

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 0038 OF 2018

(ARISING FROM FPT – 00 – CV – CS – 0046 OF 2014)

SEMU BYOMUHANGI CHRISTOPHER ::::::::::::::: APPELLANT

VERSUS

RUGUMYA JONES ::::::::::::::: RESPONDENT

(Admin Ad-litem of the Estate of the late Rujabuka Paul)

BEFORE: HON. JUSTICE VINCENT WAGONA

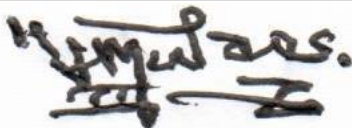
JUDGMENT

Introduction:

The appellant being aggrieved with the decision of His Worship Kwizera Vian, Magistrate Grade One at Fort Portal Chief Magistrate's Court in FPT – 00 – CV – CS – 0046 of 2014 delivered on 1st June 2018 appealed to this Court seeking to set aside the judgment of the trial court. Before the conclusion of the appeal, the Respondent Rujabuka Paul died and the current Respondent was appointed administrator ad-litem.

Background:

The Respondent filed Civil Suit No. 0046 of 2014 against the Appellant under the tort of trespass seeking orders thus; a declaration that the defendant was trespassing on the suit land located at Rwendongo Village, Nyaruzi Parish, Rutete Sub County, Kabarole District; an order of vacant possession; a permanent



injunction; general damages and costs of the suit. It was contended by the Respondent that he acquired the suit land by way of purchase on 15/06/2003 from the late Merenia Tibita and an agreement was made to that effect. That after the death of Merenia Tibita in 2013 January, the appellant started encroaching on the land whereby he started destroying and cutting trees. That the appellant's acts constituted actionable trespass, subjected great inconveniences and mental anguish to the Respondent as such he prayed for judgment in his favour.

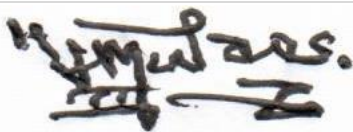
The appellant on the other hand denied the allegations of trespass on the suit land. He contended that he was the lawful owner of the suit land which he acquired from his late father, Aloyzious K. Besigye who acquired the same by purchase. That the Respondent attempted to force him out of the land by leveling charges of criminal trespass against him which failed. He thus asked court to issue a declaration that he was the lawful owner of the suit land and consequently strike out the Respondent's suit with costs.

The learned trial Magistrate after evaluating the evidence on record entered judgment in favour of the Respondent where he declared him the owner of the suit land, issued a permanent injunction against the Respondent, awarded general damages of shs 5,000,000 against the appellant and costs of the suit. The appellant being aggrieved lodged the appeal to this court.

Grounds of appeal:

The appellant framed three grounds of appeal thus;

- 1. The learned trial Magistrate erred in law and fact when he totally disregarded the appellant's documentary and witness evidence on record thereby arriving at a wrong decision.**



2. The learned trial Magistrate erred in law and fact when he failed to consider the inconsistencies and contradictions in the Respondent's evidence thereby reaching a wrong decision.

3. The learned trial Magistrate erred in law and fact when he totally disregarded the proceedings at locus thereby reaching a wrong decision.

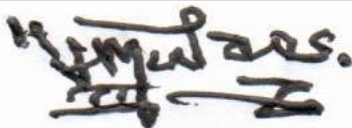
Representation and Hearing:

Angella Bahenzire appeared for the appellant while Mr. *Obed Mwebesa of M/s Obed Mwebesa & Associated Advocates* appeared for the Respondent. Court issued directions to the parties in its ruling in Misc. Application No. 57 of 2023 directing them to file their written submissions. The appellant's counsel complied with the directions while learned counsel for the Respondent did not. This being an old appeal, I will consider the submissions of learned counsel for the appellant and evidence on record in arriving at my decision.

Duty of the first appellate Court:

This being a first appeal, my duty as a first appellate court under Section 80 of the Civil Procedure Act is to subject the evidence of the lower court to a fresh and exhaustive scrutiny and draw fresh and independent inferences and conclusions. In doing so, I will apply the law strictly and consider the evidence adduced in the lower court. I will bear in mind the fact that I did not have the opportunity to see the witnesses testify and I will therefore make the necessary due allowance in that regard. (*See Panday Vs R (1967) E.A 336 and Narsensio Begumisa & 3 others Vs. Eric Kibebaga, SCCA NO. 17 of 2002.*)

Resolution:

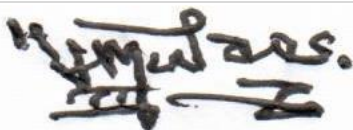


I have carefully considered the three grounds of appeal framed by the appellant for determination by this court. What clearly comes out is that they all contest the manner in which the learned trial Magistrate considered the evidence on record in arriving at the findings challenged by the appellant. I will thus examined all the three grounds under one issue being - whether the learned trial magistrate properly considered the evidence on record in arriving at the impugned decision.

Submissions of counsel for the appellant:

It was submitted by learned counsel for the appellant that trial court did not examine the documentary evidence on record. The Respondent presented PE1 and PE2 an agreement upon which he claimed to have bought the suit land. The appellant relied on DE1 and DE2 being the purchase agreement for the suit land by his late father dated 12th December 1978. The appellant's claim over the suit land was pegged on inheritance from his late father Besigye Aloysious. These agreements were not examined by the trial magistrate and the contest of the same by the appellant for PE1 and PE2 for having been obtained through fraud. Since there were two equities before court stemming from PE1, PE3 and DE1 & DE2, the learned trial magistrate should have proceeded under the maxim of equity that where there are two equities the first one in time prevails.

The trial magistrate did not evaluate the important aspects of the evidence especially on how the land belonged to Melinia and title she could pass to the Respondent. The trial magistrate also did not evaluate the evidence of PW2, DW1, DW2 regarding use of the suit land. Further, the learned trial Magistrate did not consider the inconsistencies and contradictions in PE1 and PE2 regarding payment of the consideration and the testimony of PW2 and PW3. These contradictions if



considered by court were a clear manifestation that the land belonged to the appellant.

3 The learned trial Magistrate did not consider the evidence at Locus. Then, there was no evidence upon which the learned trial Magistrate awarded a sum of shs 5,000,000/- as general damages. The trees allegedly destroyed were property of the
6 appellant. Learned counsel asked court to allow the appeal and have the judgment of the trial court set aside with costs in this court and in the court below.

Consideration of the Appeal by Court:

9 There were 2 competing claims; one by the appellant that the land belonged to his late father who gifted the same to him while still alive and the one by the respondent that he bought the suit land from Melina Tibita, the previous owner.

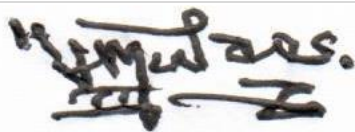
12 **PW1 (Rujabuka Paul)** aged 78 testified that he acquired the suit land from Melina Tibita by purchase at a consideration of shs 600,000/= paid in installments. They made an agreement (PE1 & PE2) which was witnessed by all neighbours, villagers
15 and elders namely - Kanyeihamba, Dominico Butuka, Twine, Francis Byaruhanga (the secretary of the agreement) and Sarah Namanya. The total consideration of shs 600,000 was not paid physically to Melenia Tibita instead they agreed with her that
18 she uses the same to pay school fees for her granddaughter Namanya Sarah, and this was included in the purchase agreement. He took possession in 2003 and Melenia died in 2013, whereupon the defendant started using the land for
21 cultivation and cut his trees. He took the matter to police (Iruhura Post) where the defendant was tried in the Chief Magistrate's Court of Fort Portal and sentenced to 6 months (PE3). That after serving the sentence, he came back and started
24 disturbing him. That the defendant was still using the suit land irrespective of the

injunction that stopped him (PE4). In cross examination he stated that he knew the defendant's father as Alozious Besigye whose father was Cosma Bazimba and the mother was Tibita Melinia. That he bought the suit land in 2003 from MeliniaTibiita. That the trespass started in 2013 after the death of Melinia. That Sarah was a witness to his land agreement with Melinia and was in senior two then.

PW2 (Byaruhanga Francis) aged 48 testified in chief that he is the one who wrote the agreement of purchase between Paul Rujabuka and the late Melenia Tibiita in 2003. That the consideration was shs 600,000/-. That Melenia indicated that she had sold land to raise school fees for her granddaughter Namanya Sarah who had completed primary seven and wanted to join secondary. That the plaintiff paid the whole consideration. That Melenia signed as well Sarah and her granddaughter.

PW3 (Namanya Sarah) testified that her grandmother sold the suit land to the plaintiff at a consideration of Ugx 600,000/=. That she was present and the said money was paid in installments in form of school fees. That every term she could sign on the agreement for the amount collected as school fees. That the plaintiff paid school fees up to S.4. That the suit land belonged to her grandmother since she grew up seeing her using the suit land. She also admitted that PE1 bears her signature and a thumb print for her grandmother. In cross examination she stated that her father Alozious Besigye died in 1995. At the time of his death, he had three children including the defendant.

DW1 (Byomuhangi Christopher) aged 36 by 22.6.2017, testified that he was in possession of the suit land and was using the same for cultivation of food crops. That the land was his and he received the same from his father Alozious K.

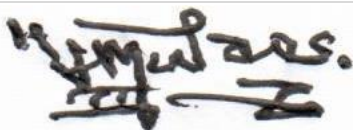


Besigye. That his father passed on in 1995. That his late father gave him an agreement where he bought the land from. That he purchased the same from Tiberindwa (now deceased). That the whole land that his father bought from Tiberindwa was in dispute. That he had an original agreement dated 12/12/1978 (*DE1 and DE2*). That his late father was using the land to grow food crops and he was not aware of the sale of the suit land by Melinia. That incase Melinia sold the land, she did it illegally because she has never been in possession of the same; that the plaintiff had never possessed the suit land. In cross examination he stated that on DE1, one Divannsi signed. That his father was a son to Cosma Bazindwa and Melinia. That he was not aware whether Sarah and Melinia sold the suit land to get school fees for Sarah.

DW2 (Denavensi) stated that the suit land belonged to Besigye but she didn't know how he got it because by the time she came in the area, he was already in occupation. That she knew Melinia as a mother to Besigye.

DW3 (Mpungu Christopher) testified she knew the suit land and the same was utilized by the defendant. That the suit land belonged to Aloyzio Besigye, father to the defendant. That he knew Melinia and her land had a banana plantation and was different from the one in dispute.

DW4 (Kamanyire Zakayo) testified that he knew the land in dispute and the same was for the appellant. That he inherited it from his late father Besigye Aloyzious. That Besigye was known to him and he used to be his friend. That the defendant occupied the suit land when his late father was still living. That the defendant's late father called him when he was giving the suit land to the defendant. That he also knew Melinia as a grandmother of the defendant and a mother to Besigye. That at



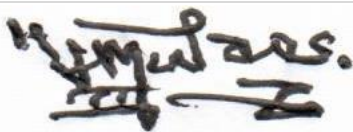
one time, the land was used by Melinia to help the orphans of Besigye. That Melinia had a house on her land and when it collapsed, she shifted to the suit land.

- 3 That Melinia used to cultivate the land for food. That the land for Melinia is still there. That the land in dispute is the one that Besigye left to the defendant and the one allegedly sold by Melinia to Rujabuka. In cross examination, he stated that
- 6 That Melinia sold the said land after the death of Besigye.

On 7/2/2018, court visited locus where each of the parties showed court the extent of the land in dispute and court observed that there were no crops on the land.

9 ***Analysis.***

- The Respondent (PW1) led evidence regarding acquisition of the land by way of purchase from the late Melinia Tibita, the grandmother to the defendant. The
- 12 agreement of purchaser together with translation was admitted as ***PE1 and PE2*** respectively. That the purchase price was paid in form of school fees for a one Namanya Sarah (PW2), the granddaughter of the late Melinia Tibita. That after
- 15 purchase, he assumed possession of the said land. His testimony was supported by PW3 who confirmed the sale and the fact that money was paid as school fees. PW3 stated that the land in dispute belonged to Melinia who inherited it from her
- 18 husband and she was using the same. PW3 confirmed that he wrote the agreement of sale between the late Melinia and the Respondent and the agreed consideration was shs 600,000/= which was paid as school fees. PW1 stated that after the death
- 21 of the late Melinia, the defendant trespassed on the suit land, cut his trees and he report him to police and later the file was sent to the Chief Magistrate's Court of Fort portal where the accused was tried, convicted and sentenced to 6 months. The
- 24 judgment and sentencing ruling were admitted as PE3. That after serving the

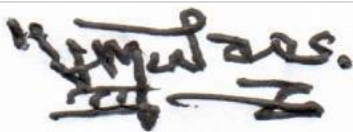


sentence he returned and again trespassed on the suit land which forced the Respondent to secure an injunction from court (PE4). That even with the injunction in place, the appellant continued to use the land forcefully.

The evidence of the plaintiff's witnesses at trial was not discredited or weakened during cross examination. The contradictions pointed out by learned counsel for the appellant were minor and do not affect the spirit under PE1 and PE2.

In *Alfred Taja v Uganda, EACA Crim Application No. 167 of 1969 which was adopted by the supreme court in Sarapio Tinkamalirev Uganda, SC Crim. Appeal No. 027 of 1989*, court guided that minor inconsistencies which do not go to the root of the case ought to be ignored. In this case, PW1 and PW2 were consistent about the sale and how money was paid in form of school fees. PW3 also confirmed that she received the same as school fees. The inconsistencies on how the same was paid vizaviz the terms for the school calendar years does not in any way negate the fact that there was a sale and consideration was fully paid.

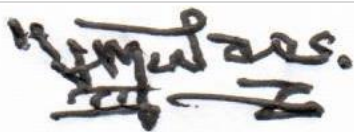
On the other hand, whereas the appellant claims that he received the land from his late father Besigye, he did not inform court when and how he received this land. The mere possession of his father's purchase agreement did not confer ownership of the land to him. DW2 and DW3 did not know how the defendant acquired the suit land because they were not present when the defendant's late father allegedly gave him the suit land. That DW4 was the only person present when the land was handed over casts doubt on the credibility of his evidence. DW4 further stated that the land was used by the late Melinia to look after the orphans of the late Besigye, while the defendant states that he was always in possession. Further if indeed it is admitted by the defendant that the late Melinia used the suit land after the death of

A handwritten signature in black ink, appearing to read 'S. Besigye', is located at the bottom right of the page.

his late father, DW1 did not state in his evidence as to when and how he started using the land. He further contradicted himself when he stated that he assumed possession of the land when his father was still living. However in 2017 when he testified, he was 36 years. His father, the late Besigye died in 1995 implying that if the land was given when his father was still alive, it means that it was before 1995 when he was still a minor. He did not lay a convincing account surrounding the circumstances regarding how as a minor he was given land and documents of title when his father was still alive. There is a court judgment in the criminal case (PE3) where the appellant was found to have trespassed on the suit land. The totality of the evidence leads me to cast doubt on the credibility of DE1.

I agree with the findings of the learned trial magistrate that the Respondent proved his claim of trespass to the suit land by the Appellant and ownership of the suit land. I cannot therefore fault the learned trial Magistrate in that regard.

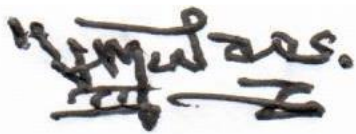
As regards general damages, it is a settled position of law that an appellate court would not interfere with an award on general damages on appeal unless proved that the award was excessive, illegal, premised on wrong principle of law or consideration or where there is no evidence to support the same or where court adopted a wrong estimate of the damages due in the circumstances. (See: ***Court of Appeal Civil Appeal No. 18 of 2015, Hilda Mutashwera v Constance Ryangombe***). In the present case, the Respondent led evidence to prove that he made efforts to stop the appellant from continuing to trespass on the suit land including filing a criminal case of criminal trespass where he was found guilty. That he also secured a temporary injunction restraining the appellant from further trespassing on the suit land. It was admitted by the appellant that even in the



currency of the said injunction, he continued to use the suit land in contempt of the orders of court. The Respondent also testified that the Respondent cut his trees and continued to cultivate the suit land to his detriment. I therefore find that the award of Ugx 5,000,000/= was fair in the circumstances and I do not find any reason to interfere with the award.

Consequently, this appeal has no merits and accordingly grounds 1, 2 and 3 fail. I hereby dismiss the appeal. I have denied the appellant costs in this court on account that he never filed his submissions as directed by court.

I so order.



Vincent Wagana

High Court Judge / Fortportal

DATE: 19/04/2024

