THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CORAM G.M. OKELLO, JA. A.E. MPAGI-BAHIGEINE, JA. KITUMBA, JA.

CIVIL APPEAL 11/97

Between

STANLEY BEINABABO………………………………………. APPELLANT

- AND-

ABAHO TUMUSHABE…………………………………………… RESPONDENT

(Appeal from the judgment of the High Court (Kania J.) dated 6/12/96 in H.C.C.A. No.35 of 1995)

JUDGMENT OF G.M. OKELLO, J.A.

This is a second appeal. It arose from the appellate decision of the High court (Kania J.) dated 6-12-96 whereby it reversed the trial Magistrate's judgment and entered judgment against the appellant.

The respondent had bought a piece of land from Tindimurekwa (Pw3), the brother of the appellant. Tindimurekwa promised to execute a sale agreement in favor of the respondent after the respondent had fully paid the purchase price. The respondent paid the entire purchase price in three installments but the vendor did not execute the promised sale agreement. The respondent later entered the land and occupied it apparently without the vendor's blessing. Subsequently, the vendor's father who was still the registered proprietor of the land which he had given to the vendor, transferred it to the respondent

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The appellant later bought the same piece of land from his brother PW3 and sued the respondent in the Magistrate's court of Rukungiri to recover the land. His ground was that the respondent was a trespasser on the land. Before the Magistrate's court, PW3 sided with the appellant. He testified that his sale of the land to the respondent was conditional upon the brother of the vendor consenting to the sale. According to him, that consent was withheld because the land was a family piece of land which could not be sold to an outsider like the respondent.

The trial Magistrate believed that view and gave judgment for the appellant, ordering inter alia that the respondent vacate the land. On appeal, the High Court set aside the judgment and orders of the trial Magistrate. It substituted them with a judgment for the respondent. Hence this appeal.

There are five grounds of appeal, namely:

"1, That the learned Judge erred both in law and fact
by failing to properly evaluate the evidence on record.

2. That the learned Judge erred both in law and fact in holding that the respondent was not a trespasser.

3. That the learned Judge erred in law in holding that payment of the purchase price in three installments stretching from 27-11-90 to 17-7-91 to the vendor by the respondent amounted to a sale of land.

4. That the learned Judge erred in law in holding that a transfer executed by the registered proprietor not being a party to the agreement of sale amounted to an agreement between the vendor and the respondent.

5. That the learned Judge erred in law in not construing the requirement of consent of the appellant's brothers as an express term of the contract.

At the commencement of the hearing of this appeal, neither the respondent nor his counsel appeared even though there was evidence of due service on the respondent personally. His previous lawyers, M/s Kakuru and Co. advocates who represented him in the High Court declined to accept service on the ground that they no longer represented the respondent. At the instance of counsel for the appellant, we allowed the hearing of the appeal to proceed in the absence of the respondent in term of rule 99(3) of the Rules of this Court. At the hearing, counsel

for the appellant abandoned grounds 1, 3 and 5. He argued only grounds 2 and 4 together.
The gist of Mr. Twesigire, learned counsel for the appellant's argument was:

1. That there was no enforceable contract of sale of land between the vendor and the respondent as the agreement of sale was not reduced into writing.

2. That it was irrelevant that the respondent had fully paid the purchase price since there was no evidence of part performance to entitle the respondent to enforce the parol contract.

3. That discreet or clandestine taking possession of the land by the respondent without the consent of the vendor could not constitute part performance.

4. That the purported transfer of the land by the vendor's father to the respondent was not helpful to the respondent because the father was not a party to the contract of sale.

5. That the respondent's remedy lay only in action to recover his purchase price but not for specific performance.

Counsel cited the "Law of Real Property R.E. Megarry and H.W.R. Wade" 4th Edition page 542 and "Halsburv Laws of England 3rd Edition Vol.36" page 297. He criticized the Judge in the lower court for holding that the respondent was not a trespasser on the land merely because the respondent paid the purchase price in full. Finally, counsel prayed that the appeal be allowed with costs here and in the court below.

I agree that the law puts contract for sale of land in a special category by themselves. To be enforceable, such contracts have to be in writing or have satisfied the equitable requirement of part performance. For example, taking possession of the land with the vendor's consent.

The learned authors in their distinguished book entitled "The Law of real Property" 4th Edition at page 542 (supra)

said: -

"But although a valid contract relating to land may be made orally, it will be unenforceable by the most important method of enforcing contracts namely by action, unless either the statutory requirements as to written evidence of the contract or the requirements of equity as to part

performance have been satisfied. These requirements put contracts for dispositions of land into a special category by themselves."

The learned Judge in the court below made the following remarks at page 5 of the judgment with regard to the need for a written evidence of contract of sale of land:

"The plaintiff made a lot of capital on the fact that no formal sale contract had been executed and therefore the sale could not be considered complete. I agree with Mr. Kakuru, learned counsel for the appellant that between the parties, a sale agreement was really a formality and that was sufficiently fulfilled by the transfer executed by DW2 and as such the appellant cannot be considered a trespasser."

Clearly, that was misdirection by the learned Judge on the law governing contract of sale of land. As pointed out in "The Law of Real Property by Megarry and Wade 4th Edition" (supra) written evidence of a contract of sale of land is necessary for its enforceability. It was further stated in Halsbury Laws of England 3rd Edition Vol.36 page 297 that,

"Payment in whole or in part of the purchase price is not an act of part performance which entitles the purchaser to enforce a parol contract."

Messrs, Megarry and Wade in their book "The Law of Real Property" (supra) at page 547 said that a clandestine entry by the purchaser into the property without the consent of the vendor cannot constitute a lawful possession even though the purchaser had paid the purchase money in whole or in part.

An alternative way of ensuring the enforceability of a parol contract of sale of land is to show clear evidence of the transaction regarding the land. For instance, that the purchaser has already taken possession of the land with the consent of the vendor. This is to fulfill the equitable requirement of part performance.

The learned authors stated at page 562 of their said book that: -

"In the case of a contract for sale of land it was thus sufficient act of part performance if the purchaser was let into possession by the vendor for then it was clear that there must be some transactions between them concerning the land. The contract could not be fabricated by perjured evidence. But if the purchaser merely paid the vendor without taking possession, this was not

sufficient act of part performance because it did
not by itself indicate a transaction about the land."

In the instant, case the learned Judge agreed that between parties the written sale agreement was a mere formality since the purchaser had paid the purchase price in whole. In his view, even that formality was fulfilled by the transfer executed by DW2 in favor of the respondent and that therefore the purchaser could not be considered a trespasser on the land.

As was pointed out earlier, this was misdirection. Payment of the purchase money whether wholly or in part does not entitle the purchaser to enforce the parol contract. Similarly, a clandestine taking possession of the land by the purchaser does not entitle him to enforce the parol contract. He needs the consent of the vendor to take possession of the land as evidence of part performance.

In Delaney v T.P. Smith Ltd. (1946) KB 393, the vendor repudiated an oral agreement but the purchaser nothing daunted, made a clandestine entry into the property. On being forcibly ejected by the vendor, the purchaser claimed that he had been lawfully in possession under the contract and so could not be disturbed. This argument failed because the vendor was still the legal owner of the property and the purchaser's title could be proved against him only if the action was founded on the contract which was precisely what the statute forbade.

In the instant case, the purchaser's title was being proved against a third party. As against the third party, the respondent's title is founded on possession, not on the contract. Under the common law, possession is the root of title. Every possession creates a title which as against all subsequent intruders has all the incidents and advantage of a true title. See Pollock and Waight, Possession in the Common Law *p.95.* The respondent was already in possession of the land. To succeed, the appellant needed to show that he has a better title than that of the respondent. He cannot set up justerii as has been done, against the respondent to defeat his title. Only parties to a contract can sue on it. The appellant, who is not a party to the contract of sale of land between PW3 and the respondent, cannot invoke the right under that contract against the respondent. I accordingly find no merit in these grounds.

In the result, I would dismiss the appeal with costs only in the court below as the respondent did not appear at the hearing of the appeal. As Mpagi-Bahigeine, J.A. and Kitumba, J.A. both agree, the appeal is dismissed. The appellant shall pay the respondent's costs in the court below only.

Dated at Kampala this 27th. day of November 1998

G.M. OKELLO

JUSTICE OF APPEAL

JUDGMENT OF A.E. MPAGI-BAHIGEINE,J.A.

I have read the judgment of Okello,J.A. in draft.

I find myself in complete agreement with the learned judge, and have nothing useful to add.

Dated at Kampala this 27th day of November.1998.

A.E.MPAGI-BAHIGEINE

JUSTICE OF APPEAL

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JUDGMENT OF C.N.B. KITUMBA, J.A.

I have had the advantage of reading the judgment of My Lord Okello, J.A. in draft. I entirely agree with the judgment and I have nothing to add.

I would dismiss the appeal. The appellant shall pay the respondent's costs in the court below as the respondent was not present at the hearing of this appeal.

Dated at Kampala this 27th day of November 1998

C.N.B. Kitumba

Justice of Appeal.