

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL APPEAL NO. 170 OF 2019

5 **(Arising from the judgment and orders of His Worship Okumu Jude Muwone,
 Magistrate Grade One at Makindye Chief Magistrate's Court in Land Suit No.
 78 of 2018)**

DR. LUBEGA KHALID -----

10 **APPELLANT**

Vs

MARIAM G. MUZEI -----

15 **RESPONDENT**

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

20 This is an appeal against the decision of His Worship Okumu Jude Muwone, Magistrate Grade One, delivered on the 29th day of November, 2019, at Makindye Chief Magistrate's court in which he dismissed the Appellant suit with costs to the Respondent.

Before this suit was heard by the learned trial magistrate, Counsel for the Respondent raised a preliminary objection, that the Plaintiff/ Appellant, Dr. Lubega Khalid had sued a wrong party. Counsel submitted that the Plaintiff sued the Defendant/ Respondent Mariam G. Muzei, who was not the registered proprietor of the suit land. In her ruling, on page 124 of the record, delivered on the 20th May 2019, the learned Chief Magistrate, Makindye, Her Worship Katushabe Prossy, overruled the objection on grounds that claim of the Plaintiff was for trespass and it could be maintained against a party who was in occupation of the suit land as the Defendant was.

I find it necessary to revisit this ruling as the appellate court under section 16 of the Judicature Act. In her ruling, the learned Chief Magistrate found as follows;

‘The suit before this court is for trespass. The plaintiff alleges that the defendant shifted her perimeter wall into the plaintiff’s kibanja.....It goes without saying as rightly submitted by counsel for the plaintiff that the gist of a suit for trespass is a violation of possession, not a challenge of title. The issues of proprietorship do not arise here they follow the act allegedly done. What matters is that there was an alleged unauthorized entry by the defendant and that entry caused damage to the plaintiff. The court has to establish whether this was done or not. This objection therefore fails’

Perhaps the learned Chief Magistrate omitted to peruse the plaint before arriving at her decision. Paragraph 3 of the Plaint states as follows;

‘The Plaintiff brings this suit against the defendant seeking among others; a declaration that the Plaintiff is a lawful/ bonafide occupant together with that portion located on the defendant’s land comprised in Kyadondo Block 244 Plot...at Kibuli; a declaration that the Defendant’s action of shifting or extending her perimeter wall inside the Plaintiff’s kibanja and depositing building materials thereon amount to trespass, a permanent injunction, an eviction or demolition order, general damages and costs of this suit’

There are some relevant deductions that I have made from this portion of the plaint which in my view constituted the causes of action before the trial court;

- a. The plaintiff's primary claim was one seeking a court declaration of his proprietary interest in the suit land as a lawful/bonafide occupant.
- 5 b. The plaintiff referred to the suit land as, 'the defendant's land', which was erroneous, the defendant was not the registered proprietor.
- c. Trespass was listed as a cause of action which from the order of presentation, came secondary to the claim of proprietary interest.

Further, under the paragraph of the plaint outlining the reliefs sought from the court, 10 the plaintiff makes his priorities evident by listing his first remedy as follows;

i) A declaration that the plaintiff is a lawful/bonafide occupant together with that portion located on the Defendant's land comprised in Kyadondo Block 244 Plot...at Kibuli'

I find that it was inaccurate for the learned Chief Magistrate to conclude that this claim 15 was one of pure trespass. The Plaintiffs claim was primarily for proprietary interest and it was upon successful proof of this claim as against the registered proprietors that the remedy in trespass could be maintained by the Plaintiff, Dr. Khaled Lubega. Ms. Mariam G. Muzei is not the registered proprietor of the suit property. She was not the correct party to sue solely in this suit. In my opinion, her alleged acts of trespass raised 20 a secondary cause of action for which she could be added as a party to the Plaintiff's claim but not as a lone Plaintiff as the case was.

The record on page 15, reflects that later, at the onset of the trial, the learned trial magistrate Grade I, admitted a joint scheduling memorandum from the parties on the 11th July 2019. Reference was made to the 'agreed facts' by Counsel for the Plaintiff in 25 his final submissions before the trial court on page 35 of the record of proceedings. These 'agreed facts' were vehemently denied by Counsel for the Defendant in his

submissions in reply on page 42 of the record. I have not been able to trace a copy of the Joint Scheduling Memorandum on the lower court record. I find it imperative to reiterate the importance of a scheduling conference before the court as a preliminary step to hearing civil suits.

5 Order 12 rule 1 of the Civil Procedure Rules S.1 71-1 provides as follows;

Scheduling conference.

(1) The court shall hold a scheduling conference to sort out points

of agreement and disagreement, the possibility of mediation, arbitration

and any other form of settlement—

10 Under this rule, the holding of a scheduling conference is mandatory. It is the responsibility of the court to hold the scheduling conference. When parties are permitted to file a joint scheduling memorandum, the court is still duty bound to conference with the parties and adopt the joint scheduling memorandum after review and amendments were necessary. In the case of Stanbic Bank (Uganda) Limited v Uganda Cros Limited,
15 SCCA 4 of 2004 (unreported), Tseekoko, JSC, held that;

‘That a trial court is expected to hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any form of settlement...This is the stage when proper issues would emerge.’

The failure by the learned trial magistrate to hold a scheduling conference allowed the
20 following three issues to emerge;

- a. Whether the defendant was a trespasser?**
- b. Whether the plaintiff has a cause of action against the defendant?**
- c. What are the available remedies?**

In my view these issues were not in harmony with the plaintiff's claim in the plaint. The 1st issue should have been; **'Whether the Plaintiff was a lawful/bonafide occupant on the suit land?'** And if the parties wanted the court to resolve the question of cause of action, it should have been the first issue for the court to determine. It was
5 only when that issue was answered in the affirmative that the issue of trespass would have become relevant for court's determination.

A perusal of the learned trial magistrate's judgment from page 9 to page 13 of the record indicates that the issues were maintained as is, in that order. In effect, the court went ahead to determine the suit without the registered proprietors of the suit land.

10 Order 1 rule 3 of the CPRs provides for who may be joined as defendants as follows

Who may be joined as defendants.

*All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were
15 brought against those persons, any common question of law or fact would arise.*

It is my considered view that while the Plaintiff could not be compelled to sue any one he did not want to sue, his plaint was a challenge on the proprietorship of the registered owners on the suit land. Section 59 of the Registration of Titles Act cap 230 is to the effect that a certificate of title is conclusive proof of ownership. The registered
20 proprietors ought to have been parties to the suit as Defendants to allow the court to correctly and judiciously resolve the Plaintiff's claim. This was in line with the principles of natural justice.

On the issue of costs, I find that this situation could have been avoided if the trial court had diligently exercised its duty under Order 12 rule 1 of the CPRs. And I shall therefore
25 not penalize either party in costs.

In conclusion, I allow this appeal on the foregoing preliminary findings and I order as follows;

- 1. The proceedings, judgment and orders of the learned magistrate Grade 1 in Land Suit No. 78 of 2018 were irregular and improper as the court proceeded in the absence of the registered proprietor of the suit land in direct contravention with section 59 of the Registration of Titles Act Cap 230 and the principles of natural justice; and are hereby set aside.**
- 2. The parties are advised to file a fresh suit in a court of competent jurisdiction to allow all the issues between all the parties with an interest in the suit property to be heard and a decision rendered by the court.**
- 3. Each party shall bear its own costs.**

Olive Kazaarwe Mukwaya

JUDGE

8th February 2021

Delivered by email to Counsel to the parties.