

UGANDA / JUDGMENT

**Mathias Mutulankya V Lukyamuzi
Lawrencio (Civil Appeal No. 0064 of
2012) [2013] UGHCLD 99 (16 May 2013)
[2013] UGHCLD 99**

COURT

HC: Land Division (Uganda)

BEFORE

Owiny-Dollo, J

CASE / FILE NUMBER

Civil Appeal No. 0064 of 2012

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THE REPUBLIC OF UGANDA

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

CIVIL APPEAL No. 0064 OF 2012

(Arising from the judgment of Her Worship Tusiime Sarah Bashaija, Magistrate G.1, in Mpigi Chief Magistrate's Court Civil Suit [Land Matters] No. 143 of 2008)

MATHIAS MUTULANKYA } APPELLANT

VERSUS

LUKYAMUZI LAWRENCIO } RESPONDENT

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

JUDGMENT

The facts of this appeal are fairly simple and straightforward. The Appellant and Respondent are, by different mothers, sons of the late Yaliabifunye Fabiano who died testate. The Respondent sued the Appellant together with another person not party in this appeal, in the Mpigi Chief Magistrate's Court, claiming that their late father had bequeathed to him (Respondent) land situated in Maya, Busiro, Mpigi District (herein referred to as the suit land), which he had earlier acquired a kibanja interests therein from and during his late father's lifetime, and had cultivated it till the time of his father's demise. Hence, he sought declaratory orders by Court that the sale of the suit land by the Appellant to the 2nd Defendant was null and void, his eviction from the suit land wrongful, and a permanent injunction against the Defendants, as well as damages, and

costs.

The Appellant denied all this, and instead contended that the suit land, which he sold to the 2nd Defendant, had instead been bequeathed to him by their late father. After a full trial, the learned trial Magistrate found for the Plaintiff (Respondent herein); for which the Appellant herein felt aggrieved, and has preferred this appeal on grounds which, as stated in the memorandum of appeal, are that: –

- 1. The learned trial Magistrate erred in law and fact when she held that the Respondent has got a kibanja on the land comprised in Busiro Block 460 Plot 128 which formerly belonged to the Appellant.
- 2. The learned trial Magistrate erred in law and fact when she held that the Appellant is a trespasser on the suit land.
- 3. The learned trial Magistrate erred in law and fact when she omitted to visit the locus in quo of the suit land.
- 4. The learned trial Magistrate erred in law and fact when she failed to apply the correct principle governing award of general damages.
- 5. The learned trial Magistrate erred in law and fact and misdirected herself when she failed to properly evaluate the evidence on record as a whole thereby coming to a wrong conclusion

However Counsel for the Respondent, in his written submissions, raised the following preliminary points of law, which I am duty bound to dispose of first to determine whether I should proceed with the merits of the appeal. First, is that this appeal is incompetent as there is no formal decree extracted from the judgment appealed against accompanying the memorandum of appeal; which, Counsel contends, contravenes the provisions of section 220(1) of the Magistrates' Courts Act. It is however submitted for the Appellant that this contention is premised on a flawed appreciation of the law as it stands now, as the mandatory requirement for such formal decree to accompany the memorandum of appeal is no longer good law.

The second point of objection worthy of consideration is that this Court has no jurisdiction over the matter, as the appeal has not been preferred in the Nakawa High Court Circuit which the trial Court is under. The other points of objections, such as the appeal lacking notice of appeal, are really unwarranted as there is no provision in the law for an appeal to the High Court to be preceded by such notice. The law instead enjoins the Appellate Court to notify the trial Court of an appeal from its decision, and to demand for the trial record to be submitted to it. Counsels have otherwise each backed up their respective contentions with a number of authorities which I have had the benefit of carefully considering; and so I think this offers the opportune moment to put this seeming confusion to rest.

Section 220 (1) (a) of the Magistrates Courts Act provides that subject to any written law, an appeal shall lie to the High Court from either a decree, part of a decree, or order, of a Chief Magistrate or Magistrate Grade 1 sitting in the exercise of original civil jurisdiction. Section 220 (1) (b) of the Act however provides that an appeal shall lie to the Chief Magistrate from the decisions, judgments or orders of a Magistrate Grade 2. Section 220 (2) of the Act stipulates that, notwithstanding any provision in the Civil Procedure Act or in any rules of Court requiring that a decree be drawn up and extracted before an appeal is filed, an appeal from the decision of a Magistrate Grade 2 shall be valid without a decree having first been extracted.

The Act therefore makes clear distinction between an appeal from the decisions of a Chief Magistrate or Magistrate Grade 1, and those made by a Magistrate Grade 2; in that the one from the Chief Magistrate or Magistrate Grade 1 is an appeal from the decree or order made by that Magistrate, while for a Magistrate Grade 2, the appeal is from the decision, judgment, or order of that Court. Hence while from the provisions of the Magistrates Courts Act, it is mandatory to draw up and extract a decree or order from the decision of a Chief Magistrate or a Magistrate Grade 1 exercising original civil jurisdiction, to accompany an appeal therefrom, such is not a requirement with regard to an appeal from the decision of a Magistrate Grade 2.

There are numerous authorities that have declared an appeal to the High Court, from a Chief Magistrate or Magistrate Grade 1, preferred without an accompanying formal decree or order, a nullity. Such authorities include *Kisule vs. Nampewo [1984] H. C. B., Yoana Yakuze vs. Victoria Nakabembe [1988 -1990] H. C. B. 132, Roberto Biiso vs. May Tibamwenda [1991] H. C. B. 92.* However, the Court of Appeal has since made a radical departure from this long held proposition of law, by holding in a number of cases that the law requiring that a formal decree or order should be filed with the memorandum of appeal is a legal relic, which is no longer good law in the light of the provision of Article 126 (2) (e) 1995 Constitution which obliges Courts to render substantive justice without undue regard to technicalities.

Such authorities include *Banco Drabe Espanol vs. Bank of Uganda; Court of Appeal Civ. Appeal No. 42 of 1998*, in which the Court held that the rule requiring the extraction of a decree or order to accompany the memorandum of appeal is now moribund; and in any case, it is a mere technicality which has no further force of law in the light of the provisions of Article 126 (2) (e) of the 1995 Constitution. In this regard, the Court cited, with approval, its own decision in *Kibuuka Musoke William & Anor. vs. Dr. Apollo Kaggwa Court of Appeal Civ. Appeal No. 46 of 1997*, in which it was categorical in holding that: –

"... .. the extraction of a formal decree embodying the decision complained of is no longer a legal requirement in the institution of an appeal. An appeal by its very nature is against the

judgment or reasoned order and not the decree extracted from the judgment or the reasoned order."

The Court then expressed itself further in the **Banco Drabe Espanol case (supra) that: –**

"The extraction of the decree was therefore a mere technicality which the old Municipal law put in the way of intending Appellants, and which at times prevented them from having their cases heard on merits. Such a law cannot coexist in the context of the 1995 Constitution Article 126 (2) (e) where the Courts are enjoined to to administer substantive justice without undue regard to technicalities."

Admittedly, the Court of Appeal has made these radical decisions in the course of interpreting its own rules of procedure. However, although the Court of Appeal and the High Court are governed by different rules of procedure, the High Court has, in its own cases such as **Mbakana Mumbere vs. Maimuna Mbabazi - H. C. Civ. Appeal No. 3 of 2003 (Per Mukasa J.)**, **Tumuhairwe Lucy vs. The Electoral Commission & Anor. (Mbarara - H. C. Civ. Appeal No. 2 of 2011 (Per Bashaija J.)**, *John Byekwaso & Anor. vs. Yudaya Ndagire (Per Tuhaise J.)** fully followed the Court of Appeal's departure from the old proposition of law with regard to a formal decree in preferring an appeal. This I find quite sound as, owing to the very persuasive rationale which the recent decisions by the Court of Appeal are grounded on, it would otherwise lead to gross absurdity if the High Court were to take a different position.

The other preliminary point is that because this appeal has been preferred in the Lands Division of the High Court, instead of the High Court at Nakawa under which the trial Magisterial Court falls, the appeal is therefore before a Court without jurisdiction over it. I think

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this contention is founded on a faulty premise, and borne out of a failure to distinguish between Court's jurisdiction, and Court's administrative Circuits. By law, the High Court, wherever it sits, has an unlimited jurisdiction throughout the entire territory of Uganda. Court Circuits are instead for the convenience of administering justice; by affording Court users easier access to justice. They have nothing to do with jurisdiction. I therefore find that the preliminary objections raised herein are all without merit; and so overrule them.

One other matter I should point out is the decision by Counsel for the Respondent to limit his written submissions to raising preliminary points, and then praying that Court should allow him more time to file submissions on the merits of the case in the event that the objections are overruled. This was unwise, as it holds the Court at ransom; and more so since Court's unqualified directive to Counsels was to file written submissions in the appeal. The prudent course of action, for Counsel who raises any preliminary point in their written submissions is to proceed and submit on the substantive issues of merits of the case as well. By this, if the matter is not disposed of on the preliminary points, the Court then considers the submissions made on the merits of the case in determining the substance of the case.

Grounds No.1 & No.5: The trial Magistrate's evaluation of evidence.

It is evident that the 1st and 5th grounds of this appeal are really variants of one ground; namely that they both allege a flaw in the trial Magistrate's evaluation of the evidence adduced at the trial. I will therefore consider them jointly. I should also seize this opportunity to clarify on a matter I have noticed is quite common with lower Courts; where in the name of evaluation of evidence, all that is done is merely presenting a narrative of the evidence adduced. It is the duty of Court, at the close of the case of the parties to the suit, to critically assess any evidence adduced before it, in the light of other evidence on record. It is this which amounts to evaluation of evidence. Otherwise from mere narration of the evidence adduced in Court, without giving any weight thereon, the Court fails to render justice.

Be it as it may, as a first appellate Court, I have to subject the trial Court record to fresh scrutiny and appraisal; and come to my own conclusions thereon. In doing this, as was pointed out in the case of **Dinkerrai Ramkrishan vs. R. [1957] E. A. 336 at 337**, upon a full consideration of the trial Court's judgment, if I find that the trial Court was wrong in its findings or decision, I should not shrink away from making pronouncing myself clearly to that effect. However, in the exercise of my independent appraisal as an appellate Court, I have to bear in mind at all times that I never had the benefit of observing any of the witnesses testify at the trial; and for which reason, I am ill- equipped to delve in the appraisal of their demeanour.

The trial Magistrate made a finding that the Respondent has a kibanja interest in the suit land, but that the registered title vested in the Appellant. It is the contention of the Appellant's Counsel that the first leg of this finding is not backed by evidence. However, there is ample evidence on record, in fact from either side, that indeed the Respondent had long been in possession of the suit land during the life time of their father Fabiano. In proof of this, there is the Respondent's own evidence which is corroborated first by that of Kirabira Emmanuel (PW2) aged 73 years and a neighbour to the suit land, who used to help the Respondent fertilize the coffee on the land, then that of Godfrey Kityo (PW3) aged 53 years, who also neighboured the suit land and also used to work on the land for the Respondent.

Further evidence came from Joseph Lukyamuzi (the independent witness) who is an uncle to both the Appellant and the Respondent,

and one of the executors of the will of the deceased Fabiano. All these witnesses testified that the Respondent had cultivated the suit land for a long time before the death of his father Fabiano. More important was the testimony of Kitenda Joseph (DW2), a grandson to both the Appellant and Respondent, which was that the late Fabiano had told him that he (Fabiano) had cultivated the suit land in the 1930s and in 1958. This revelation by DW2 is quite significant, as it meant that the late Fabiano had stopped using the suit land in 1958; and this tacitly corroborated the claim by the Plaintiff (Respondent) that he acquired the kibanja interest in the suit land from his father around 1958.

Counsel for the Appellant has attacked the independent witness' testimony, contending that he has been inconsistent and contradictory of the Respondent's testimony regarding the latter's claim of a kibanja interest in the suit land. True, the independent witness claimed that the Respondent's kibanja interest was on land comprised in Block 25 Plot 416, whereas the will and inventory made by the executors both mention Block 460, Plot 25. However, the Appellant himself revealed that the suit land was formerly part of land comprised in Block 460, Plot 25; and it is from this that he curved out what became Plot 128, upon it being given to him by the executors of the will in the course of distribution of the deceased's assets. This revelation invites some serious exploratory examination.

There is no dispute that the suit land is now comprised in Block 460 Plot 128; and this was curved out of Block 460, Plot 25. It is also manifest that the figure 25 is common to both the testimony of the independent witness and that of the Appellant with regard to the numbering of the land in dispute. While the independent witness stated that the Block No. was 25, the Appellant revealed that before he curved out the suit land, which became Plot No. 128, it was part of

Plot No. 25. This is supported by the will and the inventory tendered in evidence by the Appellant. It is therefore not far-fetched to conclude that the independent witness erroneously mixed up the Block No. and the Plot No. from which the Appellant curved out the suit land by referring to the Block No. as the Plot No.; and vice versa.

Similarly, while the independent witness testified that the suit land was on Plot No. 416. The will, inventory of distribution by the executors, and the Appellant's evidence, are clear that the Block No. is 460. Here too, a flaw in the spoken word is easily discernible, by which, in English, 460 and 416 do sound so close and are frequently mixed up. This mispronunciation is, here, not isolated to the two figures, as for instance many witnesses referred to the Respondent as Leo instead of Law which should have been the correct short version of Lawrencio. Accordingly, if due regard is given for this genuine mix up, then the independent witness must be taken to have meant that the suit land was on Block 460, Plot No. 25, which is what the suit land was originally part of before the Appellant curved it out after the death of their father.

It is also noteworthy that the witnesses, who are all residents of the area, agree that the suit land is in Maya, in Busiro. It is therefore not possible that two pieces of land in one village could respectively fall between Blocks No. 460 and No. 25 which, in the survey of land into blocks, are not anywhere near each other at all. Court should not be too quick to discount every inconsistency or contradiction discernible in the testimony of a witness, without first weighing such evidence against other evidence so as to determine whether such inconsistency, or contradiction, points to, a deliberate falsehood intended for the benefit of a party to the suit, before it rejects it. It is also contended that the suit kibanja was not included in Fabiano's will.

In the English version of the will tendered in evidence at the trial, it is notable that Fabiano did not identify the lands he had bequeathed to various persons according to their registration. He merely described these lands either by naming the person in possession, or the location of the lands, or the crops or structures thereon. It was instead the executors of his will who distributed

the lands to the beneficiaries by describing them according to their respective registration. However, Fabiano's will is clear that only one land had coffee plantation on it; and this land, as well as the one he (Fabiano) lived on, he bequeathed to the Respondent whom he named his heir.

It is the Appellant alone who claims that there were three pieces of land in all with coffee thereon; otherwise no other person, not even his own witness, testified in support of this claim. Instead, all the witnesses on either side who testified at the trial agreed that the suit land had coffee trees on. From this then, it is apparent that the land with coffee trees which the late Fabiano bequeathed to the Respondent is actually the suit land comprising 2 (two) acres. Although the Respondent's own evidence is that he was bequeathed the kibanja interest he had acquired from his father during his father's lifetime, it is quite apparent from a proper scrutiny of the will that the interest in the suit land that his father bequeathed to him was not the kibanja interest but the registered interest in the land.

This means, in his bequest, the late Fabiano elevated the Respondent's kibanja interest in the two acres to his (Fabiano's) full interest. If the bequest of the suit land to the Respondent was a kibanja, or if the will was silent about the Respondent's kibanja interest therein, then it would have meant that while he bequeathed the registered interest in the suit land to the Appellant, the kibanja interest therein remained for the Respondent who had acquired it during Fabiano's lifetime, and

was in effective possession thereof at the time the will was made. However since, from the evidence adduced by the various witnesses, the land and coffee plantation named in the will can only be the suit land, the registered interest in the two acres are for the Respondent.

Accordingly, the Respondent, the executors, and indeed the trial Magistrate herself, failed to properly construe the provisions of the will of Fabiano; and so they all erroneously the will to be saying that the registered title to the suit land was bequeathed to the Appellant and not the Respondent. A will is an instruction on how the estate of the maker of the will should be managed upon his or her demise. It comes into force at a future date. The late Fabiano had already conferred a kibanja interest in the suit land to the Respondent during his life time. He could not again confer the same to the Respondent by bequest. On the other hand, even if the deceased Fabiano had conferred on the Respondent a kibanja interest in the suit land, and bequeathed the registered title to the Appellant, there would be no conflict in it as the two interests are not the distinctly different.

Equally, the Respondent's satisfaction with the manner his father's will was executed, by which the suit land was given to the Appellant, and yet he claims the kibanja interest thereon, is not an inconsistency on his part. He was made to accept that his father's instructions, in the will, bequeathed the registered interest in the suit land to the Appellant. Even if this were so, nowhere in the will did the deceased Fabiano extinguish the Respondent's kibanja interest in the suit land which the Respondent had acquired from him during his lifetime; and not through the will. It would only mean that the registered interest in the whole of the land was bequeathed to the Appellant as was given to him by the executors. Indeed this is the testimony of the independent

witness who was one of the executors of the late Fabiano's will.

Regarding the distribution of the lands by the executors, the trial Magistrate considered the contention that the Respondent got more land than the other beneficiaries. I have no reason to fault her in her decision on this. I should point out here that Court cannot inquire into the fairness, or otherwise, of a will or the distribution of properties named in the will, unless such is in issue before it. The beneficiaries, here, have not contested either the bequests by Fabiano, or the execution of the will. The Respondent, named in the will as the heir, was by law entitled to an additional percentage in the distribution. Second, the evidence adduced was that four acres out of the land given to the Respondent is actually the family burial ground which all family members, including the Appellant, are entitled to.

Furthermore, the executors pointed out in the distribution inventory tendered in evidence that a big chunk of the land given to the Respondent has been eaten up by the Kampala–Masaka highway. Finally, neither Fabiano, who bequeathed the lands to various beneficiaries, nor the executors of his will, attached any value to any of the lands bequeathed and distributed. While the land area granted to the Respondent may, on the face of it, appear to be greater than what was given to the other beneficiaries, much to the chagrin of the Appellant, the values of these lands may in fact turn out to be largely the same. However, this was not the issue before Court. What Court was to determine was whether the late Fabiano bequeathed the suit land to the Respondent; and if so, the interest therein which he had so bequeathed to the Respondent. This I have clearly resolved.

Ground No. 2: Whether the Appellant trespassed onto the suit land

With regard to trespass, the persuasive evidence adduced before the trial Magistrate was that the Respondent was in lawful possession at all material time herein. He grew coffee thereon and enlisted the

services of some of the witnesses to enable him enhance the yield of the coffee by applying fertilizers to them. A claim of trespass is founded on lawful possession; and this is not necessarily ownership, as even a licensee without any proprietary interest in the land is entitled to bring an action for trespass if he or she has lawful possession of the land. In the case of **Justine Lutaya vs. Stirling Civil Engineering Co. Ltd. SCCA No. 11 of 2002**, Mulenga J. S. C. had this to say: –

**"Trespass to land occurs when a person makes an unauthorized entry upon land, and therefore 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 land owner who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land. During the subsistence of the lease, it is the lessee in possession who has the capacity to sue in respect of trespass to that land. An exception is that where the trespass results in damage to the*

reversionary interest, the landowner would have the capacity to sue in respect of that damage.

...!"*

Since it is apparent that the Respondent's kibanja interest in the suit land was elevated and merged into the registered interest by the will, and the Respondent was in possession, the Appellant had no valid claim thereon. If the nine acres, which the executors in their apportionment gave to the Appellant, included the suit land, then this was an error as such distribution was not in compliance with the provisions of the will in this regard. Equally, even if the interests the Respondent had therein were a mere kibanja interest, he was in possession, and his kibanja interest therein was regulated and protected by law; hence dispossessing him therefrom, irrespective of whatever superior interests the Appellant may have had over the land, amounted to trespass.

Ground No. 3. Failure by the trial Magistrate to visit the locus in quo.

Whether or not to visit the locus in quo is a discretionary decision which the trial Court is under duty to exercise judiciously. The Court should usually visit the locus in quo when the matter in contention is about boundary or the determination of some landmark in dispute by the parties. In the instant suit, there was no dispute as to the location of the suit land or who the neighbours were. The matter in issue was not about the identity or the acreage of the land in issue. Rather, it was about whether or not the Respondent had any claim of interest in the suit land; kibanja or otherwise. It was only the independent witness' mixing up the registration of the suit land that raised eyebrows; but this, as I have found, was a genuine error on his part. Hence, failure by the trial Magistrate to visit the locus in quo did not cause any miscarriage of justice whatever in the case.

Ground No. 4: Whether the award of damages was properly done.

It is now well settled that an appellate Court will not interfere with the award of damages made by the trial Court unless the assessment of such damages by the trial Court was based either on an erroneous principle of law, or the award was outrageously high or ridiculously low, so as not to reflect the measure of damages the successful party to the suit ought to have been awarded.

Authorities abound in support of these propositions of law. In **Uganda Breweries Ltd. v. Uganda Railways Corporation*; Supreme Court Civil Appeal No. 6 of 2001*, Oder J. S. C., followed

the decision of the Court in **Bank of Uganda v. F. W. Masaba & Others* [1999] 1 E. A. 2*; and so he split the sum awarded by the lower Courts into half, on grounds that the lower Courts had arrived at their assessment based on the application of a wrong principle of law.

In **Administrator General v. Bwanika James & Others*; Supreme Court Civil Appeal No. 7 of 2003*, Oder J. S. C., interfered even with the award of damages made by the Court of Appeal, blaming it for having based its decision on a wrong formula in the assessment of the damages. In the instant case before me, the learned trial Magistrate awarded general damages of U. shs 5,000,000/= (Five million only) for the dispossession of the Respondent of the suit land, and U. shs. 3,000,000/=

(Three Million only) for the trespass the Defendants committed on the land. This, the Appellant contends is a wrong principle the learned trial Magistrate applied in her determination of the quantum of damages. By the time of the trial, the Respondent had been deprived of the suit land, hence denied use of it, for five years.

The evidence on record is clear that the suit land had a coffee plantation and other crops on it. In fact evidence from the Appellant's witnesses corroborated the fact that the suit land had coffee plantation on it, and that it was from the sale of coffee from this land that the funeral rites of the deceased Fabiano was organized. This means the land was a productive unit. Whether the Respondent's interests in the suit land was kibanja or registered interest, is immaterial for the purposes of considering the benefit he would have derived from use of the land had he not been deprived of it. The trial Court was, unfortunately, not assisted to assess the exact loss; but as I have pointed out above, the Respondent has evidently lost a productive property of some economic value to him, and this the Court cannot ignore for purposes of awarding damages for such loss.

I do not see why the principle the learned trial Magistrate applied should be faulted. Her award did not go beyond what is permissible under the principle of restitution. It was, manifestly, neither meant to profit the Plaintiff which would have been contrary to the purpose for an award of damages, nor extremely high in the circumstance of the case. The appellate Court does not interfere with the award of damages by the trial Court on the mere ground that it might itself have made a different award. It is only when the trial Court has applied wrong principles, which is then injudicious, that the appellate Court would interfere with such an award. Placed in the position the trial Magistrate found herself in, with nothing to guide her in the assessment of damages, she nevertheless did the best she could.

I therefore uphold the award of U. shs 5,000,000/= (Five million only) as general damages for deprivation of the suit property, and the sum of U. shs 3,000,000/= (Three Million only) for trespass thereon. Therefore, and for the reasons I have given hereinabove, I uphold the judgment of the trial Court which this appeal arises from; but however, with a variation that the bequest of the suit land to the Respondent by the late Yaliabifunye Fabiano, as is contained in his will, was not the kibanja interest the Respondent had hitherto enjoyed therein; but rather, the registered interest therein which had remained with Yaliabifunye Fabiano. Accordingly then, I have to dismiss this appeal with costs to the Respondent.

Alfonse Chigamoy Owiny – Dollo JUDGE 16 – 05 – 2013

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