

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT GULU**

HCT – 02 – CV – CA – 0022 – 2003

(Arising from Gulu Civil Suit No. Gul – 00 – CV – CS – 0065 – 2002)

1. **LATIM ALEX**
2. **AKELLO SOPHIA ::::::::::::::::::::APPELLANTS**

VERSUS

BANYA CHRIS :::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

The respondent to this appeal sued the appellants as defendant in the Chief Magistrate’s Court Gulu, Civil Suit Number 065 of 2002 seeking as against the appellants an eviction order, a permanent injunction against use and enjoyment and, mesne profits in respect of the piece of land known as plot 265, Alex Latim Road, Pece, Gulu Municipality.

The respondent’s case was at trial and still is in this appeal that his late wife, Bency Cornelia Lamunu, whose estate the respondent is administering, was owner of the said suit land having bought the same from one John Bosco Odoki on 06.07.1998.

On the other hand, the appellants on their part, contended that the suit land belonged to their father, the late Rudolf Otto, whose estate the first appellant, Latim Alex, is the administrator, and therefore the suit plot is family property of the late Rudolf Otto. Those family members never consented to the sale of the plot by John Bosco Odoki, who is their brother, to the late Bency Cornelia Lamunu, wife of the respondent.

The trial court decided the case in favour of the respondent against the appellants, ordered that, appellants vacate the suit land and a permanent injunction restraining them from interfering with the respondent’s use and enjoyment of the land was granted. The respondent

was ordered to pay compensation for any hut or house of the appellants in respect of which compensation had not been paid.

The appellants dissatisfied with the judgment appealed to this court.

At trial of the case in the court below, the appellants were represented by the Legal Aid Project of the Uganda Law Society. In the appeal they appeared on their own, unrepresented.

The respondent was all along represented by Messrs Odongo and Co, Advocates, both at trial and on appeal.

Written submissions were filed in appeal by both parties to the appeal which is based on three grounds of appeal; namely:-

1. The Trial Magistrate erred in law and facts by refusing to accept documentary evidence on the ground that the same was secondary; and declared it null and void which could have guided him to reach a fair judgment.
2. The trial Magistrate erred in law and facts when he decided to hear the case while the evidence in court was to the fact that this land in question was sold to the plaintiff without the family consent.
3. The trial Magistrate erred in law and facts by failing to evaluate the evidence thereby arriving at a wrong decision.

At the outset this court finds no merit in the second ground of appeal. Whether or not there was evidence before the trial court that the suit land was sold without the family consent, could not in any way bar the court from proceeding to hear the case that was before it. The court had jurisdiction to hear and determine the case, and court did so. The second ground of appeal therefore has no merit. The same is disallowed.

The first and third grounds of appeal will be considered together as both of them concern the issue whether or not the trial magistrate properly dealt with the evidence that was adduced before him.

This court is also conscious of its duty as the first appellate court, namely, that of re-hearing the case, as it were, by re-evaluating the evidence that was given in the case, and make its own inferences, reach its own conclusions, bearing in mind that it did not have the opportunity to observe the demeanour of witnesses at trial. Thus this court, in carrying out its duty as the first appellate court, has to be guided by the observations of the trial court as regards

the witnesses' demeanour when they were testifying before the trial court: whether that demeanour brought out the particular witness as truthful or not: See **PANDYA VS R (1957) EA 336; and also: SUPREME COURT OF UGANDA CRIMINAL APPEAL NO. 10 OF 1998: BOGERE CHARLES VS UGANDA**

In the course of the trial, the second appellant, who testified as PW4, in the suit, exhibited a sale agreement dated 06.05.2000 which was exhibited as exhibit DEXH 1 as one of the pieces of evidence that her father, late Rudolf Otto, had acquired the suit land by purchase in 1983 from one Jeromia Abaka, DW2.

According to DW2, the agreement signed in 1983 between herself and the appellant's father got lost. So in 2000 another document exhibit DEXH1 was executed by her at the prompting of DW1, the mother of the appellants and both appellants. The same was executed in the presence of the LCI chairman, who, unfortunately, had died by the time of the trial of the suit.

With regard to this agreement, the trial magistrate, after considering the evidence on the matter held at page 3 para 7 of the judgment that:-

“ Much as the defendants claim that the original sale of land agreement is lost, it is not expedient and acceptable in law for a similar document to be executed when some of the signatures to the original document do not sign it. In other words, the sale agreement tendered by the defendants is null and void ab initio. One can easily suspect that this agreement was simply written, backdated in order to defeat justice”

With respect to the learned trial magistrate, he was not right to regard the document, exhibit DEXH 1 as a copy of the original agreement of 1983 that DW2 and others on appellant's side claimed to have got lost. It was not and the appellants and their witnesses in their respective testimonies to court did not claim the said exhibit to be a copy of the original 1983 agreement.

DW3 Latim Alex, the first appellant, explained how exhibit DEXH1 came to be executed. According to him, when PW3 Odoki John Bosco began selling their family land, the appellants, by way of protest and insisting against the sale, took the matter to the relevant authorities. He stated in his evidence:

“ We went to LCI to investigate. He (Odoki) said he did not know of the agreement. We informed the land supervisor and he said the LCI was to solve the dispute. At this meeting a new agreement was signed to represent the old one that got lost”

The evidence of DW2, Jeromia Abaka, who testified that he sold the suit land to Rudolf Otto, the father of appellants as exhibit DEH 1, was to the effect that:-

“ There was an agreement to that effect signed in 1983. It got lost. Some few years ago I signed another agreement relating to the land I was called by Df1. He was there when this agreement was signed. Others present were Ladwee Eribedica, DW1 was there, Df II. The LCI chairman who signed that time is dead now.”

DW1 Rosemary Acan, mother of the appellants and also mother to DW3 Odoki John Bosco, who (Odoki John Bosco) sold the land to respondent's wife and also widow (DW1) to late Rudolf Otto, father of appellants, as well as DW3 confirmed the contents of exhibit DEXH1.

DW4 Akello Sophia, the second appellant tendered the said exhibit to court and as such must be taken to have been familiar with it.

It would appear that the contents of this exhibit DEXHI, written in Acholi language, is if translated into English, (there is an English translation attached to it) a mere acknowledgment and confirmation by Jerolina Abak(Jeromina Abaka: DW2) that she gave land to Rudolf Otto in 1983. The document was then thumb printed by Jeromina Abaka:DW2, and Rosemary Acan, DW1, mother of appellants (and Odoki John Bosco) and widow to Rudolf Otto, as well as the second appellant, who also thumb printed it as witnesses to the document. The chairman LCI, vanguard sub ward, Pece Division, where the land is situate also stamped and witnessed the document by signing on the same. The date of writing, signing and witnessing the document is clearly stated as being 06.05.2000. There was no attempt to backdate the document. As already shown the circumstances under which the document came to be written were explained by the appellants and their respective witnesses.

In the considered view of this court, on a proper evaluation of the relevant evidence, there was no basis for the learned trial magistrate to conclude that the document: exhibit DEXH1 was written and back dated in order to defeat justice.

Court also finds that there is nothing in sections 62 and 63 of the Evidence Act, Cap. 6, that would bar court from considering and accepting exhibit DEXH1, as documentary evidence.

Thus in holding as he did with regard to exhibit DEXH1, the trial magistrate erred.

Apart from the existence of exhibit DEXH1, and indeed, even independent of exhibit DEXH1, there was adduced before court evidence that court ought to have evaluated so as to resolve as to who of the appellants and the respondent had established right title to the suit land.

For the respondent the evidence adduced was that he claimed ownership of the suit land because his late wife Bency Cornelia Lamunu had bought the same from Odoki John Bosco, PW3; who too confirmed in his testimony that he had sold the land to the respondent's late wife. Odoki John Bosco claimed that the land he sold had been given to him in 1980 by PW2: Vantorina Anyako. In her evidence PW2, Vantorina Anyako, confirmed having given the land to John Bosco Odoki in 1980 because he, Odoki, had taken care of her land very well. This witness did not explain how she had acquired the land herself. She however confirmed that the father of the appellants Otto Rudolf had been buried on the suit land. She also explained that she was a sister to DW1 Rosemary Acan, mother of appellants and John Bosco Odoki. PW2 confirmed that on her giving the land to John Bosco Odoki, the appellants raised a complaint that the land in question belonged to their father Otto Rudolf. PW4: Otim Patrick, LCI Secretary for defence confirmed also that after land had been bought by respondent's wife from Odoki, there were attempts to compensate the appellants and that the appellants asserted that part of the land sold did not belong to Odoki.

For the appellants, DW1, Rosemary Acan, widow to Rudolf Otto, and mother to both appellants and Odoki John Bosco, to whom Rudolf Otto was the father, testified that her husband bought the suit land from DW2, Jerolina Abaka in 1983. She, her husband and the appellants settled on the land after it had been purchased. She asserted that the land that Vantorina Anyako had in the area, she (Vantorina Anyako) sold part of it, and part of it she gave to Odoki. She was emphatic that this particular piece of land in dispute belonged to her late husband Rudolf Otto, and after his death, the same passed to her and the appellants as family land. She maintained that one of her sons, John Bosco Odoki, had no right to sell this land to the

wife of the respondent. By selling the land without the family consent, Odoki John Bosco, had in effect stolen the land.

DW2, Jeromia Abaka, confirmed having sold the suit land to Rudolf Otto in 1983. She herself had acquired the suit land from her father.

The first and second appellants who at trial testified as DW3, and DW4 saw their father buy the land from DW2 in 1983. The size of the land was 18x35 metres. There is a grave of the relative of their father and also when their father died, he was buried there. As a family they had three (3) buildings on the land. In 1995, when the appellants' father died, Odoki, started to sell land in the area, including the one belonging to the family. The family resisted this by taking the matter to the Local Councils, Police and to Gulu Municipal Council. Efforts to pay compensation to them as a family never materialized. The appellants and the rest of the family members resisted the buyer of the land from taking possession of the same.

DW5: Odida Simon: DW6: Otim Sam John: both young brothers of the appellants confirmed the suit land being their family land.

It was not disputed at the trial and on appeal by the respondent that there are graves of the appellant's family members including that of their father, Rudolf Otto, on the suit land, and further that the appellants' family has house structures on the suit land, and further, that since about 1983 the family of the appellants has continuously stayed and worked on this land.

The evidence of the respondent's witnesses themselves supports and collaborates the claim of the appellants that the suit land is and was their family and as at the time of the purported purchase by respondent wife from Odoki. For example: para 3 PW1 Banya Chris stated: page 3 of the proceedings

“ Odoki was to compensate the defendants for their houses and the graves that were there. Odoki compensated the defendants and my late wife was then free to ferry building materials. “

On being challenged by the second appellant that no compensation was effected the witness stated:

“ I leave the issue of your (defendant 2) compensation to the next witnesses”: See last paragraph: page 3 of the proceedings.

Pw2: Ventorina Anyako from whom Odoki John Bosco is said to have acquired the land sold to the respondent's wife acknowledged on page 4 para 4 of the proceedings that:-

“Later on defendants raised complaint that the land in question belongs to their father Otto Rudolfo. He was buried on this piece of land”

PW3: Odoki John Bosco, who sold the land, confirmed on page 5 para 2 that:-

“ my father and other close relatives are buried in this plot I sold”

PW4: Otim Patrick, LCI Secretary for defence of the area where the suit land is situate, confirmed that the appellants complained that they had not been compensated for their huts, graves and trees.

As to houses, however, the trial court held on page 3 paragraph 6 of the judgment that:

“ It was on this plot that most of the houses of the defendant's family are situated”

By so holding, the trial court was in effect, making a finding that the suit land belonged to the appellants' family. However, the trial court, in a contradictory manner, proceeded to hold in the same paragraph that:-

“ on the whole, I find that the plaintiff has indeed proved his case on a balance of probability whereas the defendants have failed to satisfy court as to the ownership of the suit property”

The above finding, in the considered view of this court, was not only contradictory but is also not supported by the evidence adduced before court.

This court, on a re-evaluation of the evidence finds that the fact that the appellants proved, and were not contradicted by the respondent that:-

- i. They had their houses as a family on the suit land.
- ii. There were graves of their father and other close relatives on the suit land.
- iii. They were in actual occupation of the suit land.
- iv. They had consistently, asserted their claim to the suit land as being family land and that as a family they had not consented to the sale of the land; established on a balance of probability, the case of the appellants as against the claim of the respondent.

The respondent's wife bought the suit land from John Bosco Odoki while on notice of the interests of the appellant family in the land.

This notice was the fact that the appellants, their mother, DW1 and brothers, DW4 and DW5 were on the suit land, had their house structures thereon and had graves of their family members, including that of Rudolf Otto, husband to DW1 and father to appellants, thereon.

In **Sejjaka Nalima vs Rebecca Musoke: CA No. 12 of 1985: (1992) 5 KALR 132, Odoki, J.A.** (as he then was) stated:

“ While the burden of proving the case lies on the plaintiff, it is well settled that the onus of establishing the plea of a bonafide purchaser lies on the person who sets it up. It is a single plea and is not sufficiently made out by proving purchase for value and leaving it to the plaintiff to prove notice if he can”

Applying the above holding to the facts of this case, court holds that the respondent is not protected and did not discharge the burden of proving being a bonafide purchaser for value without due notice of the appellant's interests in the suit land.

Before the trial court there was an attempt on the part of the respondent to prove that the appellants and the rest of their family had consented to the sale and had been compensated in respect of the suit land.

However, none of PW1: Banya Chris, PW2 Ventorina Anyaka, PW3 Odoki John Bosco and PW4 Otim Patrick emphatically stated that the appellants and the rest of the family had agreed to the sale of the land and/or that they had been fully compensated. The respondent's evidence on this point was very contradictory. He testified that Odoki compensated the defendants, but then also went on to state that his wife had agreed to compensate the first appellant with shs 1,500,000/= and that it was agreed that second appellant could stay on the land till further notice. On being cross examined by second appellant, respondent opted to leave the issue of compensation of second appellant to be handled by the next witness. Respondent did not clarify to court whether shs 1,500,000 was ever paid to the first appellant.

According to PW2 in supporting respondent's case, she stated that shs 90,000/= was paid as compensation for the hut of mother of second appellant by wife of respondent. This witness did not state to whom this money was paid. Neither DW1 or any of the appellants were cross

examined by respondent's counsel about the issue of receipt of this money. The issue was never put to any one of them at the trial.

PW3 Odoki John Bosco claimed that both appellants were involved in the sale and handover of the land to the respondent's wife. The same witness however, also stated that only the second appellant signed the handover and that the first appellant was not there. This witness however further contradicted himself in cross examination, when he stated that he did not inform the appellants of the sale of the land because the land belonged to him and not to the family. This witness first stated that compensation had been paid for all grass thatched houses by payments to the first appellant, then second appellant and then the area LCI chairman, Mr. Opira. The same witness however went on to state that one of the houses for appellants had not been compensated for.

PW4: the area secretary for defence, who is supposed to have witnessed the compensation, stated he was present at the time of compensation of appellants by one Odong, father of the wife of the respondent and that the buyer and seller had documents of the compensation. This same witness, who stated compensation had been paid to the appellants, contradicted himself under cross examination by the first appellant when he stated that with regard to first appellant:-

“it is only your house that has not been compensated for”

Odong, father of the buyer of the land, who is stated by this witness to have compensated the appellants did not testify in the suit. No reason was furnished to court as to why he did not testify.

PW2 and PW4 also gave no explanation as to why shs 90,000/- intended to be compensation to the mother of the first appellant had to be paid through Opira Stephen, chairman LCI and not direct to the mother.

As to documents produced before court exhibit PEXH2: dated 26.01.200 is to the effect that Odoki John Bosco handed over the authority of plot 265, Alex Latim Road, to Miss Bency Cornelia Lamunu, respondent's wife, in the presence of the local Councillors. This documents was not signed by the first appellant or DW1, mother of appellants. Though the name and what appears to be a signature of Sofia Akello, second appellant are there, she was never cross examined about the document, let alone asked to confirm whether the signature was hers. The exhibit, PEXH2 is therefore no proof that second appellant consented to the sale of the suit

land. At any rate, even if she did consent there is nothing in the exhibit to conclude that she consented for the whole family of Rudolf Otto; who claimed ownership of the land.

Exhibit PEXH3, dated 06.07.1998, states that John Bosco Odoki had given away his plot No. 265 on Alex Latim Road, to Miss Bency Cornelia Lamunu with full responsibility over the same from 06.07.1998 at a cost of shs 3,300,000/= .

None of the appellants signed this document. Their mother, DW1 did not also sign the same. This exhibit has writings on it that plot 265 had on it 6 (six) grass thatched houses, 3 (three) graves and trees. At the back of the exhibit there are figures of shs 140,000/= equivalent to 7 goats for cleansing 7 graves, shs 90,000/= compensation: Odoki's mother grass thatched house: shs 50,000/= costs sharing for changing name. Then there are also at the back: received 30.08.99: chairman LCI: Opira Stephen. There is also the signature of the chairman LCI.

There is nothing in exhibit PEXH2 to indicate that the appellants or DW1, or any other family members of Rudolf Otto, consented to the sale of their family land, or that they participated in determining the compensation to be paid, or that any one of them received the compensation. Indeed the exhibit does not show that any of the appellants, DW1, or any other family member of Rudolf Otto were present at the time the document was executed. The exhibit PEXH3 is also therefore no proof that the appellants, or any family member of Rudolf Otto's family consented to the sale and received compensation for the developments on the suit land.

Exhibit PEXH4, executed on 26.01.2000 is titled

“compensation of the balance between Mr.Odoki John Bosco and Latim Alex”. The exhibit acknowledges that Mr. Odoki John Bosco had failed to pay compensation to Latim Alex, and that **“ to rectify the situation”** the buyer Miss Bency Cornilia Lamunu had agreed to compensate Latim Alex with shs 150,000/= after one month i.e. 26/02/2000 before Local Councillors. In the document the buyer agrees before the Local Councillors that the second appellant can continue staying in the suit land freely until further notice.

Exhibit PEXH 4 has the names of the second appellant and what appears her signature as one of the witnesses. There is no name or signature of Latim Alex; or that of the mother of the appellants, DW1. The second appellant was not questioned about exhibit PEXH4 as to its contents and she was never asked to confirm her signature thereon. The exhibit therefore is not proof that the appellants agreed to the sale of the land, the amount of compensation to be paid and that compensation was paid to them

DW1 was emphatic in her evidence that **“Odoki sold this land without our consent”**. It was never put to her that she and the appellants consented to the sale and that compensation had been paid to them for their interests in the land.

DW3 and DW4 the first and second appellants were not questioned at all and it was never put to them that they consented to the sale of the land and that they had been compensated for their interests in the land. So too was the case with DW5 and DW6.

On a proper evaluation of the evidence adduced as to the issue of compensation the respondent's evidence and that of his witnesses was contradictory and not forthright, as pointed out above. It did not in the view of this court; controvert the appellant's evidence and that of their witnesses on the issue.

The trial magistrate didn't indicate, in the notes he made when he visited the locus in quo, and also in his judgment, as to what he found at the locus in quo that made him to conclude that the appellants had failed to satisfy court as to the ownership of the suit land. The trial court in its judgment held on page 3 at bottom that:-

“ when this court visited the locus in quo, it found that along Latim Alex Road, the lay out of plots was clearly marked . The first plot at the junction of Alex Latim Road and Adonga Road was well developed. The second one belongs to Ventorina Anyako; the lady who gave a plot to Odoki and the third plot belonged to Odoki John and it is the one he sold to the plaintiff's wife”

With respect to the trial magistrate there is no explanation in the above extract of the judgment as to how the described lay out of the plots established that the suit land plot could not have been owned, as family land, by the appellants. The trial magistrate, failed on visiting the locus in quo, to identify and state whether or not the suit plot of land is the one containing the graves and housing structures that the appellants and their witnesses testified to as belonging to their family including the grave of the remains of their father and husband to DW1, the late Rudolf Otto. Since it is in respect of the graves and housing structures that compensation was being offered by the respondent's late wife, as buyer, it is safe to conclude that these graves and housing structures were situate on the suit plot of land. The graves and housing structures, the subject of compensation payment attempts, constituted independent evidence that the appellants suit land belonged to the appellants as family land and that the respondent's wife bought while on notice of this fact.

Having evaluated and re-appraised the evidence adduced before the trial court, this court finds and holds that the trial magistrate erred in his evaluation of that evidence when he held that the appellants had failed to prove their case on a balance of probability; and that the respondent had proved his case.

It is the finding and holding of this court that the appellants proved on a balance of probability that the suit land belonged to the family of the late Rudolf Otto their father and husband to second appellant, that they were a son and daughter of the late, that they themselves, their mother, DW1, and brothers DW5 and DW6 were staying, working and using this land, they had graves of their family members and grass thatched houses on this land, they had not as a family consented to the sale, had not as a family agreed on compensation to be paid. There was no evidence that any compensation had been paid and received by any one of them from the side of the respondent.

By the appellants establishing the above facts, the case of the respondent cannot be said to have been proved on a balance of probability.

Grounds 2 and 3 of the appeal therefore succeed. This appeal is allowed. The judgment of the trial court and the orders made therein are set aside. They are substituted by an order dismissing the suit of the plaintiff against the defendants with costs.

It is up to the plaintiff/respondent to seek appropriate relief to whoever, unlawfully sold to his late wife, the suit land.

The appellants are awarded the costs of this appeal and , as already held, those in the court below.

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Remmy K.Kasule

Judge

24th September, 2008.

