

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL No. 3 OF 2015
Arising Out Of Iganga Civil Suit No. 36 Of 2006

NAMUGAYA WAIBI ANNET APPELLANTS

Versus

NAKIRANDA ALISAT RESPONDENT

BEFORE HON. JUSTICE MICHAEL ELUBU

JUDGEMENT

This is an appeal against the judgement and orders the Magistrate Grade I at Iganga Court HW NVANUNGI SYLVIA delivered on the 17th of December 2014.

The background to this appeal is that the appellant (NAMUGAYA WAIBI ANNET) was the plaintiff in the lower court. On the 19TH OF July 2006 she filed a claim against the respondent (ALISATI KIRANDA) in the Iganga District Land Tribunal. Her claim was for a declaration that she was the rightful owner of the Suitland which was located in Nkono central which is in Iganga Municipality. The land measured about 40 by 80 ft and was part of a larger chunk for which she held a land title described as LRV 1265 Folio 8 Plot 11 Nkono Road (along Old Kaliro Road) measuring 0.172 Ha. That she had inherited the land from her father Ezimafesi Waibi after he died in 1998. She held letters of administration to prove this. That the respondent had encroached on part of the land and built thereon. The appellant also

prayed for a declaration that the respondent's acts were illegal and a permanent injunction restraining the respondent from farther trespass should issue.

The respondent, NAKIRANDA ALISATI, in her Written Statement of Defence, denied the claim. She stated that she bought the land from one Hajji Gwantamu Abdul on the 28th of March 2001. That Gulantamu had in turn bought the suit land from one Sunday Magumba who inherited it from his parents. That Ezimafesi Waibi, the appellant's father, had applied for a lease on the said land. That Ezimafesi Waibi fraudulently obtained the lease because he did not apply for it from the Iganga Town Council. That though the lease states the land to be 0.172 Ha, the actual size of the land is 0.331 Ha. That Ezimafesi had crossed out the correct entries on the blue print and replaced it with 0.172 Ha. That he had also crossed out the correct location from Old Kaliro Road and replaced it with Nkono road. That the defendant (respondent) got notice of this fraud when she acquired a copy of the certificate of title on the 18th of October 2006. She also stated that the suit land does not form part of the estate of Ezimafesi Waibi. For these reasons the defendant prayed that the appellant's certificate of title should be cancelled.

At the hearing the evidence for the plaintiff was that the plaintiff was the holder of a certificate of title for the land comprised in LRV 1265 Folio 8 Plot 11 Nkono Road (along Old Kaliro Road) and measuring 0.172 Ha in area. That the said land had been taken over by her at the death of her father in 1998. The certificate of title and letters of administration were tendered in evidence. That the plaintiff had been born on the suit land in 1972. That the land was purchased from one Sande Magumba. At the time of purchase most of the land was a bush. PW 2 Bisobye Frederick who was a close friend of the deceased Waibi was present when the purchase of the land was made and drew up the purchase agreement. That the deceased Ezimafesi Waibi had applied for the registration of the land in 1979. The certificate was then issued on the 16th of August 1983. PW 4 Mbabazi Amina was married to Ezimafesi between

1975 and 1994. That she had lived with the deceased on the land for the time they were married. All these witnesses stated that they knew one Hajji Gwantamu as a friend of the deceased Waibi. That the deceased had entrusted Gwantamu with the collection of rent from a six roomed house that had been built on the land by Waibi. As a police man who was posted to different parts of the country, Waibi entrusted his friend with that task. Gwantamu had overseen the construction of the building and lived in one of the rooms. At some point in the late 1980s Gwantamu left the home. One Edisa Mulamogi then took over the collection of rent from this mud and wattle house. It eventually collapsed.

In 2001 the defendant came on the land and broke down the remains of the rental house claiming she had bought that portion of the land from Gwantamu. Efforts by the plaintiff through LCs, the Police and the Iganga District Administration to restrain her were futile. At one point the defendant assaulted the plaintiff, then cut down her bananas and other trees. She was charged with the offences of criminal trespass and malicious damage. The defendant entered an undertaking before the chief magistrate and bonded herself not to disturb the Waibi family whom she acknowledged had title to the disputed land. The plaintiff also placed a caveat on the land. The defendant ignored all these and went ahead to fence off and build on that portion of the land. The location of these trees and banana plants on the land is where PW 4 Mbabazi had made the bricks which were used to construct the rental house. The defendant passed away in the course of the hearing and before the defence opened its case. The evidence for the defendant was that she bought the land from one Hajji Gwantamu Abudu at one million seven hundred thousand shillings which was paid in two instalments. At the time of acquisition there was a semi-permanent mud and wattle house which the defendant demolished and built another one. DW 1 Kisuyi Yahaya was the son of Gwantamu and stated he did not know how his father acquired that land. That his father did not stay on the land but lived at his ancestral

home in Butende. That the land was given to DW 1 in 1998 but his father went behind his back and sold the same land to the defendant. Gwantamu passed away in 2004. DW 2 stated he was Abdalla Aziz a former local government official and knew that the land belonged to Gwantamu. That he was taken by the defendant to see the land after she purchased the same. He knew that Ezimafesi was the first to settle on the land and he did not know how Gwantamu acquired the land he sold. That the land originally belonged to Sande Magumba. He stated he was not present when the defendant paid for the land. The witness knew that Waibi had a wife from the west of Uganda. DW 3 Namadawa Rehema was present at the execution of the sale agreement and signed as LC I Women's councillor. That she had lived in the area since 1973 but did not know how Gwantamu acquired the land. That although there were several witnesses at the sale none of the immediate neighbours was present. DW 4 Majidu Natatya was an LCI chairman in the area. He drafted the sale agreement. He admitted no neighbours were present at the sale of the land. He said he was not aware there was a land title to the land and did not consult the area land committee before he oversaw the sale. That he did not know how Gwantamu acquired the land. He also stated Waibi's family did not witness the sale. He acknowledged that there had been a dispute in the LC Court over the same land, followed by a prosecution for criminal trespass.

The trial court made a locus visit at which a number of witnesses who had not testified at the hearing in court were introduced and entertained by the court.

A second locus visit was made in the company of a surveyor, Kyamulesire Bruno, who opened the boundaries. The survey found that the titled plot exists in its correct location and 0.035 Ha of it were occupied by the defendant. The land was found to be 0.131 Ha in actual size.

In her Judgment the trial magistrate found that the plaintiff had failed to prove that the suit land fell within her land. For that reason the plaintiff failed to prove the acts

of trespass alleged. That the plaintiff failed to prove she had a cause of action. The learned trial magistrate then dismissed the suit under Order 7 rule 11.

Being dissatisfied with the findings the plaintiff filed this appeal with the following grounds:

1. The Learned trial Magistrate erred in law in rejecting the plaint under Order 7 Rule 11 of the Civil Procedure Rules when the claim and annexures disclosed a cause of action.
2. The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on court record thereby arriving at a wrong decision.
3. The Learned Trial Magistrate erred in law and fact when she entertained fresh evidence at the locus quo thereby occasioning a miscarriage of justice.
4. The Trial Magistrate erred in law and fact when he misinterpreted the expert evidence of the surveyor (PW4) thereby reaching a wrong decision.
6. The Trial Magistrate erred in law in denying the Appellant the remedies sought after the first issue was resolved in her favour.

It is proposed to ask the court for orders that:

- a) The Appeal be allowed
- b) The Judgment and orders of the Lower Court be set aside
- c) The Appellant be declared the owner of the suit land
- d) The Respondents, her agents, servants, successors in title be evicted from the suit land.
- e) The Respondent pays costs of this appeal and the Lower Court.

At the hearing, the parties were granted leave to file written submissions but only the appellant complied. The parties were represented by Mr Martin Asingwire for the appellant. The respondent's representative reported her counsel to be Ms Susan Zimeyi.

It must be stated that as this is a first appeal, the parties are entitled to a fresh scrutiny of all the evidence on record with this court arriving at its own conclusions.

Ground 1 and 2

1. **The Learned trial Magistrate erred in law in rejecting the plaint under Order 7 Rule 11 of the Civil Procedure Rules when the claim and annexures disclosed a cause of action.**
2. **The Trial Learned Trial Magistrate erred in law and fact when she failed to property evaluate the evidence on court record thereby arriving at a wrong decision.**

It is the argument of counsel for the appellant that before the lower court could dismiss the plaint as failing to disclose a cause of action it had to apply the test in the case of **Auto Garage and Anor vs Motokov (No 3)1971 EA 574** which was cited in *Senabulya Francis vs Thomas Cunningham Civil Appeal No 18 of 2008* (Jinja) as,

“What is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated.” {**Cotter v. Attorney General of Kenya (1938), 5 EACA. 18** per Sir Joseph Sheridan C.J. approved}.

In addition, of course, the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable ... then a cause of action has been disclosed...

It is the submission of Counsel that in establishing whether there was a cause of action established the court would limit its scrutiny to the pleadings which in this

case were the statement of claim filed on 19th of July 2006. That it showed the appellant was administrator of the estate of the late Ezimafesi Waibi with letters of administration. The land was titled. The certificate of title and the letters of administration were both tendered in evidence. It is the submission that the title established the appellant's proprietorship showing her right to the property. That in showing that the defendant had entered upon the land, which the defendant did not deny, that right was violated. That the appellant's title was unimpeachable since there was no fraud imputed to it. The respondent's possession was therefore adverse and infringed on the appellant in which case a cause of action was established.

The evidence in this case, as this court sees it, is that the appellant has a certificate of title. It was shown by the survey conducted by the court at the last locus visit that the land named therein is in its correct ground location. It is the finding of this court that the appellant was able to establish the antecedents of ownership, her certificate of title notwithstanding, when she produced an eye witness (PW 2) to her purchase. This evidence was not contested. The respondent on the other hand, is said to have purchased the land from Abudu Gwantamu. None of the respondents witnesses, including Kisuyi Yahaya (Gwantamu's son), could say how Gwantamu acquired the land. PW 1, PW 2 and PW 4 all knew Gwantamu well. That he was a close friend of Ezimafesi Waibi who had asked him to collect rent from a building located on the suit land. It was this same building that had later collapsed. It turns out that Gwantamu sold the land on which this building was located. PW4, Amina Mbabazi was once Waibi's wife. In fact DW 2, Aziz Abdullah knew that Waibi had a wife from western Uganda. PW 4 stated that it was her who had made the bricks used to construct the building which was originally on the suit land. That Gwantamu left Waibi's home at some point and went to live at his ancestral home in Butende. This was the land that the appellant took over.

The foregoing clearly proves that the plaintiff was the rightful owner to the suit land registered as LRV 1265 Folio 8 Plot. As a holder of title she is the lawful proprietor as envisaged by Section 59 of **the Registration of Titles Act** which stipulates that the person named in the certificate as the proprietor of the land described in the certificate is owner.

The respondent is stated to have purchased the land. Two LC officials, Majidu Natatya DW 4, who is the LC I chairman and Namadawa Rehema DW 3 state they were present at the purchase. DW 4 drafted the deed of sale while DW 3 appended her signature as one of the witnesses. These local administration officials admit they had no knowledge of how Gwantamu had acquired the land. They did not consult the area land committee which they knew existed. The area land committee is supposed to ascertain land rights which in the view of this court include property rights (see Section 64 (6) of the Land Act). It is also true that none of the immediate neighbours were present when the sale was made. DW 1 stated that his father had originally given him the suit land but later sold it telling him that he was saving him because the land could be grabbed from DW 1.

This court is persuaded from these facts that the land did not belong to Gwantamu Abudu. That he was merely a caretaker who, with apparent connivance of the Local Council Chairman, sold the land.

There is no evidence that the respondent carried out a thorough due diligence before purchase. In fact the manner in which the sale was concluded, principally failure to do due diligence or involve neighbours smacks of fraud. The appellants cited *Sir John Bageire v. Ausi Matovu, C.A.C.A. No.07 of 1996, at page 26*, which emphasized the value of land and the need for thorough investigations before purchase where it is held *inter alia* that:

Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations not only of the land but of the sellers before purchase.

When the above is considered with the evidence that Gwantamu was never the owner, then it would appear that the respondent had notice of the seller's lack of title and deliberately omitted to do the expected inquiries into the ownership of the land. The survey was conducted with the involvement of all the parties. The findings were that the suit land was within the registered land, just as the plaintiff had claimed.

PW3 had testified as the Physical planner of Iganga. An application to expunge his evidence was dismissed (rightly in my view). He stated that the land supervisor had found that the respondents land fell within the appellants land and that the respondent land was non-existent in the Iganga Town Council plan.

In evaluating this evidence the learned trial magistrate dismissed the claim on the basis of a discrepancy in total land area in the survey findings.

What is clear here is that the portion of the land where the respondent demolished a house belonged to the appellant. The respondent could not prove ownership. That she had notice of Gwantamu's dubious proprietorship but connived with the local council officials to take the land.

That in those circumstances the respondent then entered upon the suit land and built a house. It was then the appellant argued that the respondent had trespassed on her land.

It has been held that trespass to land occurs where a person makes an unauthorised entry to land and thereby interferes or portends to interfere with another person's lawful possession of that land ... 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 same (see **Justine Lutaaya Vs Stirling Civil Engineering SCCA 11/2002**).

The entry by the respondent in the instant case was clearly illegal and unauthorised in the circumstances. The appellant had the lawful possession of the land at the time of entry.

It is therefore clear that the appellant had a cause of action, she was the proprietor of the land, that the respondent entered upon her land and that she built a house thereon. The respondent was therefore liable in trespass.

I therefore find that the trial magistrate wrongfully dismissed the appellants claim as failing to disclose a cause of action. She also failed to properly evaluate the evidence on record and arrived at the wrong conclusions.

Grounds 1 and 2 succeed.

3. The Learned Trial Magistrate erred in law and fact when she entertained fresh evidence at the locus quo thereby occasioning a miscarriage of justice.

When the trial court reconvened at the locus on the 17th of April 2013 the trial magistrate entertained the evidence of Bogere David and Hajji Muhamed Bikodo. These were both witnesses who had not testified during the hearing in Court.

In **Acai Vs Acai (1982) HCB 60** Justice Karokora held:

When the Court deems it necessary to visit the locus in quo then both parties, their witnesses must be told to be there. When they are at the locus it is not a public meeting where public opinion is sought as it was in this case. It is a Court sitting at the locus in quo. In fact the purpose of the locus in for witnesses to clarify what they stated in Court. So when a witness is called to clarify what they stated in Court they must do so on oath. The other party must be given an opportunity to cross examine him. The opportunity must be extended to the other party. Any observation by the trial Magistrate must form part of the proceedings.”

It was also held *Kabonge Jane and Anor vs Semanda Paul HCCA 76 of 2014 (Land Division) [unreported]* that it is irregular to allow people who have not testified in

court to give evidence at locus and that it would vitiate the entire locus proceedings where it happened.

The above clearly lays out the position of the law on locus. In the instant case therefore the proceedings of the locus visit of the 17th of April 2013, where witnesses who did not testify in court were called, cannot be left to stand. They are accordingly set aside.

Ground 3 succeeds.

Ground 4 and ground 6

4. The Trial Magistrate erred in Law and fact when he misinterpreted the expert evidence of the surveyor (PW4) thereby reaching a wrong decision.

6. The Trial Magistrate erred in Law in denying the Appellant the remedies sought after the first issue was resolved in her favour.

On ground 4 I have already dealt with and relied on the findings survey report which found the land is in its correct position and the respondent occupies 0.035 Ha of the suit land. The ground succeeds

The last ground is on remedies.

In view of my findings above it is my findings that this appeal succeeds on all grounds. The judgment and orders of the trial court are set aside. The appellant is entitled to the prayers in her claim. In the result,

- a. The appellant is hereby declared the owner of the suit land
- b. The appellant is consequently entitled to vacant possession of the land
- c. A permanent injunction issues restraining the respondent's successors in title from any farther trespass on the suit land.
- d. The appellant is entitled to the costs here and the court below.

Dated at Jinja this 8th day of august 2018

A handwritten signature in black ink, appearing to read 'Michael Elubu', written in a cursive style. The signature is positioned above a horizontal dotted line.

Michael Elubu

Judge