

THE REPUBLIC OF UGANDA,
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO 137 OF 2012
(ARISING FROM JINJA HIGH COURT CIVIL SUIT NO 093 OF 2010)
(ARISING FROM MUKONO CIVIL SUIT NO 0093 OF 2009)

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(Coram: Kakuru, Musota, Madrama, JJA)

BETWEEN

MAYIGA JOHN}APPELLANT

AND

MRS KALULE}RESPONDENT

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JUDGMENT OF COURT

This is a second appeal from the decision of Honourable Lady Justice Flavia Senoga Anglin delivered on 21st October, 2011 at Jinja High Court in Civil Appeal Number 093 of 2010 setting aside the judgment of his worship Johnson Karemani Magistrate Grade 1 delivered on 26th August, 2010 in Civil Suit Number 093 of 2009.

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At the hearing of this appeal, learned Counsel Mr Thomas Luyambi appeared for the appellant while learned counsel Mr Samuel Sseguya appeared for the respondent.

Learned counsel for the appellant abandoned grounds 1, 2, 3, 4, 5, 6, 7 and 9 of the appeal on the basis that they were not sustainable and addressed court on an amended ground 8 as that only ground of appeal that:

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"The learned Judge erred in law when she set aside the whole judgment of the magistrate without giving remedies as provided for under the Land Act.

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On the remaining ground of appeal, he submitted that there was no dispute that the appellant paid for the suit property to the husband of the respondent. The husband received the money for the suit property and the learned appellate court Judge erred in not ordering refund of the money with interest under section 39 (4) of the Land Act.

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5 In reply, the learned respondent's counsel submitted that there was no competent appeal against the respondent surviving and therefore the appeal against her should be dismissed with costs. He further submitted that this court is free to consider the law and make appropriate orders at its own discretion.

Resolution of appeal

10 This is a second appeal governed by section 72 of the Civil Procedure Act, Cap 71 which provides that:

"72. Second appeal.

15 (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that—

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

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

20 (c) a substantial error or defect in the procedure provided by this Act or by 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 the merits. ..."

25 Our jurisdiction as a second appellate court is restricted to determination of questions of law only though Rule 32 (2) Rules of this Court allows us to appraise inferences of fact drawn by the trial court. In this appeal there are no facts in controversy and therefore the appeal will be resolved on a point or points of law only.

Background of appeal

30 The brief facts are that the appellant originally sued the respondent and her husband Mr Samuel Senjuba Kalule for recovery of a piece of land comprised in LRV 2053 folio 25 Plot 1789 block 190 located at Nasuti in the then Mukono Town Council, Mukono district. The original suit was filed in the Chief Magistrate's Court of Mukono against the respondent and her husband jointly and severally for specific performance of the contract, general damages for trespass, an eviction order and costs of the suit. The basis

5 of the suit was that the appellant claimed to have lawfully bought from the husband of
the respondent the piece of land described as LRV 2053 folio 25 plot 1789 block 190
located at Nasuti (the suit property). In the alternative the appellant contended that
respondent who was the second defendant in the trial court deliberately made false
claims that the suit land was family land. In the alternative he prayed for compensation
10 for loss of the plot equivalent to the current market value of the suit property, general
damages for breach of contract and any other remedy that the court deems fit to order.

The learned trial magistrate allowed the appellants suit and entered judgment for the
appellant against the respondent and her husband (the first defendant). He declared
that the appellant is the legal owner of the suit property having lawfully bought it from
15 the first defendant (the husband of the respondent in this appeal). The trial magistrate
further declared that the suit property was not family land and both defendants were
trespassers thereon. Thirdly, the trial magistrate ordered the husband of the respondent
(the first defendant) to hand over vacant possession of the suit property to the
appellant. Fourthly, the trial magistrate ordered both defendants to jointly pay to the
20 appellant Uganda shillings 2,000,000/= as general damages for trespass. Lastly the trial
magistrate awarded costs of the suit to the appellant.

The first defendant, who is the husband of the respondent in this appeal, did not appeal
and the respondent in this appeal Mrs. Prossy Esther Ntudde Nakityo Kalule lodged an
appeal in the High Court on five grounds of appeal namely:

- 25 (1) The trial magistrate erred in law and fact when he failed to appreciate and to
evaluated the appellants evidence and that of DW3 the Probation Officer,
Mukono and held that the land comprised in LRV 2053 folio 25 was not family
land within the meaning of section 39 of the Land Act.
- (2) The trial magistrate erred in law to hold that the land in issue did not qualify
30 for the consent of the appellant.
- (3) The trial magistrate erred in law and fact to decide that the appellant was/is a
trespasser.
- (4) The trial magistrate erred in law and fact to hold that the appellant was liable
to pay general damages for trespass since 2008.
- 35 (5) The trial magistrate erred in law and fact to have awarded general damages of
Uganda shillings 2,000,000/=.



5 The learned first appellate court Judge allowed the appeal and held that any transaction entered into contrary to section 39 (1) of the Land Act is a nullity. Secondly the purchaser has a right under the same section to claim from any person with whom he entered into the transaction any money paid or any consideration given by him in respect of that transaction. Thirdly, the transaction between the appellant and the
10 husband of the respondent was void and unenforceable. Fourthly, the only remedy open to the respondent who is the appellant in this appeal is to claim from the first defendant, the husband of the respondent, money in respect of the transaction and any damages suffered for failure to obtain the interest he paid for. The learned first appellate court Judge allowed the appeal with costs in the High Court and in the
15 Magistrate's Court.

We have taken note of the fact that the husband of the first respondent never appealed to the High Court and is not a party to this appeal. He is the one who sold the property to the appellant and the sale was declared a nullity on appeal in the High Court. The appeal was lodged by his spouse who was the only aggrieved person. The first
20 defendant in the trial court, who is the husband of the respondent in this appeal, seems not to be aggrieved by anything having sold the property to the appellant.

As a matter of procedure, any order that is sought under section 39 (4) of the Land Act, is an order against the first defendant in the trial court. Secondly, the respondent having appealed to the High Court was the only aggrieved party in the High Court and it is not
25 surprising that the learned first appellate court Judge held that the respondent in that court who is the appellant in this court was entitled to a refund of the money he had paid. This is what the first appellate court Judge held at pages 13 - 14 of her judgment and pages 97 last paragraph and 98 of the record that:

30 "Under section 39 (4) of the Land Act, where any transaction is entered into contrary to section 39 (1) of the Act, the transaction is null and void. The provision is mandatory since it is couched in the following terms "... The transaction shall be void".

35 However, the purchaser has a right under the same subsection, to claim from any person with whom he entered into the transaction any money paid or any consideration given by him in respect of the transaction.

5 The transaction between the respondent and the first defendant was void and unenforceable for all the reasons stated in this judgment.

The only remedy open to the respondent is to claim from the first defendant the money paid in respect of the transaction and any damages he has suffered for failure to obtain the interest he paid for.

10 The appeal is allowed. The judgment and orders of the trial magistrate are set aside with costs to the appellant here and below."

It was clear to the learned appellate court Judge that the first defendant was not a party when she made the order that it was open to the respondent who is the appellant in this court to claim from him.

15 Subsections 39 (1) and (4) of the Land Act are relevant. As far as section 39 (1) is concerned, it forbids the sale of family property without the consent of a spouse and because it is not in controversy that the sale in question was a nullity, we do not need to refer to it. What is material in the remaining ground of appeal is subsection 4 of section 39 which provides that:

20 "39. Restrictions on transfer of land by family members.

...

(4) Where any transaction is entered into by a purchaser in good faith and for value without notice that subsection (1) has not been complied with, the transaction shall be void; but the purchaser shall have the right to claim from any person with whom he or she entered into the transaction any money paid or any consideration given by him or her in respect of the transaction."

What is being asked of this court is to enter judgment against a party who is not a party to the appeal and who is not aggrieved because he never appealed from the trial court decision. Section 39 (4) cited above requires a court to determine whether the transaction was entered into by the purchaser in good faith and for value without notice that subsection (1) of section 39 of the Land Act has not been complied with. That is a question of fact which required determination by a court of law. It is contrary to the rules of natural justice and constitutional provisions for fair trial under article 28 (1) as well as order 44 (c) of the Constitution of the Republic of Uganda to make an order against anybody without giving them an opportunity to be heard. The right to a fair

5 hearing is doubly entrenched by article 44 (c) of the Constitution and we cannot
derogate from it. The learned first appellate court Judge issued a judgment on 21st
October, 2011 that the respondent can claim against the first defendant the money paid
in respect of the transaction and any damage he has suffered for failure to obtain the
interest he paid for. The appellant ought to have pursued that in the original court
10 because the first defendant was by that time not a party to the appeal in the High Court.
In any case, he was not an aggrieved party by the decision of the trial magistrate to give
the property to the appellant.

In the premises, we agree with learned counsel for the respondent that there is no valid
and competent appeal against the respondent who was aggrieved by the sale and
15 appealed to the High Court. The appellant is at liberty to pursue his claim against Mr.
Samuel Senjuba Kalule, the husband of the respondent to recover the money he paid to
him without receiving any consideration, subject to the law of limitation. We accordingly
dismiss the appeal against the respondent with costs. We make no order with regard to
the money had and received by first defendant who was a party in the trial court but not
20 the appeals.

Dated at Kampala the 29th day of March 2019



Kenneth Kakuru

Justice of Appeal



Stephen Musota

Justice of Appeal



Christopher Madrama

Justice of Appeal