THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

HCT – 02 – CV – CA – 0034 – 2004

(Arising from Chief Magistrate's Court of Gulu at Kitgum Civil Suit No. 62 of 2001)

JUSTINE OKENGO::APPELLANT

VERSUS

1. NATALI ABIA
2. LEO OKIDI
3. OPIRA VINCENT
4. FRANCIS OMOYA
5. OCHAN BOSCO::RESPONDENTS

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

The appellant appealed against the judgment of the Gulu Chief Magistrate's Court, sitting at Kitgum, delivered on 11.11.04 in Civil Suit No. MK 62 of 2001

The appeal is on four (4) grounds, summarized as follows:-

1. That the trial court erred in holding that the store did not form part of the land in dispute.
2. That the court erred in holding that Lint Marketing Board was a mere squatter and thus could not sell the suit land.
3. That the trial magistrate erred when he failed to visit the locus in quo which would have guided him in reaching a right decision.
4. The trial magistrate failed to consider the contradictions in the defendant's evidence

The case of the appellant, at trial, was that in 1997 he had bought two stores and the suit land upon which the stores were situate from the Lint Marketing Board which was then under liquidation.

The case for the second respondent was that the suit land had belonged to his father and that it was the land he was occupying.

In his judgment the learned Chief Magistrate held on page 3 last paragraph of the Judgment that:-

> ***" It is therefore true that what the plaintiff actually bought are the stores and not the land on which it is built"***

The evidence adduced before the trial court is that Lint Marketing Board had constructed stores on the land and it is these stores that had been sold to the appellant. The stores were permanent fixtures on the land.

The general law relating to fixtures is summed up in the latin phrase***: "quicquid plantatur solo, solo cedit***" Meaning: Whatever is attached to the land as a permanent fixture becomes part of the land and the property of the owner of the land: See **HOLLAND AND ANOTHER v HODGSON AND ANOTHER (1872) LR 7 CP 38,** and the **Nigerian Case of : Francis v Ibitoye (1936) NLR 11.**

The test for a fixture is the degree of annexation and the object of the annexation.

Articles not otherwise attached to the land, other than by their own weight, are not to be considered as part of that land, unless the circumstances are such as to show that they were intended to be part of the land. The onus that they were so intended is on the one so asserting. On the other hand, articles affixed on the land by other means other than their own weight, become part and parcel of that land, unless circumstances are such as to show that they were intended all long not to be part and parcel of the land. The onus lies on the one contending that such articles are not part of that land.

The overriding consideration is whether the article is affixed to the land as a chattel temporarily, in which case it remains a chattel, or permanently as, part of the land, in which case it becomes part and parcel of the land. See The Supreme Court of Australia State of Victoria case, **BELGRADE NOMINEEES AND OTHERS V BARLIN-SCOTT Air conditioning (Aust.) Pty Ltd (1984) v R 947**

The evidence before the trial Chief Magistrate was that the stores were permanent features on the land and that they had been put there by Lint Marketing Board who had used them over time. It is the Lint Marketing Board that sold them to the appellant. Thus Lint Marketing Board must have owned the land upon which it built the stores. Accordingly when it sold the stores to the appellant, it also sold the land, of which the stores, as a permanent fixture, were part and parcel of that land.
No evidence was adduced before the trial court, and that court did not make any specific finding that Lint Marketing Board had trespassed on any one's land during the period of constructing, using and maintaining the stores. No evidence was also adduced that Lint Marketing Board had constructed the stores as temporary structures to be moved away from the land after a specified period.
The learned trial Chief Magistrate therefore erred in law and in fact in holding that the appellant bought only the stores and not the land on which the stores were built.

This court, on a revaluation of the evidence and applying the correct position of the law to the re-evaluated evidence holds that the appellant bought the land and the stores on that land; and that the stores as permanent fixtures on that land; were part and parcel of the land, which was the suit land.

Grounds 1 and 2 of the appeal succeed.
The third ground faults the trial Chief Magistrate for not holding a locus in quo at the actual scene of the land, and that by failing to do so, he did not reach a right decision in the case.

There is merit in this ground. The evidence adduced before the trial court made it of crucial importance for the trial court to visit the locus in quo and be able to determine the boundaries of the land upon which the stores were situate and therefore the extent of the land bought by the appellant.

According to the appellant the land he bought was 150 by 100 metres. He described its boundaries as on the East bordering the land of the father of second respondent, North: it borders

with the pit latrine of Nicholas Oula, on the West it borders with a road and in the South it borders with the animal grazing land. PW2 Valentino Opwa too gives the size of the suit land to be

60 x 50 metres and describes its boundaries. That the size of the land in metres differs from that of appellant can be excused because the witnesses are lay people who did not actually take the exact measurements of the land. PW3, Dalmas Okwera, knew the boundaries of the suit land so well that he went as far as inviting court to go to the locus in quo. He testified:

> **"If court wants the boundary I will show court the boundary. What I know is that the house is on the land and cannot stand on its own. When we separated the boundary we gave the adjoining land to the plaintiff and not only where the store stood"**

To the extent that PW3 was closely related to both appellant and respondent, both being nephews to him, he can be regarded as an impartial witness. He had witnessed much of what had gone on concerning the land, including the fact that the respondent had been the first one to try to buy the stores, (and the land upon which they were situate) from Lint Marketing Board. It is only after the second respondent had failed to raise the money to pay for the same, that an offer was made to the appellant.

No reason is given in the judgment as to why the trial magistrate never accepted the request of this witness to go to the locus in quo and be shown the boundaries of the suit land.

The evidence of the second respondent also necessitated the trial court to visit the locus in quo. He stated that his land was 10 acres. The land where the stores were, thus the one bought by appellant, was adjacent to his (2nd respondent's) land. He continued on page 6 para 2 of court proceedings:-

> **"The stores is therefore not on my land. The stores is**
>
> **45 x 65 metres. But we set about 10 metres aside. The plaintiff has wrongfully sued me**"

The testimony of defence witness Odoch Charles, who knew both appellant and second respondent very well, as they all lived in the same Parish, also made it imperative that the locus in quo is visited. He stated that appellant lived near the area where he was chairman. This is where the stores were. From the stores structures to the second respondent's land was 90 metres. The land where the stores were, was the one near the second respondent, and not that of the appellant. In cross examination, this witness explained that the land in dispute had a latrine which is 8 metres from the store; and that the second respondent had built about 200 metres away from the stores and he, second respondent, had a house near the first store about 5 metres apart.

On re-considering all the above evidence this court agrees with the submission that it was necessary for the court to visit the locus in quo so as to ascertain, if not to determine, the actual boundaries of that land upon which the stores were situate, which land would appropriately belong to whoever owned the stores.

By failing to visit the locus in quo, the trial court failed to have actual physical evidence as to the boundaries of the land in dispute, and to test the accuracy of the evidence adduced in court by various witnesses, with actually what was obtaining on the ground. This was a miscarriage of justice as the court deprived itself of evidence that would help it reach a right decision.

The third ground of appeal succeeds.

As to the fourth ground of appeal, this court finds, on reviewing the evidence adduced at trial that whatever material contradictions there were in the case, the same would have been resolved had the trial court visited the locus in quo and tested the evidence of the witnesses who testified with what was actually obtaining on the ground.

Therefore to the extent that ground 3 of the appeal has succeeded, the fourth ground also succeeds.

Court notes that, apart from the second respondent, there were four (4) other defendants to the suit. Though interlocutory judgment was entered against them and none of them filed a defence, the trial ought to have proceeded against them as if each one of them had filed a defence under Order 9 Rule 10 of the Civil Procedure Rules.

The proceedings of court show that the trial proceeded as if the case was only between the appellant and second respondent.

It would appear that appellant conducted the trial on his own, because the record of proceedings shows that his counsel, Mr. Oyarmoi only appeared once in court on 20.12.2001 when the case was adjourned without any evidence being taken. The said counsel never appeared again. In circumstances like those, where a lay person is unrepresented, and the appellant was such a one, it is possible, without being guided by court, that he assumed that the case against the other defendants had been proved and completed with an interlocutory judgment being entered against the four defendants. This possibly explains why the trial was as if it was between the appellant and second respondent only.

This was unfortunate as the trial court and this court has not had the benefit of knowing what case the appellant had against each one of the other defendants to the suit.

It was submitted on behalf of the second respondent that the appeal was incompetent as it had been filed out of time.
This court has perused the court record and is satisfied that the Notice of Appeal and Memorandum of Appeal were filed on 26-11-2004. The proceedings of the lower court do not show when judgment was delivered; but an endorsement on the cover of the court file is to the effect that judgment was delivered on 11.11.04. The appeal was thus filed in time.

As to the absence of the decree, this court under its constitutional duty to administer substantial justice without undue regard to technicalities under Article 126 (e) of the Constitution, notes that the court proceedings of the trial court and the judgment have all been availed to this court, and court, has not in any way been inhibited in the hearing of the appeal due to absence of the decree.

Further, the appeal involves serious issues concerning ownership of land and involves ordinary people with their passions high, and therefore warranting an exhaustive and effective determination of their rights. The parties did not have legal representation but conducted the case on their own. For these considerations, court holds that the appeal is competent, absence of an extracted decree notwithstanding.

In conclusion court allows the appeal. The Judgment of the Chief Magistrate, Gulu, delivered on 11.11.2004 in Civil Suit Number MK 62 of 2001 is hereby set aside. It is substituted by an order that a retrial of the suit be done by the Chief Magistrate's Court with competent jurisdiction.

The re-trial court is to determine;

a) the size and borders of the land upon which the Lint Marketing Board stores were situate.
b) Who took ownership of the land upon which the stores were and the stores themselves, when Lint Marketing Board was liquidated,

The retrial is also to be conducted by serving summons to file a defence to each and everyone of the defendants to the suit. Should any defendant not file a defence within the prescribed time, then the case is to proceed against that defendant as if that defendant had filed a defence. That is to say such defendant is to be served with a hearing date and the plaintiff has to adduce evidence to prove his case against each and every one of such defendants, whether or not present at the hearing.

Given the fact that a retrial has been ordered in this case; court orders that each party bears its own costs of the proceedings of the case up to the date of delivery of this Judgment.

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Remmy K. Kasule

Judge

27th March, 2009