THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CORAM: ***HON.MR. JUSTICE G.M.OKELLO, JA***

HON.LADY JUSTICE C.N.B.KITUMBA, JA

HON. LADY JUSTICE C.K.BYAMUGISHA, JA

CIVIL APPEAL NO.55/02

BETWEEN

SSESSAAZI KULABIRAAWO:::::::::::::::::::::::::: APPELLANT

AND

ROBINAH NALUBEGA:::::::::::::::::::::::::::::::::: RESPONDENT

[Appeal from the judgment and orders of the High Court of Uganda at Kampala (*Lugayizi J) *dated 24th November 2000 in Civil Appeal No.53/95]

Judgment of Byamugisha, JA

This is a second appeal from the decision of the High Court, which in the exercise of its appellate jurisdiction upheld the decision of the Chief Magistrate.

The respondent was the plaintiff in the Chief Magistrate's court. She filed the suit against the appellant for an eviction order from a *kibanja* situated at Kiluluma, Buwekula in Mubende District. The appellant bought the *kibanja* from Yosamu Mpaka, the husband of the respondent on 14/01/95. Yosamu Mpaka had bought the same *kibanja* from one Yuriyo Ndigegyirawa(D.W.2) on 1st January 1959. He settled on it with his family and it was utilised for growing food crops etc. On a date and year that was not mentioned, one of the children in the family was murdered and Yosamu Mpaka, the father, was suspected to have committed the offence. He was arrested and imprisoned. When he came out of prison, he did not return to his family. Instead he went to settle in Fort Portal. While he was there, he contacted one Andrew Kyawulwa

(D.W.6) to get him a buyer for the kibanja which Kyawuwa did. A sale agreement was concluded and the appellant was introduced to local council officials of the area as the new owner of the *kibanja.* He was put in possession. The respondent took the matter to court challenging the sale claiming that she acquired the *kibanja* jointly with her husband and therefore had an interest in it that was ignored by her husband and the appellant. She also claimed that the appellant was not a bonafide purchaser for value without notice.

At the trial, evidence adduced by both sides indicated that the respondent was no longer living on the *kibanja* and had separated with her husband for about 8 years. The learned Chief Magistrate in his judgment acknowledged that the respondent was no longer living on the *kibanja* but that she had an over riding equitable interest to the matrimonial home. He held that she was entitled to a separate independent income and home. He also found that the appellant was not a bonafide purchaser for value without notice. He relied on the testimony of the respondent and one of her witnesses, which was to the effect that she protested the sale before the local council officials but she was ignored. Accordingly, he granted her an order for vacant possession and all the developments on the *kibanja* from the date of purchase and costs of the suit.

Being dissatisfied with the outcome, he lodged an appeal in the High Court. The memorandum of appeal filed on his behalf contained 4 grounds namely: -

1. **That the learned Chief Magistrate erred in law and fact by relying on the contradictory and / or hearsay evidence of the plaintiff/respondent and her witnesses.**
2. **That the learned trial Chief Magistrate misdirected himself in finding that the *kibanja* in dispute together with all the developments thereon belonged to the plaintiff/respondent.**
3. **The learned Chief Magistrate erred in law when he failed to hold that the appellant was a bonafide purchaser for value without notice of any defect in title of the vendor (Yosamu Mpaka).**
4. **The learned trial Chief Magistrate grossly erred in law in disregarding the defendant's and his witnesses overwhelming evidence on record and instead substituted it with his own hypothesis, speculation and conjecture and he acted against the weight of evidence.**

At the hearing of the appeal, the above grounds were reduced into two by the appellate judge namely:

1. whether the respondent had an interest in the suit premises?

2. whether the appellant purchased the suit premises with full knowledge of the respondent's interest therein?

3. The appropriate remedies.

He answered the above issues in the affirmative. He dismissed the appeal with costs to the respondent-hence the instant appeal.

The memorandum of appeal contains the following grounds:

1. **The learned judge erred when he ruled that the respondent had an interest in the suit land whereas there was no evidence to prove that she had a lawful interest in the land in her own right.**
2. **The learned judge failed to find that even if the respondent had an interest in the suit land there was no evidence to prove that the appellant had notice or knowledge of such interest.**
3. **The first appellate court failed to evaluate the evidence on record and come out with a just decision. Had it done so it would have found that the respondent had no valid interest in the suit land.**

The appellant sought the following prayers:

(a) that the appeal be allowed with costs both here and in the courts below.

(b) The judgements and orders of the Chief Magistrate and the High Court be set aside.

(c) That the respondent has no lawful interest in the suit land.

When the appeal came before us for final disposal, Mr Makeera, learned counsel for the respondent, submitted that the grounds of appeal filed by the appellant were not in conformity with the law. He relied on the provisions of **section 74 of the Civil Procedure Act** that restricts grounds of appeal on a second appeal. The grounds on which a second appeal can be lodged are found in **section72**. These are:

(a) that the decision is contrary to law or to some usage having the force of law;

(b) if the decision has failed to determine some material issue of law or usage having the force of law;

(c) that a substantial error or defect in the procedure provided by the Act or any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon merits.

Learned counsel submitted that ground one of appeal is on a matter of evidence and the last ground complained that the appellate judge failed to evaluate the evidence. He contended that on the basis of the section the memorandum of appeal does not disclose any grounds that should be considered by this court. He further submitted that this court considers matters of law and it is presumed that the assessment of evidence by the trial court and the appellate court should be final. He invited us to dismiss the appeal, as the appellant has not shown which point of law was not considered by the courts below.

In reply, Mr Lutakoome, learned counsel for the appellant, stated that section 72 was complied with. He claimed that the issue of whether the respondent was a customary tenant on the *kibanja* was a matter of law. He further claimed that the sale agreement did not cite her as a joint purchaser of the *kibanja*. He pointed out that the *mailo* owner knew only Mpaka as the owner and there was no evidence that the respondent had a joint interest in the land. He invited us to overrule the objections.

I agree with the submissions of counsel for the respondent that section 72(supra) restricts grounds on which a second appeal may be preferred. The role of the second appellate court was explained by the Supreme Court in the case of **Henry Kifamunte v Uganda Criminal Appeal No.10/97.** At page 12 of the judgement the court said:-

"On second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: **Rv Hassan bin Said (1942)9EACA 62**

In order for the second appellate court to interfere in concurrent findings of fact by the trial court and the first appellate court, it has to be shown that the first appellate court erred in law or in mixed fact and law to justify an intervention.

In the matter now before us, the trial court did not in fact specifically find that the respondent had an interest in the *kibanja*. The court found that she had a right in it. At page 5 the learned Chief Magistrate said:

"***To a present (sic), a matrimonial home is meaningless unless its on a kibanja which she will use for cultivation and use crops on it such as bananas and coffee and banana trees for subsistence and cash for necessaries of life.***

After what transpired the plaintiff and Mpaka were entitled to separation as it would have been a risk for both to stay together. The logical solution would have been for her to stay on this kibanja, acquired during the course of their stay together. Mpaka may have bought bibanjas for his children but this does not affect the plaintiff's rights as his wife. Similarly she may now be living with her daughter-in-law and her grand children but this does not deprive her to her rights to an independent and separate home and income. It is time society disregarded the repugnant custom of a woman being appended to her father or brother during spinsterhood to her husband during marriage and her son or sons after divorce or during widowhood".

The learned appellate judge in upholding the decisions of the trial court found that the respondent had an interest in the suit land having jointly purchased the same with her husband.

With respect, I think the appellate judge erred both in law and in fact to find as he did that the respondent had purchased the land jointly with her husband. There was no such evidence of joint purchase. I think there is a difference in law between having a right in land and an interest. The latter goes with ownership, which might be legal or equitable. Such interest is capable of being registered as a charge on the land. On the other hand rights are associated with the use of land for activities such as playing games and the use of footpaths etc.

The changes that were introduced by the Land Act in 1998 and the subsequent amendments in 2004(Act 1/04) I think were meant to redress the sentiments expressed by the trial Chief Magistrate. For purposes of clarity I shall reproduce some of them.

Section 38A provides for security of occupancy. It states as follows:

"(1) Every spouse shall enjoy security of occupancy on family land.

(2) The security of occupancy prescribed under subsection (1) means a right to have access to and live on family land.

(3) For purposes of subsection (2), the spouse shall in every case have a right to use the family land and give or withhold his or her consent to any transaction referred to in section 39, which may affect his or rights.

(4) In this section-

"family land" means land-

(a) ***on which is situated the ordinary residence of a family;***

(b) ***on which is situated the ordinary residence of the family and from which the family derives sustenance;***

(c) ***which the family freely and voluntarily agreed to be treated to qualify under paragraph (a) or (b)***

or

(d) ***which is treated as family land according to the normal culture, customs, traditions or religion of the family.***

"ordinary residence" means the place a person resides with some degree of continuity apart from accidental or temporary absences; and

a person is ordinarily resident in a place when she or he intends to make that place his or her home for an indefinite period;

"land from which a family derives sustenance" means-

(a) ***land which the family farms; or***

(b) ***land which the family treats as the principal place which provides the livelihood of the family;***

(c) ***land which the family freely and voluntarily agree to be treated as the family's principal place of source of income for food.***

(5) For avoidance of doubt, this section shall not apply to spouses who are legally separated."

Section 39 imposed restrictions on the sell, exchange, transfer, pledge, mortgage or lease of family land except with the consent of either spouse.

I would, therefore overrule the objections raised by counsel for the respondent and find that the memorandum of appeal was properly filed.

In submitting on the grounds of appeal, M r Lutakoome argued grounds 1 and 3 together and the second ground separately. I shall handle them in the same manner. Learned counsel stated that there was no evidence to support the judge's finding that the respondent had an interest in the *kibanja.* He claimed that there was a house on the kibanja that was sold in 1993 and the respondent raised no complaint. He further submitted that there was no evidence to prove joint proprietorship.

In reply, Mr Makeera, learned counsel for the respondent, submitted that the law governing the kibanja is the Land Reform Decree (now repealed). Under that law *kibanja* was defined as developments on the land. These include crops, plantations etc. On the evidence adduced by the respondent, learned counsel stated that she testified that she bought the *kibanja* jointly with her husband. It was his contention that the sale could not take place in total disregard of her interest. On the sale itself, counsel stated that the appellant was not a bonafide purchaser for value without notice because he was told about the protest and the respondent was in possession. He invited us to find that this was family property and that the sale was not proper.

As I pointed out earlier, the learned appellate judge failed in his duty of re-appraising the evidence afresh and subjecting it to exhaustive scrutiny, as the law requires. That being the case, it is our duty to re-evaluate the evidence ourselves. There is no doubt that the *kibanja* was purchased in 1959 by Mpaka. It is not clear whether at that time, he was already married to the respondent. The respondent as a wife, used the *kibanja* to cultivate and grow crops for home use and perhaps for sale. Her testimony in court was that she jointly purchased the *kibanja* with her husband. This is what she told court:

"I know the defendant in this case. He is cultivating my kibanja. He bought it from my husband. Both of us worked for the kibanja. When my husband wanted to sell the kibanja, my eldest son opposed him. My husband paid people and they shot him. When the defendant bought it I went to RC 1 committee in our area and claimed that I bought the kibanja with Mpaka. Me and Mpaka had twelve children. Iam still living with seven of the children. The kibanja is big. It has a banana and coffee plantation on it".

The respondent called three witnesses namely Kasibante Wilson (P.W.2) who testified that the appellant bought their *kibanja* behind their back. It was also his evidence that he protested the sale. Jane Nabakoza (P.W.3) a daughter of the respondent testified that the *kibanja* belonged to her parents. It was her testimony that it was her mother who planted the banana and coffee trees as their father used to work in Kilembe mines. The last witness for the respondent was her daughter Violet Kyansasire who testified that the *kibanja* in dispute belongs to her parents and that it was the respondent who planted the banana and other crops on the *kibanja.*

The respondent in his evidence testified that he inspected the *kibanja* before purchasing it. He was accompanied by Kyawulwa (D.W.5) and two children of Mpaka namely Tulinda and Keminagano. He further testified that the respondent never opposed the purchase of the kibanja before the local council officials but he also learnt that the respondent had separated from Mpaka for a period of 8 years.

At the time of the purchase, the law governing the transaction was the Land Reform Decree. The only interest that the law recognised at that time were the developments on the customary holding. The developments on the land were crops. The fact that the respondent as a wife of Mpaka planted the crops did not in itself create an interest in law in her favour. I think with respect, the learned appellate judge was wrong to uphold the findings of fact by the trial court to the effect that the respondent had interest/rights in the *kibanja.* The appellant made the necessary inquiries before he purchased the *kibanja* and the *mailo* owner, the local council officials and the vendor himself sanctioned the transactions. If the respondent wanted any compensation for her developments on the land, she probably would have received some money from her husband. I think the appellant was a bonafide purchaser for value without notice. His appeal to this court, would, therefore, succeed.

I would allow the appeal by setting aside the orders of the High Court and declaring that the respondent had no interest in the suit land. The appellant would be awarded costs both here and in the courts below.

Dated at Kampala this…28th .day of……February…….2005.

C.K.Byamugisha

Justice of Appeal