

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MUBENDE
CIVIL APPEAL NO. MBD- 019 OF 2014(Arising From Civil Suit. No. 022 of
2012 of Mubende Chief Magistrate)

NTAMA KOSIYA=====APPELLANT

VERSUS

HENRY KAWALYA=====RESPONDENT

JUDGMENT BY: HON. JUSTICE DR. JOSEPH MURANGIRA

Introduction.

Representation

The appellant, Ntama Kosiya, is represented by Mr. Kibirango Peter and Bagenda Ivan from Ms. Orima & Co. Advocates, Kampala and Ms. Barunga Associated Advocates, Kampala respectively.

The respondent, Henry Kawalya, is represented by Mr. Michael Akampurira from Akampurira & Partners, Kampala.

Brief facts of the appeal

The respondent (plaintiff) sued five defendants, namely Kashaija Elinesta, Ntama Kosia, Muganda Sansio, Karubu Zakyeli and Kabururu Peter, in the Chief Magistrate's Court at Mubende in Civil Suit No. 22 of 2012.

The respondent's claim against the appellant and others was for trespass, declaring the defendants as trespassers on the respondent's land, restoration of the plaintiff's (respondent's) boundaries, permanent injunction, special and general damages and costs of the suit.

The trial court gave judgment in favour of the respondent (plaintiff)

The appellant was not satisfied with the whole decision the trial Magistrate, Her Worship Sarah Mponye, the then Chief Magistrate, Mubende Chief Magisterial area. Hence, this appeal.

The appeal

This appeal is based on the following grounds; that:-

1. The learned Chief Magistrate erred in law when she ordered for cancellation of the appellant's Certificate of title of land comprised in Buwekula county, Block 373 Plot 5 since such powers are a preserve of the High Court; and appellate courts above High Court of Uganda and exercisable only on the basis of fraud.
2. The learned Chief Magistrate erred in law and fact when she failed to dismiss the respondent's suit on account of being time barred, that is it having been brought after a period of twenty-eight years as from the time the appellant obtained possession and Certificate of title thereof.
3. The learned Chief Magistrate erred in law and fact when she held that the appellant was a trespasser on the respondent's land then forming part of Buwekula county LRV 1094 Folio 6, Plot 2 Block 374, while well knowing that the appellant was and is a registered proprietor of land comprised in Buwekula county Block 373 plot 5 which the respondent alleged that the latter had partly overlapped with the respondent's land comprised in Buwekula County LRV 1094 Folio 6 plot 2 Block 374.
4. The learned trial Chief Magistrate erred in law and fact when she disregarded the recommendation of commissioner surveys and mapping in particular three (3) recommendations thereof, by

ordering alteration of the appellant's titles comprised in Buwekula County Block 373 Plot 5, in absence of fraud on the part of the appellant and without the court's lack of requisite jurisdiction to make such order, which misdirection occasioned a miscarriage of justice to the appellant.

5. The learned trial Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence before her, thereby reaching wrong conclusions and findings.
6. The trial Chief Magistrate erred in law and fact when she condemned the appellant in costs of the suit when he was wholly bonafide in acquisition of his land title which the respondent alleged it overlapped with his land comprised in Buwekula County LRV 1094 Folio 6 Plot 2 Block 374.

The appellant proposes that:-

- (a) The appeal is allowed.
- (b) The judgment and orders of the lower court be set aside.
- (c) The respondent be condemned in costs both for this appeal and in the court below.
- (d) A Certificate of costs for two Advocates for the appellant be granted.

Resolution of the appeal.

All counsel for the respective parties filed in court written submissions while resolving the abovestated grounds of appeal.

The respondent (plaintiff) sued the following defendants: Kashaija Elinest, Ntama Kosiya, Muganda Sansio, Karubu Zekyeli and Kabururu Peter. Later in the proceedings, the respondent (plaintiff) entered into a consent judgment with the 3rd, 4th and 5th defendants. Thus, the suit proceeded against Kashaija Elinest (1st defendant) and Ntama Kosiya (2nd defendant).

The judgment was entered in favour of the Respondent (plaintiff) as against the 1st and 2nd defendants. 1st defendant, Kashaija Elinest, never appealed against the Decree of the trial Court. The 2nd defendant (appellant) appealed against the judgment and decree of the trial court.

In the judgment and decree, the trial Chief Magistrate found Kashaija Elinest and Ntama Kosiya (appellant) to have committed trespass and were ordered to restore land boundaries as demarcated by the Surveyors in 1978 for the Respondent's suit land. The appellant was further ordered to pay costs of the suit.

On ground 1, it is the argument by Counsel for the appellant that the trial Chief Magistrate erred in law and fact when she ordered for cancellation of the appellant's land certificate of Title comprised in Buwekula County, Plot 5 Block 373.

In his arguments, Counsel for the respondent does not agree with the submissions by Counsel for the appellant. In his arguments, Counsel for the Respondent supported the judgment of the trial Chief Magistrate.

I perused the judgment of the trial Chief Magistrate delivered on 23rd January, 2014, at page 2, last paragraph, the trial Chief Magistrate, held that:-

“This court orders that the plaintiff’s boundaries be restored to what they were in 1978 survey executed under I/S VOO11 (see internal memo by Principal Staff Surveyor Mr. Lutaaya dated 14th January, 2014”.

From the above holding by the trial Chief Magistrate, the latter never ordered for cancellation of the appellant’s Certificate of title as is being alleged by Counsel for the appellant in their written submissions. The trial Chief Magistrate in effect ordered for rectification of the defendant’s certificates of title including that the appellant, and making appropriate changes in the Land Register of Titles by the Commissioner Land Registration in respect of the said Certificates of Title.

Again, I perused the lower court proceedings, and found that the decision of the trial Chief Magistrate is based on the evidence available on the lower court record. Thus, ground No. 1 of appeal is found in the negative.

On ground 2 of appeal, Counsel for the appellants submitted that the Respondent’s (plaintiff’s) suit should have been dismissed, as the suit was filed in court long after expiry of 12 years period. That therefore the suit was time barred. He relied on section 5 of the Limitation Act, Cap 80, Laws of Uganda. In reply, counsel for the respondent in his written submission does not agree. He, too, relied on case law in support of his arguments. The issue of whether a suit is affected by limitation period in cases of trespass is settled. In the case of **Justine E.M.N. Lutaaya -Vs- Sterling Civil Engineering Company Limited, Supreme Court civil appeal No. 11 of 2002**, Mulenga JSC held that:-

“Trespass to land is a continuing tort.”

Also, in the case of **Polyfibre Ltd -Vs- Matovu Paul and others** Civil Suit No. 412 of 2010, it was held that limitation period would not apply in a case for trespass to land, since trespass is a continuing tort. In the suit in the lower court and even in this instant appeal the trespass to the respondent's land as pleaded in the plaint, is still continuing. In essence, I am bound by the abovestated supreme court decision. In the premises therefore, I answer ground 2 of appeal in the negative.

On ground 3 of appeal, Counsel for the appellant submitted and argued that the trial Chief Magistrate erred in law and in fact when she held that the appellant is a trespasser on the respondent's land. I perused the lower court proceedings and it is my finding that the trial Chief Magistrate directed the Commissioner Lands, Surveys and Mapping to conduct a credible survey on the suit land which came up with a report. It was on this report by the Commissioner Lands, Surveys and Mapping that the trial Chief Magistrate based herself to hold that the appellant had trespassed on the respondent's suit land.

Again on perusal of the appellant's Counsel's written submissions, I did not see anywhere therein where Counsel for the appellant point out any evidence on the lower court record to show that the appellant is the rightful owner of the disputed suit land and not a trespasser. The trial Chief Magistrate was justified to hold the way she did. In the case of **Justine E.M.N Lutaaya - Vs- Sterling and Engineering Company Limited (ibid)**, it was held that trespass to land was held to occur when a person makes an authorized entry upon another's land and thereby interfering with another person's lawful possession of the land.

Also in the case of **Placid Weli -Vs- Hippo Tours and 2 others HCCS No. 939 of 1996**, it was held that trespass is actionable parse even if no damage was done to the land to the land.

In the premises, ground 3 of appeal lacks merit. It is answered in the negative.

On grounds 4 and 5 of appeal, Counsel for the appellant argued in their written submissions that the trial Chief Magistrate did not properly evaluate the recommendations of the Commissioner of Lands, Surveys and Mapping and also failed to properly evaluate the evidence on court record as a whole.

I perused the entire record of the lower court, perused the judgment of the trial Chief Magistrate and found that she played her role very well. The trial Chief Magistrate evaluated the evidence on the lower court record as well as recommendations of the Commissioner Lands, Surveys and Mapping. On page 2, paragraph 2 of the judgment, the trial Chief Magistrate stated:-

“From the evidence of the survey report dated 2nd December, 2013, it has been established that D1 had encroached/ trespassed on the plaintiff’s land by 1.22 Hectares (3.0 acres) and D.2 had encroached/trespassed on the plaintiff’s land by 3.07 hectares (7.5 acres) respectively. The plaintiff has therefore proved that both D1 and D2 were trespassers on his land. This is on the balance of probabilities”.

I also take note that the appellant’s Counsel in their written submissions, they did not show which evidence the trial Chief Magistrate never evaluated on the lower court record. In the circumstances the appellant’s Counsel did not give me enough material and evidence upon which I could base on to fault the trial Chief Magistrate.

In the end result, I answer issues 4 and 5 in the negative.

On the ground 6 of appeal, Counsel for the appellant in their written submissions argued that the trial Chief Magistrate erred in law and fact when she ordered the appellant to pay costs to the respondent.

Indeed, at page 2, paragraph 4 of the judgment, the trial Chief Magistrate stated: -

“However, costs follow the event. The trespass of the defendants, knowingly or unknowingly caused the plaintiff to incur costs of both litigation and surveys which costs would not have been incurred if there was no trespass. Plaintiff, therefore, deserves to be awarded costs. I thus, award the plaintiff costs against the defendants.”

The findings of the trial Chief Magistrate as quoted above is supported by section 27 of the Civil Procedure Act, Cap. 71, which reads :-

Costs.

Subject to such conditions and limitations as may be prescribed, and to the provisions 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 or Judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.

The fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of the powers in subsection (i); but the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (1) The court or judge may give interest on costs at any rate not exceeding 6 percent per year, and the interest shall be added to the costs and shall be recoverable as such.

In the case of George Kasedde Mukasa -Vs- Emmanuel Wambedde & 4 others HCCS 459 of 1998, it was held that: -

“In an action for trespass, if the plaintiff proves trespass, he/she is entitled to recover damages even though he/she has not suffered any actual loss. Further, if the trespass has caused the plaintiff actual damage, the plaintiff is entitled to receive such an amount as will compensate him for his/her loss”.

In sum total, I hold that the trial Chief Magistrate having found that the appellant is a trespasser on the Respondent’s suit land, the respondent was entitled to the costs of the suit. The trial Chief Magistrate was by law right when she awarded costs to the respondent. I thus, answer ground 6 of appeal in the negative.

Conclusion.

In closing and in total consideration of the evidence on the lower court record as a whole, the authorities cited and relied on hereinabove in this judgment, and for the fact the respondent has succeeded on all the 6 grounds of appeal, judgment is entered in his favour in the following orders; that:-

- (a) This appeal is dismissed.
- (b) The judgment and orders of the trial Chief Magistrate are upheld.
- (c) The respondent is awarded costs here and in the court below.

Dated at Mubende this 26th day of September, 2018.

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DR. JOSEPH MURANGIRA
JUDGE

26.09.2018