IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 115 of 2019

In the matter between

P'ODUR MILLS **APPELLANT**

And

WATMON BERRY **RESPONDENT**

Heard: 19 February, 2021.
Delivered: 23 April, 2023.

Civil Procedure - *Jurisdiction - two or more courts from different systems have concurrent jurisdiction over a case if all of the courts simultaneously have the power to hear it; the jurisdiction of one is co-extensive with that of the other.*

Land law - *a donor of unregistered land cannot transfer by allocation what he or she does not possess.*

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] During the year 2006 the respondent sued the appellant in the L.C.II Court at Pawat Omero Parish, Purongo sub-county, Nwoya District, seeking a declaration that the land in dispute situate at Olwiyo Trading Centre belonged to him. The respondent claimed to have been allocated the land in dispute during the year 1978 by an officer from the Gulu Urban Office in the presence of the then sub-

county Chief, a one Mr. Peter Otto. The respondent claimed to have constructed thereon a six-roomed building but during the year 1987, the local population was re-located to Karuma during the LRA insurgency leading to the collapse of the building. Upon his return during the year 1994 at the end of the insurgency, he re-constructed a semi-permanent house on the land which he let the appellant occupy as caretaker.

[2] Later the respondent brought onto the land truckloads of bricks in preparation for the construction of a permanent building on the land but the appellant's brother, a one Komakech, sold them off, while at the same time the appellant attempted to sell off the land to a one Ojera. On or about 20th June, 2006 the respondent issued the appellant with a notice to vacate the land but the appellant refused to honour the notice, hence the suit during the hearing of which the respondent presented receipts of payment of rates for December, 1999 to the then Gulu District Administration as proof of his interest in the land.

[3] The appellant's defence was that the land originally belonged to his father, a one Mr. Abuneri Odur. During or around the years 1984-1985, taking advantage of the absence of the appellant's father, the then leader of Olwiyo trading Centre engaged in an unlawful exercise of re-allocation of land. It is during the year 1995 that the appellant's father stopped the respondent from digging a foundation on the land. Ten years later, the respondent revived his claim to the land by filing a suit before the L.C.II Court which on 29th July, 2006 decided in favour of the respondent. The appellant's appeal to the L.C.III Court at Purongo was dismissed. The appellant appealed further to the Chief Magistrate' Court of Gulu which on 11th February, 2007 too dismissed the appeal for want of prosecution. The appellant successfully sought its re-instatement whereupon it was decided on 12th July, 2019 in the respondent's favour.

The grounds of appeal;

[4] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The Chief Magistrate erred in law and in fact when he failed to evaluate the evidence on the record as a whole when he quashed the L.C.III Court judgment of Purongo sub-county and confirmed the L.C.II Court judgment of Pawatomero Parish without considering the question as to whether the persons who purported to allocate the suit land to the respondent had legal authority to do so, hence came to a wrong conclusion.
2. The Chief Magistrate erred in law and in fact when he failed to evaluate the evidence on record as a whole when he quashed the LC.III Court judgment of Purongo sub-county without any documentary evidence to show that the respondent was lawfully allocated the suit land in 1978 by the same officers of Gulu Urban Office, hence came to the wrong conclusion.
3. The Chief Magistrate erred in law and in fact when he failed to evaluate the evidence on record as a whole when he quashed the LC.III Court judgment of Purongo sub-county and confirmed the L.C.II Court judgment of Pawatomero Parish without consideration whether the L.CII Court had jurisdiction to hear the case.
4. The Chief Magistrate erred in law and in fact when he failed to evaluate the evidence on record as a whole when he quashed the LC.III Court judgment of Purongo sub-county and confirmed the L.C.II Court judgment of Pawatomero Parish, which misconstrued and disregarded most of the appellant's evidence like graveyards, tamarind tree and evidence of his witnesses on record.

The submissions of counsel for the appellant;

[5] Counsel for the appellant submitted that the L.C.II Court at Pawat Omero Parish, Purongo sub-county, Nwoya District decided in favour of the respondent on account of allocation that occurred during the year 1978. The respondent did not produce any proof of allocation save a general receipt issued by the Gulu Urban Office during December, 1999. Ther was no evidence of such authority having been vested in that Urban office by the Uganda Land Commission. The respondent had no proof of application for nor grant of a lease. Considering that he was 44 years old at the time he appeared and testified before the L.C.II Court during the year 2006, the respondent must have been 16 years old at the time of the alleged allocation in the year 1978. He had no capacity to contract at that age. On the other hand, the appellant proved that he had been in possession for a long time until his possession was interrupted by the war. The L.C.II Court is not a Court of first instance; it only has appellate jurisdiction. That Court as well misconstrued and disregarded most of the appellant's evidence like graveyards, tamarind tree and evidence of his witnesses on record. This evidence disproved the respondent's claim that the land was vacant at the time it was allocated to him.

The submissions of counsel for the respondent;

[6] Counsel for the respondent submitted that the grounds of appeal are argumentative and repetitive. The respondent presented sufficient documentary evidence to support his case. He presented a receipt for a building permit and other payments made to the urban authorities. The urban authorities knew and recognised his interest in the land. The respondent produced witnesses who corroborate his testimony. The local council courts had jurisdiction to hear the case. The learned Chief Magistrate properly evaluated the evidence. When the L.C.III Court visited the *locus in quo* it found evidence of bricks and the foundation of the respondent. There was no graveyard on the land. It is the respondent\'s uncle that planted the tamarind tree. The appeal should therefore be dismissed.

The decision;

[7] It is the duty of this court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[8] In its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

i. **Ground 3;** the L.CII Court's jurisdiction to hear the case at first instance.

[9] It is trite law that the jurisdiction of courts is a creature of statute. A court cannot exercise a jurisdiction that is not conferred upon it by law. Therefore, whatever a court purports to do without jurisdiction is a nullity *ab nitio*. It is settled law that a judgment of a court without jurisdiction is a nullity and a person affected by it is entitled to have it set aside *ex debito juditiae* (see *Karoli Mubiru and 21 others v. Edmond Kayiwa [1979] HCB 212; Peter Mugoya v. James Gidudu and another [1991] HCB 63*). The law in force at the time was *The Local Council Courts Act, 2006* which under section 11 (1) provided as follows;

> (1) Every suit shall be instituted in the first instance in a village local council court if that court has jurisdiction in the matter……"

[10] The implication of that provision was that the proceedings ought to have begun at the L.C.1 Court level. However, section 76A of *The Land Act* (introduced by section 30 of *The Land (Amendment) Act, 2004*), divested L.C. I Courts of primary jurisdiction over disputes in land, providing instead that "the Parish or Ward Executive Committee Courts shall be the courts of first instance in respect of land disputes." The impact of that amendment was considered in *Busingye Jamia v. Mwebaze Abdu and another, H. C. Civil Revision No. 33 of 2011*, which was cited with approval by the Court of Appeal in *Nalongo Burashe v. Kekitiibwa, C. A. Civil Appeal No. 89 of 2011* where it was held that as a result of that amendment, the L.C.II Court had original jurisdiction to hear and determine disputes over land.

[11] At the same time, by reason of section 95 (7) of *The Land Act*, jurisdiction over land disputes was divested from Executive Committee Courts and magistrates' Courts and vested in District Land Tribunals as from 2nd July, 2000. However, section 98 (7) of *The Land Act* was amended by *The Land (Amendment) Act, 2004* to read:

> (7) Until the land Tribunals are established and commence to operate under this Act, Magistrates Courts and the Local Council Courts shall continue to have jurisdiction they had immediately before the commencement of this Act.

[12] Therefore, the Executive Committee Courts were to continue to have the jurisdiction they had immediately before the 2nd of July, 2000 until establishment and commencement of operation of the land tribunals. By 26th July, 2006 when the L.C.II proceedings in the instant case were initiated, there is no evidence to show that there was a District Land Tribunal that had been constituted and operationalised under section 76 (1) (c) of the Act, with geographical and pecuniary jurisdiction to determine land disputes as the court of first instance, and that the land matters now in issue did not exceed two thousand five hundred currency

points. The establishment and operationalisation of a District Land Tribunal for the area in question was a question of fact that required evidence.

[13] That aside, it is noteworthy that whereas section 76A of *The Land* Act as amended constituted the Parish or Ward Executive Committee Courts into courts of first instance in respect of land disputes, the Act at the same time under section 76 (1) (c) conferred jurisdiction unto District Land Tribunals to determine disputes as the court of first instance in all land matters where the subject matter did not exceed two thousand five hundred currency points. The Act in effect created concurrent jurisdiction shared by the two forums with regard to cases falling within the specified pecuniary limits of the latter. Two or more courts from different systems have concurrent jurisdiction over a case if all of the courts simultaneously have the power to hear it; the jurisdiction of one is co-extensive with that of the other.

[14] In order to prevent conflicting decisions and promote adjudicative efficiency, normally, in the case of concurrent jurisdiction, when one authority has taken cognisance of the matter, then the other authority would not take cognisance of the said subject-matter. To the extent that there is no evidence to show that at the time the proceedings of the L.C.II Court at Pawat Omero Parish, Purongo sub-county were commenced, i.e. 26th July, 2006 there was in place a Nwoya District Land Tribunal ousting its jurisdiction, the proceedings and judgement of the L.CII Court cannot be declared a nullity. In the circumstances, this ground of appeal fails.

ii. **Grounds 1 and 2;** invalidity of the allocation that occurred in 1978.

[15] Where questions of title to land arise in litigation, the court is concerned only with the relative strengths of the titles proved by the rival claimants. The plaintiff must succeed by the strength of his or her own title and not by the weakness of the defendant's. To be entitled to evict the appellant from the land, the respondent had to prove a better title to the land**.** If someone is in possession and is sued for

recovery of that possession, the plaintiff must show that he or she has a better title. If the plaintiff does not succeed in proving title, the one in possession gets to keep the property, even if a third party has a better claim than either of them (see *Ocean Estates Ltd v. Pinder [1969] 2 AC 19*). The respondent did not prove a better title.

[16] The instance of title claimed by the respondent was by way of allocation during the year 1978, by an officer from the Gulu Urban Office in the presence of the then sub-county Chief, a one Mr. Peter Otto. The principle of *nemo dat quod non habet* no-one can give something they do not possess), will apply in the absence of statutory provision to the contrary. A donor of unregistered land cannot transfer by allocation what he or she does not possess (see *Mwebesa and three others v. Shumuk Springs Development Limited and three others, H.C. Civil Suit No. 126 of 2009*). He or she who has no title cannot transfer one (see *Mortgage Business plc v. O'Shaughnessy [2012] 1 WLR 1521*). The common law principle of *nemo dat quod non habet* has long held that a person cannot convey a superior title to the one already held. Consequently, urban authorities or other statutory entities have no capacity to allocate land that is not vested in them (see *Nyumba Ya Chuma Ltd v. Uganda Land Commission and another, Constitutional Petition No. 13 of 2010*).

[17] At the time the time during the year 1978 when the respondent claimed to have been allocated the land in dispute by the Gulu Urban Office, *The Public Lands Act, 1969* had renamed what was formally Crown land, public land and vested it in the Uganda Land Commission. Under section 25 of the Act, the Uganda Land Commission was empowered to make a grant in freehold or leasehold of public land. The marginal note to section 15 provided for ""leases to urban authorities" and stated that;

> Where by operation of this Act either at the commencement thereof or any time thereafter land which is situated in an area over which an urban authority exercises jurisdiction is vested in or transferred to a land board shall be the responsibility of the land board.

[18] Section 23 (2) of the Act empowered the Commission to grant to Urban Authorities of designated areas, such leases and on such terms and conditions as the Minister

would direct and any lease so granted would be deemed to be a statutory lease. Subsequently, under section 1 of *The Land Reform Decree of 1975* all land in Uganda was declared public land to be administered by the Uganda Land Commission in accordance with *The Public Lands Act* of 1969, subject to such modification as were necessary to bring the Act into conformity with the Decree.

[19] Accordingly, one can transfer only what one owns or is authorised to transfer, and the buyer or allocatee can acquire no more than what the transferor can transfer legally. As an Urban Authority, Gulu Urban Office could only derive the capacity to allocate land to the respondent, as it purported to do in 1978, by way of an offer a lease upon prior acquisition of the status of a controlling authority, presupposing therefore that it had been granted a statutory lease over public land within its area of jurisdiction, by the Uganda Land Commission. In absence of a prior grant of a statutory lease by the Uganda Land Commission, Gulu Urban Office had no capacity to allocate any land. Even if it did, that authority could only be exercised by way of grant of a lease offer. In the circumstances, the leaned Chief Magistrate misdirected himself when he dismissed the appeal without taking into account the respondent's claimed root of title. These two grounds of appeal therefore succeed.

iii. **Ground 4;** misdirection in the evaluation of evidence.

[20] In the case of unregistered land, the Court is required to establish the root of title. The chain of title has to be investigated back to the root of title to confirm that the claimant actually lawfully obtained interest being asserted. This means identifying the proprietary interest that commenced the chain of ownership which ends with the current claimant. This means examining the record of all transactions that could affect the title, e.g., sales, mortgages, deaths and probates. If any transaction earlier in the chain was void because of fraud, forgery, mistake or some other reason, the claimant's title may be defective and void against anyone who may have been wrongly deprived of the land or interest in question.

[21] A good root of title must begin with a recognisable description of the land and vest ownership of the whole legal and equitable interest in the land in question, into an identified person or group of persons, without anything that casts any doubt on the title. The chain in the ownership of the land should be unbroken right from the root to the present-day claimant. The description of the land should be consistent and correspond with the actual land physically inspected.

[22] It was the respondent's case that following the allocation of what was hitherto vacant land, during the year 1979 he constructed a six roomed building on the land; three in front and three at the back. When the area was engulfed by insecurity during the year 1987, he abandoned the building. On return during the year 1994, he found the structure had been unroofed and the walls demolished. He used some of the bricks to construct a house for his mother, but she feared to occupy it. Instead, the appellant's brother, a one Okecha, occupied it. hen the respondent attempted to re-construct the building; he was stopped by the appellant. The respondent disputed the appellant's claim that the tamarind tree located on the land was planted by his relatives, but contended rather that it was planted by Opobo Yaleri. He was supported by the testimony of one of the owners of a neighbouring plot, Opobo Yaleri.

[23] Another witness, Alfred Odongtoo, testified that the land in that trading centre was being allocated by a one Ojera since the early 1960s. It is during the insurgency of 1987 that they vacated the area due to the insecurity. A one Ojok Yaleri too testified that it is the respondent who had a building on the land before the insurgency. The land in issue was under the control of government and t is on that basis that the allocations were done. The respondent produced receipts indicating payment of ground fent to the sub-county.

[24] On the other hand, the appellant relied on the testimony of Oringa Faustino who stated that the allocation followed a forceful expropriation by the Urna Officer. Before that, the rea in dispute belonged to the appellant. This was corroborated by

Otto Andrew and Onyutta Albino who testified that a one Abuderi Odur had a house on the land at the time the allocations were done during Idi Amin's regime. As proof of that occupancy, he showed the Court the existence of a *Cwa tree*, graves, and foundation of the house. During the year 1963, the appellant's father Abuneri Odur ran a shop in the Olwiyo Trading Centre and in 1970 purchased the approximately one acre of land now in dispute from a one Yosua Okello, next to that of Opobo Yaleri. He left his wife *Min* Lamunu Teopista in possession.

[25] During 1984-1985 the land was partitioned without his consent and allocated to different persons by the civic leadership of the trading centre, who included Ojera Charles and Odongtoo Alfred. The allocatees had connections to the UNLA, which fact deterred the appellant from taking remedial action. This was later compounded by the LRA insurgency that resulted in displacement. During the year 1993-94 he permitted the respondent to construct a house for his mother on the land. The respondent's mother is an aunt to the appellant, but she never occupied the house. Instead around 1994 the respondent begun digging another foundation for raising a commercial building on the land, which activity the appellant stopped.

[26] Form the two versions, it is evident that while the appellant's root of title is traceable to acquisition through purchase by his father Abuneri Odur during the year 1970, the respondent's claim is traceable to a rudimentary process of expropriation and allocation by the civic leadership of the trading centre. While purchase and expropriation are methods of acquisition of title, both are regulated by law; the former by the common law of contract and the latter by statutory provisions. There was no evidence led controverting Abuneri Odur's acquisition of land by purchase, yet the respondent's allocation had no statutory foundation. Not only was Abuneri Odur's acquisition earlier in time, but it was also based on a version that was never discredited by any evidence to the contrary. The only issue therefore that had to be decided was whether the civic leadership of the trading centre or the Gulu Urban Office had the legal capacity to deprive the appellant of the land and re-distribute it. Had the Chief Magistrate e's Court properly re-evaluated the evidence, it would

have come to the conclusion that this was not the case. This ground of appeal therefore succeeds.

Order:

[27] In the final result, the appeal succeeds. Consequently, the judgment of the court below is set aside. Instead, judgment is entered for the appellant against the respondent declaring the land in dispute to be the property of the appellant. The costs of the appeal and of the court below were awarded to the appellant.

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Stephen Mubiru

Judge

Appearances

For the appellant : M/s MOM Advocates.

For the respondent :