THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: HON. JUSTICE G. M. OKELLO, Ag. DCJ
HON. JUSTICE S. G. ENGWAU, JA
HON. JUSTICE C. K. BYAMUGISHA, JA

CIVIL APPEAL NO. 19 OF 2003

BETWEEN

PAUL MUGALU:: APPELLANT

AND

MANJERI NABUKENYA:::::::::::::::::::::::::: RESPONDENT

(Appeal from the judgment and orders of the High Court at Kampala (Ntabgoba, PJ, as he then was) Dated 18th July, 2002 in HCCS No. 374 of 2001).

JUDGMENT OF ENGWAU, JA

The respondent, Manjeri Nabukenya, had sued the appellant, Paul Mugalu, in the High Court at Kampala, seeking the following reliefs:-

(a) A declaration that the respondent has a Customary interest on the suit land;

(b) Special damages for the alleged destruction of her Crops which she alleged were on the kibanja and were destroyed by the appellant;

(c) General damages for her suffering inflicted on her by the appellant;

(d) A permanent injunction to restrain the appellant from trespassing on her land; and

(e) Costs of the suit.

The brief facts of the case were that in 1977 the respondent bought 2 acres of kibanja (mailo land) situate at Namalere village in Mityana District from one Simeon Bwabye, the grandfather of the appellant. She has since then occupied the said kibanja and cultivated crops thereon. In October 1991, the appellant unlawfully entered into the said kibanja and destroyed the respondent's crops worth Shs.2, 154,000/= without any colour of right. She claimed that money in special damages. She also claimed general damages for trespass and inconvenience plus costs of the suit.

In the High Court the respondent was awarded the following:-

(a) Special damages at Shs. 2,144,600/=;

(b) General damages at Shs. 1,000,000/=;

(c) Costs of the suit; and

(d) Interest on the decretal sum at the rate of 18% p.a. from the date of judgment till payment in full.

As a result, the appellant has appealed to this court on the following grounds, namely:-

1. The learned judge erred in law and fact when

he granted to the respondent special damages of Shs.2, 144,600/= or at all.

2. **The learned judge erred in law and fact when he granted general damages and interest on the decretal sum at the rate of 18% p.a. from the date of judgment till payment in full.**

3. **The learned judge erred in law and fact when he ruled that the respondent legally acquired a kibanja on the suit land.**

4. **The learned judge erred in law by deciding upon unpleaded issues.**

Before embarking on the grounds of this appeal, I must point out from the outset that on the 4th November, 2004 this court gave an order on the schedule of filing written submissions by counsel for both parties. It is only the counsel for the appellant who has complied with the order. As a result, the pannel of justices in this case, unanimously agreed that I write a lead judgment without any written submission from counsel for the respondent, which I now proceed to do.

Mr. John Mike Musisi, learned counsel for the appellant, argued the 4 grounds separately in the following order: Ground 3 followed by 1, 2 and 4 respectively. I shall also follow the same order.

On ground 3, Mr. Musisi contended that Sam Serugga (deceased) the father of both the appellant and his sister, Maria Rosa Nakafu (deceased), did not own the suit property situate at Namalere village in Mityana District. He based his argument on the evidence of the appellant, DW1 and that of Eldad Muube, DW2. The appellant testified that he bought the suit land

from Yayeri Nakato in 1980 at Shs.200, 000/=. The appellant knew that his father, Serugga, had attempted to buy the suit land but failed to pay 40 shillings by the time of his death in 1958. Yayeri Nakato who was the registered proprietor signed a transfer for the appellant in 1980. In his testimony, Eldad Muube, DW2, supported that evidence of the appellant.

In his view, Mr. Musisi submitted that the evidence of both the appellant (DW1) and his witness, DW2, waters down the respondent's claim and her witnesses over the suit land. The respondent, Manjeri Nabukenya (PW1) testified that on 15/3/77 she bought 2 acres of kibanja land from one Simeon Bwabye at Shs. 2,000/= and a written agreement of sale was executed. She stated that Simeon Bwabye bought the said kibanja from one Maria Rosa Nakafu (deceased) sister of the appellant. Maria Rosa Nakafu inherited the 2 acres of kibanja at the funeral rites

after the death of her father, Sam Serugga and later sold the same to her grandfather, Simeon Bwabye.

It was the contention of Mr. Musisi that Serugga died after failing to pay for the land, he could not possibly have given his daughter, Maria Rosa Nakafu, the 2 acres of land that was not yet his. And if Serugga would not have given Maria Rosa Nakafu 2 acres of land he did not own, Maria Rosa Nakafu herself could not have sold the 2 acres to Simeon Bwabye. Consequently, Simeon Bwabye also did not have the 2 acres of land for sale to the respondent, Manjeri Nabukenya.

To fortify his argument, Mr. Musisi pointed out that the respondent and her witnesses failed to produce:

(a) the title in the name of Serugga;

(b) **the agreement by which Serugga purchased the said kibanja from Yayeri Nakato;**

(c) the *"will"* of Serugga bequeathing 2 acres of that land to Nakafu; and

(d) any agreement by which Nakafu sold to Bwabye the said 2 acres of land.

In the premises, Mr. Musisi prayed that this court, after a re-evaluation of the evidence on record, finds that:

(i) the respondent never acquired any customary interest on the suit land and was, therefore, a trespasser thereon.

(ii) the agreement, Exbt. P1 (in Luganda) and its translation, Exbt PII (in English) was a forgery.

Mr. Ntabgoba, the learned Principal Judge as he then was, found on ground 3, that the respondent had bought a 2 acre kibanja situate at Namalere village in Mityana District from Simeon Bwabye in 1977. After a thorough scrutiny of the evidence on record as a whole, the learned Principal Judge relied on the evidence of the respondent herself and two of her other witnesses including the appellant's witness, DW2.

The respondent testified that she bought the 2 acres of land situate at Namalere village in Mityana District from Simeon Bwabye on 15 - 3 - 77. The agreement of sale was executed. During the wars, however, it got lost. Nevertheless, a second agreement replacing the missing one was written in 1990. A legal Assistant, Hilda Taliba (PW2) translated the Luganda version, Exbt. P1 into English - Exbt PII both of which were tendered in evidence.

The wife of Simeon Bwabye, Mary Nakyanzi (PW3) witnessed her husband selling the said kibanja to Mukyala Manjeri Nabukenya, the respondent. She further testified that in her

presence Sam Serugga entrusted 8 acres of land to her husband to keep in trust for his children. Serugga had 10 acres of land altogether. He bequeathed 2 acres of land to his daughter, Maria Rosa Nakafu. The 8 acres were to be shared between his 5 children after their becoming of age.

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The Muluka Chief of the area, Jackson Lwasa (PW4) confirmed witnessing the 2nd agreement replacing the 1st one to the effect that Simeon Bwabye sold 2 acres of kibanja to the respondent. He also confirmed that in 1991 the appellant destroyed the crops which the respondent had planted on that kibanja. The complaint was heard by RC I Council which advised both the appellant and respondent to reach an understanding on the matter but all in vain. So the matter was forwarded to RC II and thereafter to RC III. Subsequently, the matter was filed in the High Court resulting into this appeal.

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The evidence of Eldad Muube, DW2, is to the effect that the late Serugga, the father of the appellant, was his brother. The witness was chairman of LC 1 of the area. The respondent one time complained to them that the appellant had destroyed her crops which she planted in a small kibanja sold to her by Bwabye. They went to the locus and found 100 cassava stems and some coffee trees. As the appellant and respondent had failed to reconcile, the matter was forwarded to LC 11 court.

30 After considering the evidence of PW1, PW3, PW4 and DW2 as stated above, I think the learned Principal Judge was justified to hold that the respondent had bought the suit land from Simeon Bwabye. She

occupied the said kibanja and planted thereon some crops which the appellant later destroyed resulting into court action. I find, therefore, no merit in ground 3 of this appeal.

As regards the 1st ground, the complaint is that the Principal Judge relied on a valuation report merely annexed to the plaint in awarding special damages of Shs. 2,144,600/= to the respondent without proof. Mr. Musisi's contention was that the said report was neither produced in evidence nor was its author, Mr. F. X. Kanyike, summoned to give evidence in proof of its contents. He submitted that the cardinal rule concerning special damages is that they must not only be pleaded but they must be strictly proved. For that proposition, counsel relied on **Kampala City Council vs Nakaye (1972) EA 446**. Mr. Musisi submitted that there was no attempt to prove these damages and they should, therefore, not have been awarded. I agree. Therefore, ground 1 of this appeal succeeds.

Regarding ground 2, the complaint is against the award of general damages in the tune of Shs. 1 million with interest at 18% p.a. from the date of judgment till payment in full. In his judgment, the Principal Judge stated, inter alia, that "***..... As if the fraudulent acquisition of land was not bad enough, the***

defendant started harassing the plaintiff, cutting her crops. It is this harassment that led the plaintiff into the LC courts, and the Magistrates' courts and eventually to this court via State House. She was caused great inconvenience, great stress and above all grave anxiety. She must be awarded sum substantial damages. I award her a sum of Shs. 1,000,000/=".

Mr. Musisi vehemently attacked that extract from two fronts. First, that there cannot be such an award like stress and inconvenience for going to court. According to him, an award of costs to a successful party should be

enough to reimburse him/her.

Secondly, that if the Principal Judge had properly evaluated the evidence on record, he would have found that the respondent was never a rightful kibanja holder of the suit land. According to Mr. Musisi, the said kibanja belonged to the appellant except that the respondent had illegally planted some crops thereon which he told her to remove and eat as far back as 1983 but continued to plant more new crops. In the premises, Mr. Musisi submitted that the respondent was not entitled to an award of general damages because she had harvested and ate her crops. As for coffee and banana plantations, the appellant testified that they were planted by his father, Serugga.

Learned counsel further submitted that at the time the land wrangles between the appellant and respondent began; the Land Reform Decree was in force. He contended that under section 3 (3) of the Land Reform Decree, a lessee on conversion (mailo owner) had a right to evict tenants if the lessee required the land for development purposes and subject to paying the tenants compensation for improvements. In the instant case, the only improvements that the respondent had on the said kibanja were her crops which she harvested and ate. She was not entitled to an award of general damages for new crops which she subsequently planted.

When dealing with ground 3, I found that the Principal Judge had properly evaluated the evidence of PW1, PW3, PW4 and DW2 and was justified to hold that the suit kibanja was the property of the respondent, which she bought from Simeon Bwabye, the grandfather of the appellant. PW1, PW3, PW4, DW2 and the appellant himself confirmed that the respondents crops were destroyed by the appellant from the suit kibanja. Therefore, she was entitled to general damages for the crops so destroyed and any inconvenience caused.

It is trite that this court would only interfere with the discretion to award general damages if the award was illegal or based on a wrong principle or where it is manifestly excessive or inordinately law. It has not been proved that the award of general damages at Shs. 1 million was illegal or based on a

wrong principle or was manifestly excessive in the circumstances of this case. In the premises, I would decline to interfere with the discretionary power exercised by the Principal Judge in awarding these general damages. Ground 2 also fails.

On ground 4, the complaint is that the Principal Judge erred when he held that the appellant had obtained the title to the suit land fraudulently. It was the contention of Mr. Musisi that the allegation of fraud was not pleaded and no evidence was led to show fraud. It was introduced for the first time during the respondent's submission. In counsel's view, the importation of fraud during submissions and in the judgment occasioned injustice to the appellant. The Principal Judge made award of general damages using fraud as one of the grounds. In **Interfreight Forwarders Ltd vs EAB, SCCA No. 33 of 1992**, a party should not depart from his pleadings.

The evidence of PW3, PW4 and DW2 is that the respondent bought 2 acres of the said kibanja from Simeon Bwabye. The respondent stated that she bought the kibanja in 1977 and sale agreement was executed. Apart from the 2 acres of the suit land, Serugga had altogether 10 acres of land. Before his death in 1958, Serugga had entrusted the 8 acres of land to Bwabye until his children became of age. The only child who was of age at the material time was Maria Rosa Nakafu. Serugga bequeathed 2 acres of the suit land to Nakafu and she inherited the same during funeral rites. She later sold it to Bwabye.

The appellant got title to the 8 acres entrusted to Bwabye for himself without sharing the same with other children of Serugga. In addition, the appellant included the 2 acres of the suit property to make 10 acres in his title. It was for that wrongful act which prompted the Principal Judge to use the word "**fraud**". I do not think that fraud was one of the grounds for awarding general damages or the basis for the judgment. Ground 4 is untenable.

In the result, I would allow this appeal in part, in that special damages were not strictly proved and make no order as to costs, each party is to bear its own costs.

Dated at Kampala this ……10th… day of …February… 2005

S. G. Engwau
JUSTICE OF APPEAL.