THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0086 OF 2014

1. JOHN KIHIKA

2. KAIDOLI WILLIAM :: APPELLANTS

VERSUS

ABSOLOM TINKAMANYIRE :::::::::::::::::::::::::: RESPONDENTS

(An appeal from HCT-01-CV-CA-03 of 2006 before Byabakama, J dated 30/11/2012)

CORAM: HON. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. JUSTICE EZEKIEL MUHANGUZI, JA

HON. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF EZEKIEL MUHANGUZI, JA

Introduction

This is a second appeal arising out of the decision of Hon. Justice Byabakama Simon Mugenyi delivered on 30/11/2012 wherein the High Court in exercise of its appellate jurisdiction set aside the judgment and orders of the Chief Magistrate's court of Fort Portal at Fort Portal.

Background

The facts giving rise to this appeal as accepted by the learned appellate judge are that the appellants sued the respondent for trespass on 13 acres of customary land located at Nyakabala, Kyamutasa Parish Kyenjojo District which they inherited from their respective fathers. The respondent contended that he acquired the land through purchase from Egaate Katenga. The trial court found in favour of the appellants and the respondent filed an appeal to the High Court on the following grounds:-

1. ***The learned trial Magistrate failed to evaluate the evidence before her and thus came to a wrong conclusion.***
2. ***The learned trial Magistrate erred in law in holding that one Egaate had no title in the land to pass on to the respondent***

The appeal was successful, and being dissatisfied with the judgment of the High Court on appeal, the appellants filed this appeal on the following grounds;

1. ***That the learned Judge on appeal erred in law when he failed to properly re-evaluate the evidence on record which occasioned a miscarriage of justice to the appellants.***
2. ***That the learned Judge on appeal erred in law when he found that one Egate had authority to sell the suit land to the respondent.***
3. ***That the learned Judge on appeal erred in law when he failed to find that the appellants were lawful owners of the suit land on account of inheritance and adverse possession.***
4. ***That the learned Judge on appeal misdirected himself when he found that there were contradictions and inconsistencies in the appellants' evidence.***
5. ***That the learned Judge on appeal misdirected himself when he allowed the appeal and set aside the judgment, decree and orders of the lower court.***

Representation

At the hearing of the appeal, Mr. Boniface Ngaruye Ruhindi and Mr. Richard Bwiruka, learned counsel appeared for the appellants while Mr. Chris Ibale, learned counsel appeared for the respondent.

Appellants' submissions

Counsel for the appellants submitted that the learned Judge on appeal did not discharge the duty of re-evaluating the evidence and thus caused a miscarriage of justice. He argued that from the evidence of PW1, the suit land was bequeathed to him from his late father in 1944 and the second appellant inherited the land from his father in 1976. He pointed out that the appellants have been in possession of the suit land ever since they inherited the same from their respective fathers until 1998 when the respondent trespassed and fenced the land which evidence was not challenged by the respondent.

Further, that the respondent's evidence clearly showed that he had no agreement of sale and after the court had visited the locus in quo, there was nothing to suggest that there was tea on the said land.

Counsel contended that the appellants led evidence to show that Kalyebara (late son of Egaate) had no claim over the suit land at all and even if he did, Egaate could not lawfully pass good title because she had no letters of administration for the estate of the late Kalyebara. In support of his argument counsel relied on ***Maureen Tumusiime v Macario Detoro & Anor (2006)1 HCB 127*** and *Section 180 of the Succession Act Cap. 162* for the proposition that the executor or administrator of a deceased person is his or her legal representative for all purposes and all property of the deceased. Counsel asked court to

allow the appeal, set aside the judgment of the High Court and reinstate the trial court's decree, orders and judgment.

Respondent's submissions

In reply, counsel for the respondent argued that the appellate Judge was alive to the duty of a first appellate court and properly re-evaluated the evidence and found grave inconsistencies and contradictions in the appellant's evidence.

He argued that the learned appellate Judge faulted the trial Magistrate for making a finding that the vendor had no letters of administration and as such had no authority to sell the land yet there was no evidence to support this finding. Counsel asked court to disallow the appeal with costs to the respondent.

Court's consideration of the appeal

Before I delve into the merits of this appeal, I note that this is a second appeal and the role of this court as a second appellate court is laid down under **Rule 32(2)** of **the Judicature (Court of Appeal Rules) Directions SI 13-10** which provides that;

> ***"On any second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."***

This Court is therefore obliged to appraise the inferences of fact drawn by the trial court.

I also bear in mind the provisions of **Section 72** of the **Civil Procedure Act,** which is the applicable law concerning appeals from the High Court in the exercise of its appellate jurisdiction. It provides:-

"72. Second appeal.

(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;

(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.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

The effect of this provision is to bar appeals on matters of fact or matters of mixed fact and law. In ***Barclays Bank of Uganda Ltd v Gamuli Tukahirwa Court of Appeal Civil Appeal No. 8 of 2016***, Court held that the duty of the second appellate court is not to re-appraise the entire evidence on record as that would amount to assuming the role of the first appellate court. The court only deals with matters of law. The Supreme Court has distinguished clearly the duties cast on a first appellate court and on a second appellate court in the case of ***Kifamunte Henry v. Uganda, Criminal Appeal No. 10 of 1997*** thus;

"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully

weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. **See Pandya v. R [1957] EA 336, Okeno v. Republic [1972] EA 32 and Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985** ***at page 5.***

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 33(i) of the Criminal Procedure Act. It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles: See **P.R. Pandya v. R (supra), Kairu v. Uganda 1978 HCB 123...."**

Therefore, the duty of a second appellate court is to examine whether the principles which a first appellate court should have applied, were properly applied and if it did not, for it to proceed and apply the said principles.

This appeal raises five grounds for consideration by this court, however upon careful consideration of all the grounds raised by the appellants, in my view, the main issue for determination both in this court and the courts below is the issue of ownership of the suit land which is comprised of two parts. This issue will resolve all the issues raised in this appeal.

From the evidence on record, one part of the suit land constitutes five acres which is part of the land that Kihiika John stated to have inherited

from his late father in 1944. The other part of eight acres is part of the 15 acres that William Kaidoli inherited from his late father in 1976.

The evidence of the respondent is that he bought the suit land from Egaate Katenga in 1983 and Egaate Katenga, who testified as DW3 stated that the land belonged to her son Kalyebara Robert who passed away in 1981 and she decided to sell it to the respondent after her son's death.

This being a second appeal, I shall only re-evaluate evidence in as far as the first appellate court did not discharge its duty satisfactorily. Egaate Ketenga sold to the respondent and the appellants claim to have got the suit land as inheritance from their respective late fathers. At the trial court, the 1st appellant testified that he got the suit land from his late father in 1944 and the land had Mapeera, eucalyptus trees, one mango tree and he used to graze on the land which was approximately 4 acres. The suit land borders with Kaidoli (2nd appellant), Luhweza and Muhanga on the other side.

The 2nd appellant (PW2) testified that the land was bequeathed to him by his late father in 1976 and at that time, there was a house with iron sheets and was made of iron and wattle. There were also banana plantations, mango trees, Misambya trees, eucalyptus trees and Mapeera. PW3 testified that he knows the appellants as sons of his brothers and the respondent is his grandson. He testified that the land belongs to the appellants because it belonged to their fathers.

The respondent (DW1) testified that he bought the land from Egaate in 1983 and it had a tea plantation. He paid 150,000/= for the land measuring about 50 acres and he used part of it to grow food and the other part to grow seasonal crops.

From the evidence on record, Egaate allegedly sold the suit land to the respondent without legal rights to the suit land. She testified at the trial court that she sold the land after the passing of her son who she claimed was the owner. It is trite law that property of a deceased person cannot be dealt with or otherwise transferred without the grant of letters of administration. We must note that according to **Section 180** of the **Succession Act,** an administrator of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration has been granted at the moment after the death of the deceased, all that the grant does is give the administrator the legal power necessary to deal with the assets.

Therefore, without a grant of letters of administration, no person has any right whatsoever to sell or otherwise deal with property of a deceased person. The learned appellate Judge found that there was no evidence that DW3 lacked letters of administration and he faulted the trial Magistrate for finding that DW3 could not have sold property allegedly belonging to a deceased person without letters of administration. The appellate Judge held that;

> ***"Agate (DW3) was not challenged in cross-examination that she lacked the requisite authority from court to deal with the estate of her deceased son. It is trite that court should not base its decision on mere speculations or fanciful reasoning but on empirical evidence on record."***

It is my considered view that this was a misdirection on the part of the appellate Judge. Proceeding on the belief that DW3 had authority to sell land not belonging to her is equivalent to court basing its decision on speculations. The party who bears the burden must produce evidence to

satisfy it, or his or her case is lost. The probabilities must be high enough to warrant a definite inference that the allegations are true.

The appellants allege that they got ownership of the suit land from their respective fathers but have no documentation in that respect. Likewise, the respondent claims to have purchased the suit land from DW3 who lacked letters of administration to sell property belonging to her late son. There is also no agreement to prove that DW3's late son was the owner of the suit land.

I must note that in a civil suit, when the evidence establishes conflicting versions of equal degrees of probability, where the probabilities are equal so that the choice between them is a mere matter of conjecture, the burden of proof is not discharged (See: ***Richard Evans and Co. Ltd v. Astley, [1911] A.C. 674 at 687)***. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied (See: **Bradshaw v. McEwans Pty Ltd, (1959) 101 C.L.R. 298 at 305)**. The law does not authorize court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others.

As such, DW3 could not have passed good title to the respondent without such authority to deal with the property.

The learned appellate Judge found that from the testimony of the 1st appellant in which he testified that he was 59 years as of 21st January 2004 and was bequeathed the suit land in 1944, that he was bequeathed the land before he was born. From our calculation of the age, the difference between 2004 and 1944 is 60 years. This actually means the 1st appellant was bequeathed the land when he was about 1 year old and not before he was born as the learned appellate Judge found.

The testimony of PW3 was contradictory and was properly disregarded by the appellate Judge. He testified that the land was given to the 1st appellant by one Kamala who got it from the 1st appellant's father which contradicted the evidence of the 1st appellant who stated that he got the land from his late father.

However, the testimony of the 1st appellant was corroborated by the testimony of PW4 who testified that the said land belongs to the appellants and was bequeathed to them by their late fathers. We reiterate our earlier finding that DW3 could not pass good title to the respondent for reasons that she lacked letters of administration granting her power to sell the suit land.

From the foregoing, I find that the learned Magistrate properly evaluated the evidence on record and rightly found that the suit land belongs to the appellants. I would allow this appeal with costs to the appellants and set aside judgment and decree of the appellate Judge in Civil Appeal No. 3 of 2006.

Dated at Kampala this 23rd day of Jan 2019.

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EZEKIEL MUHANGUZI

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 0086 OF 2014

(ARISING FROM HCT – 01 – CV – CA – 03 OF 2006)

(ARISING FROM ORIGINAL SUIT NO FPT – 00 – CV – CS – 0052 OF 2002)

1. **JOHN KIHIKA}**
2. **KAIDOLI WILLIAM} .....APPELLANTS**

VERSUS

ABSOLOM TINKAMANYIRE} .....RESPONDENTS

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

I have had the benefit of reading in draft the judgment of Hon. Justice Ezekiel Muhanguzi, JA.

I agree with the analysis of the facts and the law in the said judgment and concur that this appeal succeeds on the terms proposed in the judgment. However, I have a few words of my own to add.

The cause of action of the appellants in the trial court was in trespass. Secondly, the appellants had prior to the said trespass in 1998 been in possession of the suit property. It was therefore crucial and a material point to establish whether they had been in possession of the suit property for a continuous period of 12 years or more without any interruption or challenge by the purchaser who is the respondent to this appeal. I note that the suit had been filed in 2002 after the promulgation of the Constitution of the Republic of Uganda in October 1995. Nonetheless, the definition of a bona fide occupant or lawful occupant under section 29 of the Land Act,

Cap 227 which was the law in force in 1998 does not seem to definitively cover a person in possession continuously of unregistered land unchallenged by the customary owner thereof for a period of 12 years or more. Section 29 seems to apply to situations where the occupant is not challenged by a registered owner of land. I note that as customary owners of the suit property, the rights of the appellants were generally guaranteed by Article 237 of the Constitution the Republic of Uganda and the Limitation Act Cap 80. Article 237 (3) of the Constitution recognised customary tenure as one of the land tenure forms of ownership in Uganda. Secondly, Article 237 (4) (b) conferred on customary owners the right to convert their tenure into freehold land by registration. By the time of the trespass the appellants claimed to be customary owners who inherited the land from their parents. The appellants also claimed to have utilised the land long before the 1960s up to the time of the trespass.

The second matter, which revolves on a question of fact, but which is not for consideration in this appeal, is the extent of the trespass. This was dealt with through a visit to the locus of the dispute by the trial magistrate. There was controversy as to which part of the property was sold by the late Egaate Katenga in 1983 to the respondent having in mind that the respondent claimed to have bought 50 acres while the claim of the appellants related to only about 13 acres of land. This was resolved in favour of the appellants by the trial magistrate. It was material before dealing with the issue of the root of title to evaluate and determine the issue of the extent of the title allegedly acquired by the respondent. This occasioned a miscarriage of justice to rely solely on whether the properly in issue belonged to the estate of the late Kalyebara, son of the vendor.

In any case, having allegedly bought the property in 1983, 12 years thereafter expired in 1995. The trespass cause of action arose in 1998 about 15 years later when the appellants were in possession. It was therefore

material for the plaintiffs who are the appellants in this court to show that they occupied the piece of property for over 14 years from 1983 before the trespass. Section 6 (1) of the Limitation Act, Cap 80 gave the appellants a right to bring an action in trespass as persons who have been in possession of the land. This is because they were dispossessed through fencing off by the respondent after being in possession of the property for more than 14 years from the time of the alleged purchase of the property. To put it in the negative, the respondent was barred by the law of limitation under section 5 of the Limitation Act from bringing any action to recover the land from the appellants having allegedly purchased it more than 14 years earlier. Further, having allegedly bought the property, the respondent did not go into occupation for a period of over 14 years from 1983 until the time of the trespass in 1998. The respondent was barred by the equitable doctrine of lapses from claiming the land.

All in all I agree with the decision of my learned brother Honourable Justice Ezekiel Muhanguzi, JA that the late Egaate Katenga who allegedly sold land belonging to her deceased son did not have authority to do so without authority of court through the grant of letters of administration or probate to the estate of the deceased.

In the premises, I concur with the orders proposed by my learned brother and I have nothing further to add.

Dated at Kampala the 23rd day of January 2020

Christopher Madrama Izama

Justice of Appeal

THE REPUBLIC OF UGANDA

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CIVIL APPEAL NO. 0086 OF 2014

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2. **KAIDOLI WILLIAM========== APPELLANTS**

VERSUS

ABSOLOM TINKAMANYIRE ==========RESPONDENT

CORAM: Hon. Mr. Justice Geoffrey Kiryabwire, JA

Hon. Mr. Justice Ezekiel Muhanguzi, JA

Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF MR. JUSTICE GEOFFREY KIRYABWIRE, JA

JUDGMENT

I have had the opportunity of reading the draft Judgment of my brother Hon. Mr. Justice Ezekiel Muhanguzi, JA.

I agree with his Judgment and I have nothing more useful to add.

Dated at Kampala this.....23rd..... day of .....Jan.....2020.

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE

JUSTICE OF APPEAL