THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[CORAM: Kiryabwire, Egonda-Ntende, Cheborion Barishaki, JJA]

Civil Appeal No. 130 of 2011

(Arising from High Court Civil Appeal No. 10 of 2009 before the Honourable Lady Justice Faith Mwondha of the High Court of Uganda (Nakawa Circuit on 18th June 2010))

MOHAMMED MUBIRU==========APPELLANT

VERSUS

MONICA BABIRYE==========RESPONDENT

JUDGMENT OF THE COURT

Introduction

1. This is a second appeal. The original case was initially filed before the District Land Tribunal of Kampala as claim no. 188 of 2005 by the respondent / plaintiff, seeking the eviction of the appellant / defendant from a piece of land, on the ground that the appellant / defendant was a trespasser. The respondent / plaintiff is the registered proprietor of the land in dispute. The appellant / defendant contended in his defence that he was a bona fide occupant of the same as he was the holder of a kibanja on the said piece of land. The matter was tried by the Chief Magistrate of Nakawa (as Nak CMC Civil Suit No. 258 of 2009) who held, in a judgment dated 5 February 2009, that the appellant / defendant was not a trespasser but a bona fide occupant of a portion of the land that belongs to the respondent / plaintiff. She ordered the appellant / defendant to acquire a registered interest of the same in three months failing which the respondent / plaintiff would compensate the appellant / defendant for that portion after valuation of the same by the Chief Government Valuer. She ordered each party to bear its costs.

2. The appellant / defendant was dissatisfied with that decision and appealed to the High Court of Uganda setting forth 4 grounds of

appeal. The High Court (Faith Mwondha, J., as she then was) held on appeal (18th June 2010) that the appellant / defendant was a trespasser who had no interest whatsoever in the land in question. The appellant / defendant was ordered to vacate the land in question within 6 months from the date of the judgment, pay Shs.5,000,000.00 as general damages to the respondent / plaintiff and costs of the appeal and the court below.

3. The appellant / defendant now comes to this court on a second appeal, setting forth the following grounds of appeal.

> '1.The learned judge erred in law and fact when she held that the appellant / defendant is a trespasser and should vacate the suit land within six months from the date of judgment, failure of which eviction orders should issue.
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> 2. The learned judge erred in law when she held that the respondent / plaintiff had rightfully acquired the suit land.
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> 3. The learned judge erred in law when she held that the appellant / defendant cannot enjoy the security of occupancy guaranteed by the Constitution of the Republic of Uganda 1995.
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> 4. The learned judge erred in law when she found that the appellant / defendant did not prove his case on the balance of probabilities.
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> 5. The learned judge erred in fact and law and when she disregarded the trial magistrate's findings on the evidence of the appellant / defendant's witnesses.
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> 6. The learned judge erred in law and fact when she awarded the respondent / plaintiff general damages of Ug Shs.5,000,000.00 and costs of the first appellate Court as well as of the trial court.'

4. The appellant / defendant prays that this court sets aside the judgment of the High Court and enters judgment for the appellant / defendant with costs here and below.

5. This appeal has proceeded in the absence of the respondent / plaintiff who in spite of service did not attend or participate in both the scheduling conference and hearing of this appeal. The appellant / defendant's counsel Ms Tamale adopted her conferencing notes filed on record as her submissions in this appeal.

Submissions of counsel

6. It is submitted for the appellant that the first appellate court failed in its duty to re-evaluate the evidence on record and reach its own findings taking into account that it never heard the witnesses. The first appellate court acted on wrong principles of law shifting the burden of proof onto the defendant / appellant in spite of the fact that the burden of proof was upon the plaintiff / respondent. The first appellate court ignored the findings of the trial magistrate who had an opportunity to visit the locus in quo and ascertain what was on the ground. The first appellate court made no mention of the trial magistrate's findings including those at the locus in quo.

7. It was submitted that the first appellate court ignored the evidence on record and based its decision on speculation. Reference was made to holding of the court that, 'Namubiru, from the evidence on record was just a caretaker having been given that duty by the father of PW3 and one Aisha Namusoke. It follows therefore that if the father of Namubiru and Nsubuga stayed on the land he was staying there by courtesy of Ali Lubega the father of Aisha Namusoke and PW3. .....' In her judgment the learned judge faulted the manner in which the appellant / defendant came to own his interest on the suit land, finding that the appellant / defendant's father did not tell the court how he came to own the kibanja in issue in the first place. Had the learned judge scrutinised the evidence properly She would have found that in fact the appellant / defendant's father ably testified that he inherited this kibanja from his father, the grandfather of the appellant / defendant.

8. The learned judge was attacked for finding that the appellant / defendant's father did not know when he gave the Kibanja to the appellant / defendant when he had testified that he did so in 1990. This was consistent with the appellant / defendant's own testimony when he stated that he got this land from his father in 1990s.

9. The learned judge held that the appellant / defendant had departed from his pleadings in so far as he had stated in his defence that he inherited this land from his grandfather while in his testimony he stated that it was given to him by his father. This was erroneous as no where in the Written Statement of Defence did the appellant contend that he had inherited the land from his grandfather.There is no evidence to show that the appellant's grandfather occupied the

land in question courtesy of Ali Lubega or that the two men knew each other in anyway.

10. The appellant / defendant contends that while the trial court reached the correct finding that the appellant /defendant was a kibanja holder it was wrong for the magistrate to order that the appellant obtains from the respondent a registrable interest within 3 months as she had security of tenure as a bona fide occupant in light of Article 237 (8) of the Constitution and section 31(1) of the Land Act. It was also wrong for the trial magistrate to order compulsory acquisition by the respondent / plaintiff in event that the appellant failed to obtain a registrable interest in the land in question in light of the provisions of section 35(7) of the Land Act.

11. With regard to the award of general damages of UGX5,000,000.00 to the respondent the appellant contends that this is not tenable as it was based on erroneous findings of law that the appellant / defendant was a trespasser which was not the case. The appellant / defendant prays that the award of damages and order for costs be reversed.

Analysis

Grounds 1, 3, 4, 5 and 6

12. We shall consider grounds 1,3, 4, 5 and 6 together as they revolve around whether or not the finding by the first appellate court that the appellant / defendant is a trespasser is supported by the evidence on record. This is a question of law much as it is based on a review of the evidence on record. Secondly the first appellate court reversed the findings of fact of the trial court. As was held by the Court of Appeal for East Africa in Shah v Aguto [1970] E A 263 it is always a question of law where a first appellate court reverses findings of fact of the trial court whether the first appellate court acted judicially in doing so.

13. This principle was set out in the following words of Duffus V-P,

> 'In this case the judge of the High Court reversed the findings of fact of the trial Court and it is a question of law as to whether he has acted judicially in doing so. If the first appeal court has not acted in accordance with the principles which have been laid down then that court would have acted contrary to law and this Court has jurisdiction to hear

the appeal in accordance with s.72 (1) (a). This question was considered by this court in the appeals of Faxel Abbas Sulumanji v Reg (1955), 22 E.A.C.A, 395 and also in Merali v Uganda, [1963] E.A.C.A. 647.'

14. At the trial court only 2 issues were framed. Firstly whether the defendant (now appellant) is the customary owner of suit land. Secondly whether the plaintiff is entitled to remedies sought.

15. After hearing the evidence for both sides including a visit to the locus in quo, the trial chief Magistrate concluded that the defendant was the customary holder of a kibanja on a portion of the land held by the plaintiff now respondent as the registered proprietor. In our view after a review of the evidence on record this finding was unassailable. PW2, a witness for the respondent / plaintiff testified that the Kibanja holder to the land in issue was originally Kasangovu who was the father to Namubiru (DW1) and Nsubuga (DW3). Nsubuga was the father of the defendant / appellant.

16. PW2 testified that at the time the plaintiff purchased the land in question it was being occupied by Kizito, Kassozi, Namubiru and the defendant. Namubiru was compensated and she left. The defendant has a family [or maybe family house?] and boys' quarters on the land. The evidence of PW2 substantially bears out the defendant who claims to be a customary kibanja holder. The father of the defendant testified that he gave the land in question to the defendant in 1990. The land originally belonged to PW3's father. It passed on to Namubiru DW1 and PW3, Nsubuga. Namubiru was compensated by the plaintiff. Nsubuga gifted his portion to his son, the defendant. The graves of Kasangovu and other relatives of the defendant are on land in question as the visit to the locus in quo by the trial magistrate revealed.

17. In his testimony the respondent / plaintiff claimed that at the time she purchased the land there was only one person on that land and there were no houses on it belonging to the appellant / defendant. DW1 was the person on that land as caretaker. This evidence is contradicted by the testimony of the respondent / plaintiff's own witness PW2, who was the LC chairperson at the time who testified that at the time the plaintiff bought the land it was occupied by several people including the appellant / defendant who had a house on it.

18. The evidence of PW2 is in agreement in material particulars with the testimony of the defendant's witnesses, DW1, DW2 and DW3. As this is a witness brought by the plaintiff we can only accept that he was telling the truth. It is evident that the story of the plaintiff is not correct in so far as she claimed that only Namubiru (DW1) was on the land at the time she purchased the same. The appellant / defendant was clearly living on the land and had his own houses on the property at the time though they were originally built by his father, DW3.

19. In the Written Statement of Defence the defendant did not assert that he inherited the land from his grandfather as claimed by the first appellate court. Paragraph 5 thereof states,

> 'The respondent shall further aver that the suit land was initially the property of his grandfather who died and was buried on the same soon after he purchased in 1918 and that his grave and those of other relatives are still on the said land.'

20. The foregoing statement cannot amount to the assertion by the appellate court that the defendant on his pleadings claimed that he inherited the land from his grandfather. He simply states that it originally belonged to his grandfather. The two are very different.

21. The first appellate court set so much score on the fact that the respondent / plaintiff was the registered proprietor of the suit land. It stated in part,

> 'Going back therefore to resolve the issues as stated above, it comes out clearly from the evidence that the plaintiff/ respondent was the owner of the suit land of which she even had a valid certificate of title which she got in 1999.'

22. And it is largely on this basis, as well as other errors, that it determines that the land belongs to the respondent / plaintiff. The court, with respect, misperceived the issue and evidence at hand. The plaintiff's ownership or title was never in issue. What was in issue was the appellant / defendant's interest as a kibanja holder.

23. The learned appellate court held,

> 'The second issue is resolved in the negative, the defendant failed to prove his customary interest on the land belonging to the plaintiff.'

24. At the trial the issue framed was whether or not the defendant was a trespasser onto the plaintiff's land. Section 101 of the Evidence Act provides,

> 'Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove those facts exist.'

25. The burden of proof to establish that the defendant was a trespasser, i.e. that he had no right to occupy the land in question lay upon the plaintiff who was seeking judgment. The defendant had asserted in his defence that he is a bona fide occupant entitled to occupation of the land in question. He had not filed a counter claim. The burden of proof lay upon the respondent / plaintiff to prove that the appellant / defendant was not a bona fide occupant but was a trespasser. That burden did not shift. It was an error by the first appellate court to shift the burden of proof in this matter to the defendant.

26. Given the way the issues were framed it was never in issue that the plaintiff was the registered proprietor of the suit land. This was accepted. It was not in contest. What was in contest was whether the defendant was a bona fide occupant on a portion of that land. This was proved by both the evidence for respondent / plaintiff and the appellant / defendant. The reasons that the first appellate court provided for rejecting the defence evidence were largely erroneous and incorrect.

27. Having come to the conclusion that the appellant / defendant was not a trespasser the award for general damages cannot be sustained. It must be set aside.

Ground 2

28. This matter was not in issue at the trial. It was in fact not contested by the defence. It was accepted that the plaintiff / respondent was the registered proprietor of the suit land. It was never raised in the written statement of defence that the defendant was contesting the title of the plaintiff to the registered interest in the suit land. The first appellate court cannot be faulted for observing that the respondent / plaintiff was the registered proprietor of the suit land. What was in issue was whether the appellant / defendant had trespassed on the same or not. If the appellant / defendant was the

customary owner of the portion of land he occupied then he was not a trespasser.

Remedies

29. The trial chief magistrate had made an order directing the appellant to obtain a registrable interest within 3 months failing which the respondent would be able to compensate him his interest in the suit land after valuation by the Chief Government Valuer. These orders had no basis in law. The respondent / plaintiff had sought an eviction order on account of the claim that the appellant was a trespasser. The plaintiff failed to prove that the appellant was a trespasser. There was no counter claim upon which relief could be granted in case the counter claim by the appellant / defendant had succeeded. It follows that the only option to the trial court was to dismiss the plaintiff's claim, leaving the respondent / plaintiff and appellant / defendant an opportunity to pursue their different rights and resultant remedies as the law provides.

Decision

30. In the result this appeal is allowed with costs here and before the High Court. The judgments of the High Court and chief magistrate's court are set aside. The plaintiff's suit is dismissed with costs.

Signed, dated and delivered this 1st day of August 2017

Geoffrey Kiryabwire
Justice of Appeal

FMS Egonda-Ntende
Justice of Appeal

Cheborion Barishaki
Justice of Appeal

11/8/2017
Peter Wanda & Kisakye Jackie for
Appellant.
Appellant present
Respondent absent
Nandudu Rose c/c
Ct: Judgment read in Court

JR.