227, defines freehold tenure as a form of
15 tenure deriving its legality from the Constitution and its incidents from the written law and enables the holder to exercise, subject to the law, full powers of ownership of land, including but not necessarily limited to using and developing the land for lawful purpose, using produce from the land, entering into any transaction in connection with the land including disposing it of.

20 For the respondent, it was submitted that a certificate of title is conclusive evidence of ownership of property, however it is not ownership in total exclusion of interests held by other parties.

It is not disputed that the appellant is the registered proprietor of land at Kashari, Block 2, Plot 125 as evidenced by the certificate of title. Additionally,
25 there was no fraud proved to impeach her title. We find that the appellate Judge gave orders to leave the house and developments of the late Lt Ryangombe intact because his estate was not a party to the suit yet as he rightly observed, the



5 problem was with the developments put on the suit land by him. We agree with the finding of the trial Judge because the estate of the late Lt Ryangombe is entitled by the constitution to a fair hearing.

We are therefore unable to fault the learned Judge for holding that since the house of the late Lt. Ryangombe and the developments thereon occupied part of the suit land, his house could not be demolished as his estate was not party to the suit.

The appellant faulted the trial Judge for holding that the order of permanent injunction did not apply to the beneficiaries of the estate of the late Lt. Ryangombe. The learned appellate Judge partially allowed the appeal and set aside all the orders of the Chief Magistrate and issued a permanent injunction restraining the appellant from trespassing on the land at Block 2 Plot 125 land at Ishanyu, Kashari. The order did not apply to the beneficiaries of the estate of the Lt. Ryangombe.

20 It is trite that an order of Court is only binding as to the litigants and not the whole world. See ***Housing Finance Bank Limited & Anor V Edward Musisi, Court of Appeal Miscellaneous Application No.158 of 2010.***

Having found under ground 2 that the house of the late Lt. Ryangombe could not be demolished without according his estate a fair hearing it follows that the permanent injunction could not apply to the beneficiaries of his estate as they were never party to this suit.



5 Before we take leave of this matter, we are of the view that if the appellant has any claim against the estate of the late Lt. Ryangombe, she has a right to sue them directly.

Grounds 2 and 3 of the appeal thus also fail.

10 As to grounds 4 and 5 of the Appeal, according to the appellant's counsel, the learned Judge erred when he interfered with the exercise of the discretion by the trial Court to award the appellant general damages and costs of the suit. The appeal Judge while handling this issue held that if the learned Chief Magistrate had addressed himself to the fact that the late Lt. Ryangombe is the person who
15 constructed the house now in dispute, he would not have awarded these damages against the appellant. This was because the acts complained of were allegedly committed by a one Lt. Ryangombe who is not a party to this suit or appeal and as such there were no general damages awarded.

It is trite law that the award of general damages is at the discretion of Court.

20 In ***Crown Beverages Ltd V Sendu Edward: Supreme Court Civil Appeal NO.01 OF 2005, Order, JSC held that:***

*"I turn now to the trial Court's discretion on matters of damages. The law is now well settled that an appellate Court will not interfere with an award of damages by a trial Court unless the trial Court has acted upon a wrong
25 principle of law or that the amount is so high or so low as to make it an*

Handwritten signature and initials in blue ink, located in the bottom right corner of the page. The signature appears to be 'Jue' followed by initials 'HAG' and a large 'P' below it.

5 *entirely an erroneous estimate of the damages to which the plaintiff is entitled.....”*

It is clear from the respondent’s evidence that her homestead and banana plantation were not in dispute but what was in dispute were the graves, part of the banana plantation and the house constructed by her late son Lt. Ryangombe.

10 We therefore agree with the learned Judge’s exercise of his discretion by denying the appellant general damages on the basis that the learned Chief Magistrate did not address himself to the fact that the respondent’s late son Lt. Ryangombe is the one who constructed a house and made other developments on the suit land but his estate was never party to the suit.

15 On costs, the learned appellate Judge held that each party bears their own costs because the parties to the appeal are both widows locked into a dispute originally not their own.

Generally, costs are awarded at the discretion of Court. Section 27 of the Civil Procedure Act provides that subject to such conditions and limitations as may
20 be prescribed and the provision of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court.

We are satisfied that the appellate Judge judiciously exercised his discretion in ordering that each party bears their own costs after taking into account the fact that the parties to the appeal were both widows who were locked in a dispute
25 originally not of their own.

Therefore grounds 4 and 5 of the appeal fail.



5 In the result, the appeal fails and is dismissed. For the same reasons given by the first appellate Judge, we too in this Court order that each party shall bear its own costs of this Appeal, and those of the Courts below.

We so order.

Dated this 5th day of DECEMBER 2017

10



HON. MR. JUSTICE REMMY KASULE

JUSTICE OF APPEAL

15



HON. LADY JUSTICE HELLEN OBURA

JUSTICE OF APPEAL

20



HON. MR. JUSTICE CHEBORION BARISHAKI

JUSTICE OF APPEAL