THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL No. 42 OF 2012

(Appeal from the judgment of Her Worship Tusiime Sarah Bashaija, Magistrate G.1, dated 20th April 2012, in Mpigi Chief Magistrate's Court Civil Suit No. 124 of 2008)

ALEX PAUL KAFEERO ..... APPELLANT

VERSUS

STANLEY JAGGWE ..... RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

The Appellant herein was the Defendant in the Chief Magistrate's Court, in the suit by the Respondent as Plaintiff; wherein the Court passed judgment in favour of the Plaintiff (Respondent herein). The Appellant is aggrieved with the decision of the learned trial Magistrate; resulting in this appeal, in which he seeks a reversal of the said judgment by having it set aside. The grounds for the appeal, as are set out in the memorandum of appeal, are that: –

1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record; and thus came to a wrong conclusion thereby occasioning a miscarriage of justice.

2. The learned trial Magistrate erred in law and fact when she ruled, as a preliminary point of law, that the Respondent/Plaintiff's suit was not res judicata.

3. The learned trial Magistrate erred in law and fact when she found that the Respondent/Plaintiff was a tenant by occupancy on the whole of the Appellant's

land measuring 6 (six) acres, yet his actual tenancy was in respect of one acre thereof.

4. The learned trial Magistrate erred in law and fact when she held that the Appellant who is the registered proprietor of the suit property is a trespasser.

5. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and found that the Respondent/Plaintiff's house, instead of the Appellant's, was demolished; and thereby erroneously awarded general damages to the Respondent.

6. The learned trial Magistrate erred in law and in fact in finding and ordering that a permanent injunction issues against the Appellant restraining him and his agents from trespassing on the suit property without regard to the Appellant's right as a registered proprietor.

7. The learned trial Magistrate erred in law and fact by awarding exorbitant and unsubstantiated general damages.

Ground No. 2. **Whether the learned trial Magistrate erred in law and fact, when she ruled, on a preliminary point of law, that the Respondent/Plaintiff's suit was not res judicata.**

Because this ground of appeal has the potential of disposing of the appeal on a point of law, if it goes the Appellant's way, I have deemed it prudent to first deal with it. Section 7 of the Civil Procedure Act, Cap. 71, provides as follows: –

> *"No Court shall try a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try the*

subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that Court."

Authorities abound, wherein Courts have pronounced themselves on the meaning and application of this provision of the law. In ***Kamunye & Ors vs The Pioneer General Assurance Society Ltd. [1971] E.A. 263***, which was followed by the Ugandan Court of Appeal in ***Semakula vs Susane Magala & 2 Ors [1979] H.C.B. 90***, Law Ag. V.–P, pronounced himself on the matter at p. 265as follows: –

"The test whether or not a suit is barred by res judicata seems to me to be – is the Plaintiff in the second suit trying to bring before the Court, in another way and in the form of a new cause of action, a transaction which he has already presented before Court of competent jurisdiction in earlier proceedings; and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

Other authorities, which state the same principle and test for determining whether a suit is res judicata or not, include ***Daniel Sempa Mbabali vs William Kizza & Administrator General [1992–93] E.A. 243***, and the English case of ***In Re May (1885) 28 Ch. D 516***. The rationale behind this provision of the law is to ensure that there is an end to litigation over a matter; and thus avoid multiplicity of suits over the same matter, with the danger that Courts could come up with contradictory decisions on the same matter or issue.

With regard to the matter now before me on appeal, it is important to point out that there had existed Civil Suit No. 24 of 2002 prior to Civil Suit No. 124 of 2008

from which this appeal arises. The previous suit was between the Respondent herein and one Ssali Salongo, over the same suit land in the subsequent suit. However, in the previous suit, neither had the Respondent herein sued Ssali Salongo as a principal, nor agent, of the Appellant herein. On appeal from the previous suit, the Chief Magistrate pointed out that the suit against Ssali Salongo was ill advised, since he was not agent or principal of the Appellant herein. She faulted the trial Court for not joining the Appellant herein as the proper Defendant in the previous suit since in the course of his featuring as a witness for Ssali Salongo, it had become clear that he was the proper party to have been sued; but not Ssali Salongo.

Indeed, it was pursuant to the learned Chief Magistrate's advice that the Respondent herein instituted the subsequent suit against the Appellant herein, from which this appeal now before me has arisen. From this then, it is unmistakably clear that the issue regarding the Respondent's complaint of trespass over the suit land was not decided; at least not between him and the Appellant herein or anyone acting in the Appellant's behalf. For this reason, the law and test laid down for determining when a suit is res judicata is not satisfied in the instant case; and so, this ground of appeal fails.

<u>Grounds No. 1, 3, and 5</u>. Whether the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record; and thus came to a wrong conclusion.

These grounds are merely variants of the same issue for the determination by this Court; as they, all, fault the respective findings or conclusions reached by the trial Magistrate, claiming that the respective conclusions were arrived at from a failure or an inadequate evaluation of the evidence adduced at the trial. This being the first

appellate Court in the matter, it is incumbent on me to fully appraise the evidence on record afresh; and make my own findings thereon, while not losing sight of the fact that I had no opportunity to observe the witnesses testify in Court at the trial. To determine the kibanja held by the Plaintiff/Respondent, the learned trial Magistrate relied on the receipts of payments of busuulu to Andrea Lwanga the original mailo owner, and then to Tamale to whom the mailo was sold.

The fact that the Respondent paid busuulu to Tamale, who had inherited Andrea Lwanga's mailo title, was proof that the Plaintiff/Respondent held a kibanja on Tamale's land. It means the whole of the land, for which the Plaintiff/Respondent had paid busuulu to Andrea Lwanga, had been transferred to Tamale. If, as is contended by the Defendant/Appellant, Tamale had only inherited part of Andrea Lwanga's land, which his father (Alex Kafeero) bought from Tamale, then there would have been two sets of busuulu payments by the Plaintiff/Respondent. One would have been to the estate of Andrea Lwanga, and the other to Tamale. The receipts of payment of busuulu was therefore key to the determination of the kibanja the Respondent held on Andrea Lwanga's land.

The evidence on record shows that the whole of the Respondent's kibanja now fell on the Appellant's land since he had inherited land, which his late father bought from Tamale. The learned trial Magistrate must have believed the Respondent's evidence that he had cultivated the suit land up to the valley, as was evidenced by the old coffee trees amongst others. It must have been in view of this that she reached her conclusions; in effect believing that the Plaintiff/Respondent's evidence as supported by those of his witnesses, were more credible than the adverse evidence adduced by the Appellant and his witnesses. On the evidence, on a balance of probabilities, she was entitled to believe the version presented by the Plaintiff/Respondent.

On the issue of the reason for award of damages, the trial record is quite clear. The learned trial Magistrate never awarded general damages for the demolition of the house the Appellant had constructed on the suit land; but instead for the destruction, which she found the Appellant had occasioned on the Respondent's kibanja by trespassing on it. Once she believed that the Respondent's kibanja stretched to the whole of the area claimed by the Respondent, then it naturally followed that the act of the Appellant who admitted to clearing the land, which had coffee trees, was wrongful; and for which an award of general damages was justified.

<u>Ground No. 4 & 6</u>. Whether the learned trial Magistrate erred in law and fact in holding that the Appellant was a trespasser on the suit kibanja; and thereby issuing an order of permanent injunction against the Appellant.

Admittedly, the Respondent's kibanja is on the Appellant's mailo interest. Accordingly, the Appellant has a superior title to that of the Respondent; thereby conferring on the Appellant legal possession of the suit land, while the Respondent has physical possession. Ordinarily, a person who has legal possession over a piece of land ought cannot commit trespass over it. However, this applies only where the relationship between the person with legal possession and the one with physical possession is founded strictly on contract; and is therefore regulated by the terms of the contract. Any wrongful entry on the land by the one with the legal possession is a breach of the term of quiet possession enshrined in the contract deed.

However where, as is the case in the instant case, the landlord/tenant relationship between the parties is regulated by statutory provisions, as is enshrined in the Constitution and the Land Act, then any unauthorised entry on the land by the one

with the legal possession would amount to an act of trespass. Accordingly then, the Appellant's unlawful entry onto the suit land, destruction of the Respondent's crops and trees thereon, as well as construction of his house thereon, amounted to grave acts of trespass; for which he was rightfully held accountable by the trial Court by the award of general damages. Similarly, the law protects the statutory tenant against the landlord from any breach of the statutory protection of physical possession which the tenant enjoys; and for this, the order of permanent injunction against the Appellant was well founded.

<u>Ground No. 7</u>. Whether, in the circumstances of this case, the Defendant made an exorbitant award of general damages.

The learned trial Magistrate gave the Respondent an award of general damages in the sum of U. shs. 5,000,000/= (Five million only) for the trespass and the damages the Appellant caused to the Respondent's land. This award was based on the evidence adduced by the Respondent, which she believed, that the Appellant had without any due process destroyed properties on the Respondent's land. An appellate Court may only interfere with an award of damages if such award was either too high in the circumstances of the case, or ridiculously so little, as not to reflect the need to atone for the injury for which the award is made. I am not persuaded that in the instant case, the award complained of falls under either of the two scenarios; and for this reason, I find myself unable to interfere with it.

What the Appellant needs to do, is to assert his right under the law as the mailo owner of the suit land, to whom the Respondent is clearly beholden as his landlord. In the event, I find that this appeal has no merit. It must fail; and so, I dismiss it with costs to the Respondent.

Alfonse Chigamoy Owiny – Dollo

JUDGE

12 – 02 – 2016