

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSTICE C.K. BYAMUGISHA, JA

CIVIL APPEAL NO.33 OF 2002

BETWEEN

HARUNA SERUNJOGIAPPELLANT

AND

GEORGE WILLIAM KIJJAMBURESPONDENT

**(An appeal from the decision of the
High Court of Uganda at Kampala in
the Judgment of (Honourable Lady Justice Anne Magezi)
delivered on 26/10/2001)**

JUDGMENT OF TWINOMUJUNI, JA

The appellant is the registered owner of Plot No.3 87, Kibuga Block No.18 situated at Natete in Kampala District. The land was originally bought by the mother of the appellant and registered in his names in 1975 when he was aged 2 1/2 years old. Between 1976 and 1991 one Ahmed Katende, the father of the appellant, not only purported to sell developments on the land to the respondent but actually illegally and unsuccessfully tried to sell and transfer the land to him. In 1991 when the appellant attained the age of maturity, he was then serving in the Army and did not return till 1994. He then found - that the respondent had lodged a caveat on the suit land. He started to claim the land only to learn that the land title was actually in possession of the respondent. It seems Ahmed Katende handed it over to the respondent as security for a loan,

which he failed to repay and tried to transfer the land to the respondent. In 1996 the parties entered into negotiations for sale or leasing the land to the respondent but could not agree on terms which were set by the appellant. The appellant asked the respondent to vacate the land but the respondent refused. The appellant obtained a duplicate land title to the land in 1999 and filed this suit in the year 2000.

In the trial court, the trial judge upheld the appellant's claim to the land and held that the respondent was trespasser and had no claim of right to the land. She made the following orders:

- a) The defendant shall vacate the land in dispute.**
- b) A permanent injunction shall restrain the re-entry of the defendant upon the suit land.**
- c) The defendant pays the plaintiff general damages of shs.2,000,000/=.**
- d) That the improvements made on the buildings that were found there could be detached or otherwise compensated by the plaintiff.**
- e) The defendant pays the plaintiff the costs of the suit.**

She declined to grant an order for payment of mesne profit in respect of the use of the buildings on the land. Being dissatisfied with this judgment, the appellant appealed on three grounds:-

- 1) The learned judge erred in law and fact to hold he respondent made any improvements on the suit land and is entitled .to compensate therefore.**
- 2) The learned trial judge erred both in law and fact when she declined to award the appellant mesne profits.**
- 3) The learned trial judge erred both in law and fact when she ordered that the respondent be allowed to remove his developments on the land or that he be compensated for the same.**

The respondent was also not satisfied with the judgment as a result of which he cross-appealed relying on eight grounds of appeal as follows:-

1. The learned trial judge erred in law and in fact when she held that at the time of the transaction between the respondent and the appellant's father, the law did not allow the severance of developments on land from ownership of land.

2. In holding that the late appellant's father could not sell the houses on the land to the respondent, the learned trial judge erred in law and in fact because the learned judge ignored evidence on record which proved that the late appellant's father owned the developments on the land long before the appellant was registered as the mailo owner in 1975.

3. The learned trial judge erred in law and in fact when she held that oral evidence could not be used in this case to prove the amount of money paid by the respondent to the appellant's father as the purchase price which was not indicated in the acknowledgement of sale executed by the appellant's father 9th October 1976.

4. The learned trial judge erred in law and in fact when after observing that the respondent had occupied the land for 24 years, went ahead to hold that the appellant was not a Bonafide occupant on the land.

5. The learned trial judge erred in law and in fact when she held that the Limitation Act Cap. 70 no longer applies to land matters after the enactment of the Land Act 1998.

6. The learned trial judge erred in law and in fact when she held that the occupation of the land in issue by the respondent was void as against the appellant.

7. The learned trial judge erred in law and in fact when she held that the respondent was a trespasser on the land.

8. The learned trial judge should have resolved the inconsistencies and contradictions in the appellant's case especially as to who bought the land and registered it in the names of the appellant, in favour of the respondent.

On appeal, it was agreed that counsel for the cross-appellant argues his grounds first beginning with the fifth ground of appeal. This ground of appeal is to the effect that the trial judge erred in law and in fact to hold that the Limitation Act Cap.70 no longer applies to land matters after the enactment of the Land Act 1998. As was observed and conceded by both counsel, this matter of limitation was not raised at all in the lower court, though it was mentioned in passing by the trial judge in her judgment. On the authority of Semakula vs. Mulondo [19851] HCB 29 a Court of

Appeal does not entertain grounds of appeal which raise new points of law which were not argued before the trial court. This should dispose of this ground of appeal. However, I think that on the facts of this case, the ground of appeal does not even arise at all. Between 1976 and 1994 the appellant was unable to claim for his land partly because he was still a minor and after 1991, he was serving in the Army. However, on his return in 1994 up to the year 2000 when he filed the suit, he - persistently claimed the land and the respondent cannot claim that his possession of the land was never challenged. In fact, the respondent acknowledged that the land belonged to the appellant by trying to negotiate for purchase or leasing of land and the properties thereon. It is, therefore, not necessary to consider the merits of this ground of appeal.

Mr. Bamwite who argued this appeal for the cross-appellant argued grounds one and two of the cross-appeal together. He attacked the findings of the trial court to the effect that at the time of the transaction between the respondent and the appellant's father, the law did not allow the severance of its developments on the land from the ownership of the land. He also attacked the judge for ignoring evidence on record which proved that the late appellant's father owned the developments on the land long before the appellant was registered as the mailo owner in 1975. In his view, there was evidence that the appellant's father owned developments on the land and could sell and transfer them to another person.

Mr. Ojambo Robert Mugeni, learned counsel for the appellant, submitted that the disputed land belonged to the appellant since 1975. His father had no capacity or authority to sell or transfer any property or buildings on the land. The fact that he paid rates to Kampala City Council did not confer on him any right to sell or transfer the buildings to the respondent. The trial court was right to hold as it did.

I have found no evidence on record to support a proposition by counsel for the cross-appellant that Ahamed Katende, the late father of the appellant, owned a Kibanja on the disputed land. There is also no evidence that the buildings which he purported to sell were actually constructed by him. It is trite law that buildings on the land are part and parcel of the land. Since the land in dispute was at all times since 1975 the property of the appellant, his father had no capacity or authority to sell or transfer any building found on the disputed land. This is how the learned trial judge disposed of this matter in her judgment:

“It is apparent that apart from being the biological father of the plaintiff Mr. Ahamed Katende did not possess the power of a legal guardian or power of attorney over the land in dispute. This is irrespective of whether he is the one who bought that land and is registered it in the names of the plaintiff. Section 56 RTA provides that the person named in the certificate of Title is the proprietor and only one having any estate or interest or power to appoint, or dispose of the land therein described. The statutory implication of the aforesaid provision is that it is only the plaintiff who could sell or transfer to the defendant any interest in the disputed land. When the plaintiffs’ father purported to sell or mortgage the land in dispute the plaintiff, the registered owner of the land was a minor. He did not have capacity to make any legal transaction over the land in dispute.”

I agree with this holding and I find no merits in grounds 1 and 2 of the cross- appeal.

In ground three of the cross-appeal, Mr. Bamwite complained that the trial judge erred to hold that oral evidence could not be used to prove the amount of money paid by the respondent to the appellant’s father as the purchase price. I find no merits in this ground of appeal. The finding of the trial court, with which I concur, is that the appellants’ father had no capacity to sell anything on the land. It is, therefore, not relevant whether he received any payment for purporting to sell anything on the land. Any evidence, oral or written on this matter would be futile. What the father of the appellant was doing was illegal and the cross-appellant knew it very well all along.

Mr. Bamwite argued grounds 4 and 6 together. The complaint is that after the trial judge found that the cross-appellant had lived on the land for 24 years, she should have found that he was a bonafide occupant of the land. The Land Act 1998 defined the term Bonafide occupant as “*a person who before the coming into force of the Constitution had occupied and utilised or developed land unchallenged by the registered owner or agent of the registered owner for twelve years or more.*”

Now, the finding of fact of the lower court and of this court is that up to 20 1991, the appellant was a minor and incapable of challenging the cross- appellants illegal occupation of his land. On return of the appellant from the army, he started demanding repossession of his land. The cross-appellant acknowledged that the land belonged to appellant and started negotiating with him to

purchase or obtain a lease to the land. He failed to meet the terms set by the appellant. It cannot be said that the cross-appellant occupied, utilized or developed the land for twelve years before the coming into force of the 1995 Constitution. He, therefore, does not qualify to be called a bonafide Occupant. This ground of appeal fails.

Mr. Bamwite abandoned grounds No. and did not argue ground No.7 as he felt he had adequately covered it when arguing the other grounds of the cross-appeal. I have found no merits in all the grounds of cross-appeal which were argued. The cross-appeal is dismissed accordingly.

Now, I move to the main appeal which has three grounds already spelt out above. Mr. Robert Ojambo Mugeni argued grounds 1 and 2 together. The gist of these grounds is that since the trial judge held that the respondent was a trespasser, it was wrong for her to hold that he had made any improvements on the land which entitled him to any compensation or to be allowed to remove them from the land. He argued that there was in fact nothing to compensate because in 1976, when the respondent took possession of the property, developments were already thereon.

I will dispose of these two grounds summarily. I agree with the learned trial judge that as early as 1983 when the respondent tried to register the land in his names, he became aware that the purported seller had no title to pass to him. He therefore knew that he was a trespasser. He is not entitled to any compensation for any developments he may have made since then. If he indeed made such developments at all, they have now become part of the land unless they are not fixed on the land. It was, with respect, also wrong for the learned trial judge to order that the trespasser be allowed to remove buildings he illegally put up on the land. Moreover he was merely improving on those he found on the land in 1976. These two grounds of appeal must succeed.

The last ground of appeal concerned a claim for mesne profits which the trial judge rejected. Her ground for rejecting it was that the claim was statute barred. She did not substantiate. The learned trial judge came to that conclusion in the following way as she stated in her judgment:

“The damages claimed by the plaintiff included a court order that the defendant vacates the land, a permanent injunction against the defendant’s re-entry on the suit land and order for mesne profits. The plaintiff claimed a total of shs.70,000,000/ from 1976 to date having calculated the claim of shs.200,000 x 12 x 7 = 16,800,000/=. The calculations are

based on rentals collected from the houses on the land. These figures of rents earned monthly were disclosed by the defence i.e. DW1 Mary Nabatusa Kijjambu. I have considered the plaintiffs claim regarding mesne profits. I am of the opinion that such calculations should be guided by section 2 of the Civil Procedure Act which defines mesne profits as **“those profits which the person in wrongful possession of such property actually received or might have received with ordinary diligence have received there from together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession.”** Without further ado the above definition excludes any claim of mesne profits because the evidence on record indicates that the defendant occupied the land when the houses were incomplete and made the improvements upon which the claim for mesne profits were based for that reason the claim is unfounded as it is statutory barred.” [Emphasis supplied]

The problem really is that though the appellant pleaded a claim for mesne profits, he did not plead them specifically. He did not specify the amount he claimed or how he came to such an amount. He did not call any evidence to prove in what state the buildings were and how much money was being made from them. With respect to the learned trial judge, I do not think that the claim would be statute barred if the appellant had specifically pleaded it and proved it. There is evidence that the appellant started claiming his property around 1996. The claim for mesne profits would have been valid, at least from the time he filed this suit in 2000 till payment in full, if the claim had been proved. A claim for special damages cannot be granted unless it was specifically pleaded and specifically proved. This ground of appeal must fail because mesne profits were not proved in the trial court.

In the result, I find that this appeal should succeed on two grounds of appeal. I would uphold the orders of the High Court contained in the Decree dated 14th November 2001 except the one on compensation for improvements or their detachment.

I would also grant the appellant 2/3 of the costs of this appeal.

JUDGEMENT OF L.E.M. MUKASA KIKONYOGO, DCJ

I had the advantage of perusing the judgement in draft prepared by Hon. Justice A. Twinomujuni JA and I agree with him that this appeal must succeed. As Hon. Justice C.K. Byamugisha J.A holds a similar view the appeal is allowed with 2/3 of the costs to the appellant in this court and High Court.

Further, the orders contained in the High Court Decree are upheld apart from the one awarding compensation on improvement or their detachment which is, hereby, set aside.

JUDGEMENT OF BYAMUGISHA, JA

I had the benefit of reading in draft form the lead judgement of Twinomujuni JA. I agree with the reasons he has given in partly allowing the appeal. I have nothing useful to add.

Dated at Kampala this 14th day of July 2005.

Hon Justice Amos Twinomujuni

JUSTICE OF APPEAL

L.E.M. Mukasa Kikonyongo

HON. DEPUTY CHIEF JUSTICE

C.K. Byamugisha

JUSTICE OF APPEAL