THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 0061 OF 2017

(AN APPEAL FROM THE JUDGEMENT AND DECREE OF HIS BYAMUGISHA DERICK, MAGISTRATE GRADE ONE AT KYEGEGWA IN FPT – 008 – CV – CS – 003/2014)

BYABASAIJA PAULINE :::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

MARY MUGISA :: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

This is an appeal seeking to set aside the judgment of His Worship Byamugisha Derick, Magistrate Grade One at Kyegegwa Chief Magistrate's Court where the court had found in favour of the respondent.

Background:

The respondent in the lower court had sued the appellant for trespass upon her Kibanja at Kyamasenga, Kakongorano, Migongwe, Kyegegwa District and sought among others, a declaration that she was the rightful owner of the suit land, and a permanent injunction restraining the appellant from further trespassing on the land.

It was contended by the respondent that by agreement dated 16th August 2009, she bought 4 – 5 acres of land at 5,000,000/= from Kamanyire and the transaction was witnessed by the local authorities and she was shown the boundaries of the land by

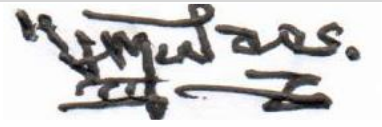
the former owners; that in 2014 the appellant without any color of right, asserted ownership of part of the land and started digging there.

The appellant denied the claims and contended that he had not been invited by the respondent to verify the boundaries at the time of purchase and that the respondent had no right over the suit land as it formed part of his land. The appellant raised a counter claim against the respondent seeking among others an order of vacant possession and a permanent injunction. The respondent filed a reply to the counter claim denying the appellant's claims.

The trial magistrate after evaluating the evidence gave judgment in favour of the Respondent declaring her the rightful owner of the suit land and further issued a permanent injunction against the appellant, thus this appeal on the following grounds:

Grounds of appeal:

1. **The learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence thereby arriving at a wrong conclusion that the appellant was not the lawful owner of the suit land.**
2. **The learned trial Magistrate erred in law and fact when he awarded the respondent general damages of shs 1,000,000/= which were not strictly proved.**
3. **The learned trial Magistrate erred in law when she failed to consider the evidence from the locus visit.**



4. **The learned trial Magistrate misdirected himself when he declared the appellant a trespasser to the suit land.**

Representation and hearing:

The memorandum of appeal was filed by M/s Kesiime & Co. Advocates.The case was cause listed for hearing and none of the parties attended court. I considered the appeal on the basis of the memorandum of appeal and the lower court.

Duty of the first appellate Court:

This being a first appeal, my duty is to subject the evidence at trial to a fresh and exhaustive scrutiny and re-appraisal before reaching my own decision having due regard to the fact that I did not see the witnesses testify to observe their demeanor.. **(See Fr. NanensioBegumisa& 3 others Vs. Eric Tiberuga, SCCA No. 17 of 2014 [2004] KALR 236)**

Burden and standard of proof:

Section 101 and 102 of the Evidence Act places the legal burden to prove a case on a person who wants court to make a decision in his or her favour. The legal burden in civil cases rests on the plaintiff to prove his or her case on the balance of probabilities while the evidential burden lies on a party who alleges a fact.

CONSIDERATION OF THE APPEAL:

I will consider grounds 1, 3 and 4 together. The respondent's claim in the lower court was grounded in trespass to land. In **Justine EMN Lutaya v Stirling Civil**

Engineering Company Ltd (Civil Appeal No. 11 of 2002) [2003] UGSC 39 (10 November 2003), Mulenga JSC guided on what amounts to trespass to land thus: ***"Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, 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 land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus, the owner of an unencumbered land has such capacity to sue, but a landowner who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land."***

The respondent had a legal burden to prove that she was in possession of the suit land at the time of the alleged trespass, that it is the defendant who trespassed on the land, and that the entry was not authorized. In this case, each party alleged that it was the other party that trespassed on their land.

PW1 the respondent stated that she had bought the suit land on 16th August 2009 from one Kamanyire Erikanjeru by agreement (Exhibited as PE.1) that clearly indicated the boundaries of ***muramura*** trees that were later burnt and were no longer visible; and that she later begun to use the land by planting thereon seasonal crops. That later a group of about 15 people came on her land and dug and fenced it, which she reported to the DPC, but the fencing continued, which she later removed; that the appellant later sent her messages threatening to kill her.

PW2 (Rwesanda Charles Omuhereza) corroborated the evidence of PW1. PW2 testified that he witnessed the purchase by the respondent as well as the purchase by the appellant. That the appellant bought from PW2's sister Basasibwaki Jane but PW2 sold on her behalf. That the appellant was not present but bought through his brother one Kyalimpa and that PW2 authored the agreement of sale to the appellant and he was also the one that showed the boundaries to Kyalimpa. PW2 stated that he also witnessed the agreement and the boundaries during the purchase by the respondent. PW2 testified that he knew the boundaries of the land of each party because he was present during the transactions. PW2 testified that the respondent did not encroach on the appellant's land. That the land had old boundaries of ***muramura*** trees but that some were no longer in place. In cross examination, he stated that during execution of the agreement, the boundary marks were in place.

PW3 (Kasangaki Kabagabe), informed court that being a land broker, he was approached by the respondent who wanted to buy land and that he signed on the agreement when the respondent was buying. That there was a dispute between the plaintiff and the defendant over the boundary marks and while on the land, he confirmed that the boundary marks existed the way they were planted. In cross examination he stated that some of the boundary marks had been removed.

PW4 (Ibrahim Kamanyire) informed Court that he knew the respondent because he sold to her land and that there were boundary marks at the time of sale and that the respondent did not encroach on the land of the appellant.

PW5 (Omuhereza Bitomunda) said that it was the appellant who had trespassed on the respondent's land and that there existed boundary marks that were now missing. In cross examination he stated that he could not recall when the respondent bought but that he was present and signed on the agreement; that the boundary marks of ***muramura*** trees were there but had since been removed.

DW1 Byabasaija Pauline testified that his land was next to that of the respondent and that it was the respondent who had trespassed on his land. That he found that she was cultivating on his land where she had encroached by an acre and uprooted boundary trees. That he later showed her the boundaries which she agreed to at first but later claimed the land as hers. That he (DW1) later re-opened the boundaries and the respondent claimed that he trespassed on her land. That it was the respondent in current occupation of the suit land and she had fenced it off and cultivated thereon. That Charles Rwesanda was the agent having been requested by Dan Rwesanga to make the agreement for him who later changed and sided with the respondent.

DW2 (Sanyu Christopher) testified that both the plaintiff and the defendant were his neighbors. That the appellant bought the disputed land from his sister, Jane Basasirwaki in 2001 and he was present and that he used to stay in the disputed land. That the dispute arose after the respondent bought land and then entered in the land of the appellant. That the land boundary marks included ***Miramura*** that had now been uprooted.

DW3 (Musinguzi Julius) testified that the appellant was his uncle and that he knew the land in dispute. DW3 told court that he knew the boundaries of the suit

land and that when the agreement was made, the L.C.1 Chairman planted bounderies of ***muramura*** trees; that later when he visited the land, he found eucalyptus trees as boundaries. That it was the respondent who trespassed on the suit land.

DW4 (Kabajurambura Annet) stated that he knew both plaintiff and defendant as residents in Migongwe where she also resided and that she was present when the appellant bought; that she found the boundary marks of the appellant removed as opposed to how they planted them. That the boundary marks were planted when the appellant was buying. She stated that when the respondent was buying, she signed on the agreement. That the respondent used the old boundary marks. That there were ***muramura*** trees which separated the appellant's land.

DW5 (Baguma Andrew) stated that he knew both the plaintiff and the defendant as neighbors in Migongwe where he also resided. That he knew the appellant bought the suit land in 2005 and he was present. That after purchase they put boundary marks using ***muramura*** trees. That he, the chairperson L.C1 and others were present when the respondent was buying her land. That they added some boundary marks to the existing ones with ***muramura*** trees. That a dispute later arose over the boundaries and it was the appellant who complained. That as the local council committee, they went to the land and found that the respondent had encroached on the appellant's land.

DW6 (Kyarimpa Patrick) testified that he knew the respondent had bought land next to the appellant. That he was told by the appellant that the respondent had encroached on his land. That he went on the land and found the boundaries in the

middle were entering the appellant's land; that the plaintiff exceeded where the ***muramura*** used to be.

ANALYSIS OF THE EVIDENCE:

I have carefully evaluated all the evidence as a whole. It stands out that PW2 was the one who prepared the purchase agreement for the appellant and witnessed the agreement of the respondent and he knew the suit land and its boundaries very well because the land that the appellant bought originally belonged to his sister and PW2 was again present when the respondent was buying. It was PW2 that pointed out the boundaries of the land that the appellant had bought, to her brother Kyalimpa who bought the land for the appellant in her absence. The Kyalimpa who transacted in the prurchase on behalf of the appellant and was shown the boundaries did not come as as witness.

Whereas DW1 alleged that PW2 had been compromised, this was not bought out in cross examination. PW2's evidence remained solid and was not in any way weakened by cross examination. To the contrary, his evidence is supported by evidence from some of the witnesses of the appellant as to the exact boundary marks between the appellant and the respondent, being ***muramura*** trees. The Court of Appeal guided in **CA Crim. Appeal No. 329 of 2010, Okello Geofrey Vs. Uganda thus: "*That law is now settled that an omission or neglect to challenge the evidence in chief on material point y cross examination would lead to an inference that the evidence is accepted subject to its being assailed as inherently incredible or palpably untrue." See Sawoabiri& Anor Vs Uganda, SC Crim Appeal No. 5 of 1990.*** In this case, the appellant did not cross examine the

respondent about him being compromised to give evidence in support of the respondent's case. He did not present evidence about the alleged comprise.

The trial magistrate in his findings at locus which are captured in his judgment observed that the boundaries had never changed and he did not see the alleged boundary marks that the appellant had alluded to save for the palm tree which was in the same line with the fence put in place by the respondent.

Taking into account the evidence of both sides, I find that the respondent's story was more believable. The respondent proved that the land in dispute formed part of what she bought from Kamanyire. I therefore agreed with the finding of the trial magistrate that the respondent on a balance of probabilities proved her claim of ownership of the suit land.Therefore, grounds 1, 3 and 4 fail.

Ground two: The learned trial Magistrate erred in law and fact when he awarded the respondent general damages of shs 1,000,000/= which were not strictly proved.

It is trite law that general damages connote a monetary award to an aggrieved party for the inconvenience he has been subjected to by a party at fault. There is no universal scale for quantifying the same. Court uses its discretion taking into account the inconvenience a successful party has been subjected to in awarding them**. (See Uganda Commercial Bank Vs Kigozi [2002] 1 E.A 305).**

In **Robert Coussens Vs. Attorney General, Civil Appeal No. 8 of 1999 (unreported**), cited with approval in **Crown Beverages Ltd Vs Sendu Edward,**

SCCA No. 1 of 2005, the supreme court observed that: ***"I will turn now to the trial court's discretion on matters of damages. The law is now settled that an appellate Court will not interfere with an award of damages by a trial Court unless the trial court has acted upon a wrong principle of law or that the amount is so high or low as to make it an entirely wrong principle of law or that the amount is so high or so low to make it an entirely an erroneousestimate of damages to which the plaintiff is entitled. The earliest authority on this point I am able to find is Philips Vs. London South Western Point supra where James L.J said on pages ….."***

In Crown Beverages (supra) Order JSC (as he then was) observed thus: ***"In my opinion, the principle that an appellate court will not interfere with the award of damages by a trial court unless the trial court acted upon wrong principle of law or the amounted awarded is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled equally applies to the instant case."***

The overall guiding principle when it comes to an award of general damages is that the law presumes they are natural and the probable consequence of the defendant's actions. They should be aimed at compensating the winning party for loss and inconvenience that he or she has been subjected to. They should be geared towards putting a successful party to the position he or she enjoyed before the claim in issue.**(See James Fredrick Nsubuga V Attorney General, HCCS No. 13 of 1999).**

In this case, the trial magistrate observed in relation to damages thus: ***"This court has considered the fact that the plaintiff obtained a temporary injunction against the defendant on 19th March 2014 and has been in occupation of the suit land, in circumstances the plaintiff is only awarded general damages of 1,000,000/= for inconveniences suffered and time spent in following up her case."*** I find the amount awarded by the trial magistrate reasonable. I have I find no grounds to fault the discretion of the trial magistrate in awarding a sum of Ugx 1,000,000/= as general damages. Therefore, this ground equally fails. In a nutshell the appeal fails with the following orders:

1. **The judgment and orders of the trial court in Civil Suit No. 03 of 2014 are hereby upheld.**
2. **The appeal is hereby dismissed with no orders as to costs since it was not defended by the Respondent.**

I so order.

Vincent Wagona

High Court Judge / FORT-PORTAL

DATE: 31/8/23