THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA, AT KAMPALA

CIVIL APPEAL NO.60/2000

YASIN KIKOMEKO::APPELLANT

VERSUS

AHMED SALONGO KATENDE:::RESPONDENT.

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE A. TWINOMUJUNI, JA.
HON. JUSTICE C.K. BYAMUGISHA, JA

<u>JUDGMENT OF A.E.N. MPAGI-BAHIGEINE, JA.</u>

This is a second appeal. It arises from a decision of the High Court (Katutsi J), dated 14/7/2000, in Civil Appeal No. 78 of 1998, emanating from Civil Suit No. G.K. 629 of 1994 at Mengo Court.

Ahmed Salongo Katende, who is the present respondent, instituted Civil Suit No. G.K, 629 of 1994 at Mengo Court against Yasin Kikomeko who is the present appellant and another one Matia Katende.

The respondent sought an eviction order against the appellant and the said Musa Katende from the suit property, known as Kibuga Block 4 Plot 663, which was later subdivided into plots Nos. 719 and 721. Both these plots were being claimed by the respondent. The basis of his claim is encompassed by Paragraphs 4, 5 and 8 of his plaint as follows;

"4). On 20th May, 1993 the plaintiff bought land situated at Bakuli, Market Zone Rd comprised in Kibuga Block 4 Plot 663 and after survey, the land became Plots 719 and 721 Kibuga Block 4. A copy of the sale agreement is annexed hereto and marked "A" and a copy of the transfer is marked

5). At the time the plaintiff bought the land, the 2nd defendant had an old ramshackle small, to *mud and wattle building on the land.*

8). On, 10/9/1994, both defendants broke part of the old building on the suit land and started erecting a new building without the plaintiffs knowledge and consent, contrary to the notice terminating the tenancy".

The appellant and Musa Katende disputed the sale to the respondent.

Though the Learned trial Magistrate disbelieved them and entered judgment for the respondent, she did so in very contradictory terms:

"(a) ***No eviction order is awarded to the plaintiff since he is not the lawful proprietor of the suit land.***

(b) Special damages of Shs. 900,000/- as the purchase price of the suit Land.

(c) General damages of Shs. 500,000/-.

(d) Costs of the suit.

Both parties being dissatisfied with the judgment appealed to the High Court, which entered judgment in favour of the respondent, thus;

"The *trial Magistrate therefore misdirected herself on the evidence. When she said that the first defendant has purchased the suit land before the plaintiff but only failed to have it registered. There was no such evidence on record. Of the two parties therefore, plaintiff had a better and superior title over the suit premises over and above empty claims of the defendants which claim according to the evidence of George Kamya Kirabira, brother of Norah Twemanye, the crook was based on dishonesty.*

The Learned trial Magistrate should and ought to have ordered vacant possession in favour of the plaintiff who although his title had been cancelled under dubious circumstances still had an

*instrument of transfer in his favour which he could again have registered any time, **so** long as he was not caught by limitation".*

The memorandum of Appeal comprises the following three grounds namely that; -

"a) The Learned Appellate Judge erred in law when he overruled a finding of fact by the trial magistrate that the appellant had purchased the land in issue.

b) The Learned appellate Judge erred in law when he failed to appreciate that the appellant has an equitable interest in the land as a customary tenant protected under the law.

c) The learned appellate Judge erred in law when he appreciated that the trial court's record was "a complete mess", in respect of the appellant's case and that the trial magistrate's judgment was a complete fiasco but went ahead to rely on the same record to pass the judgment against the appellant"

Mr. Birungi, learned counsel, for the appellant argued the first two grounds (a) and b) together. 20 He submitted that the learned appellate Judge erred in overruling the magistrate's finding of fact that the appellant had an equitable interest as a customary tenant. He argued that the appellant having purchased the suit land in 1989, he acquired a lawful interest. The subsequent sale to the respondent in 1993 never affected the appellant's interest. The Judge's finding that the appellant had no interest in the land was erroneous. Even if the document/sale agreement was not registered, it could pass an equitable interest.

Mr. Semeo Lutakome, learned counsel for the respondent strongly opposed the appeal. He submitted that the respondent purchased the suit land from one John Kizza, Dw2, who was the administrator of the estate of his deceased, father, Simeo Mpindi. Under section 134 of the Registration of Titles Act (R.T.A), the estate therefore vested in Dw2. The respondent bought the equitable interest of Norah Twemanye in 1993. Norah Twemanye was one of the beneficiaries of the late Mpindi's estate. The sale agreement is Exhibit P1. After the respondent had bought the equitable interest of Twemanye, he acquired the legal interest from John Kizza, Dw2, who also duly signed the transfer in his favour. The appellant's claim was never known to the respondent.

The appellant had no registered interest in the suit land. Mr. Lutakome, pointed out that under section 54, an unregistered document has no validity as far as land is concerned. The appellant's unregistered interests cannot override those of the registered owner. He further pointed out that under section 136 RTA, a purchaser of property cannot be put to task of inquiring into unregistered interest unless there is fraud. Learned counsel submitted that the learned Judge understood what was in issue and made a clear finding out of the confusion created by the trial magistrate. He prayed court to dismiss the appeal with costs here and below.

In rejoinder, Mr. Birungi, agreed with the statement of the law by Mr. Lutakome, but contended that it had not been properly applied. In his view, non registration did not affect the transaction. The appellant bought land and had developments thereon. He tried to get himself registered but Kizza (Dw2) denied him the opportunity.

Mr. Birungi prayed for the appeal to be allowed or alternatively an order for a retrial before another Judge.

The Learned Magistrate found that;

> **"Although according to D. Exh. 2(a) and 2(b), Dw5 bought first in 1989, while the plaintiff bought later in 1993, Dw5 did nothing to the suit land and never bothered to register his interests until after the plaintiff bought and even registered his interest in 1993."**

The learned Judge found that;

> **"The** ***first defendant though he claimed that he had purchased the same land and the trial Magistrate appear to have accepted that indeed, he had and before plaintiff had purchased it, the evidence on record did not bear this out.***
>
> **True** ***there is a document which on the face of it appear to be an agreement of sale between the first defendant and Norah Twemanye, this document is not endorsed by the court as an exhibit. It is therefore, of no probative value. Even if it were endorsed there is no evidence that Norah Twemanye ever sold land to the first defendant. Indeed in her***

evidence before the court she said in no uncertain terms that the first defendant was a mere caretaker of the land. Not only that such a document that was not registered could not pass any interest to the first defendant".

Clearly, the learned appellate Judge, therefore, was justified in 15 rejecting the purported sale by Norah Twemanye to Yasin Kikomeko, the appellant as being of no enforceable value. Norah Twemanye could only pass her beneficial interest, nothing better. It is only John Kizza, Dw2, who had the capacity to pass legal title as administrator. Furthermore, it is not clear how the sale agreements found their way on the record (page 77-78), since they are not marked as exhibits. The evidence on record disproved any genuine sale by Twemanye to the appellant, Yasin Kikomeko in 1989. She called him a mere caretaker on the land. However, the respondent having purchased the beneficial interest from Norah Twemanye in 1993, he was vigilant enough to proceed and purchase the legal estate from John Kizza at Shs. 900,000/-, as per sale agreement Exhibit P1 and transfer, Exhibit P2. Though, he registered it, it was cancelled under a misapprehension of the law.

As the trial Judge correctly observed, the respondent has a better title. He has an equitable interest in the land which is un assailable and of which John Kizza, Dw2, holds the legal estate as a bane trustee. The respondent's equitable interest constitutes an overriding interest over all future transactions on the land, adverse to his interests. The appellant however can have no such claim; Perhaps, he can proceed to prove the case against Twemanye in damages only, if at all. The respondent is the rightful occupant of the land as correctly found by the appellate Judge.

Since my Lords A. Twinomujuni and, C.K. Byamugisha JJA, both agree, the orders of the High Court are hereby confirmed.

The appeal stands dismissed with costs here and below.

JUDGMENT OF TWINOMUJUNI, JA

I have read, in draft, the judgment of Hon. Justice A.E.N. Mpagi-Bahigeine.

I agree with the judgment and the orders proposed by her Lordship. I have nothing useful to add.

JUDGEMENT OF BYAMUGISHA, JA

I had the benefit of reading in draft the judgement prepared by Bahigeine JA. I agree with the reasons she has given in dismissing the appeal. I have nothing to add.

Dated at Kampala this 10th day of June 2005.

A.E.N. Mpagi-Bahigeine
JUSTICE OF APPEAL

Hon. Justice Amos Twinomujuni
JUSTICE OF APPEAL

C.K. Byamugisha
JUSTICE OF APPEAL