

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 17 OF 2011

NALWOGA TEDDY NALONGO SSEWAMALA APPELLANT

VERSUS

JOSEPHINE NANSUKUSA & OTHERS RESPONDENTS

(Arising from Makindye Chief Magistrates Court Civil Suit No. 185 of 2008)

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The brief facts of this appeal are as follows. The appellant was the wife of a one Ssalongo Ssewamala (now deceased); while the respondents are all children of a one Donah Ssenfuka (deceased), son to Ssewamala and step-son to the appellant. The appellant claimed to have purchased a kibanja from a one Joseph Ngubu which she subsequently sought to sale. The respondents disputed the appellant's alleged ownership of the kibanja, contending that the same piece of land had been purchased from the same Joseph Ngubu by their father in 1979 vide a formal sale agreement, and upon his death the land was transferred to them. The trial court entered judgment in favour of the respondents, hence the present appeal by the appellant.

The memorandum of appeal spelt out the following grounds of appeal:

- 1. The trial magistrate erred in law and fact when she failed to evaluate the evidence on record.**
- 2. The trial magistrate erred in law and fact when she entertained a claim that was time barred.**
- 3. The trial magistrate erred in law and fact when she allowed the respondent's claim that was based on fraud and forgery.**
- 4. The trial magistrate erred in law and fact when she held that the appellant had no interest in the suit land.**
- 5. The trial magistrate erred in law and fact when she failed to visit the locus in quo.**

At the hearing of the appeal Mr. Moses Tugume appeared for the appellant while Mr. David Ssempala represented the respondents.

In his written submissions, Mr. Tugume argued grounds 1, 3 and 4 together, and addressed grounds 2 and 5 separately and in that order. Mr. Ssempala followed the same order in his submissions.

The first set of grounds pertain to the ownership of the suit land and the evidence in proof thereof. Mr. Tugume argued at length that the purported sale agreement between Ssenfuka, from whom the respondents derive title, and Ngubu was a forgery and false document that was utilised by the respondents to defraud the appellant of her land. Learned counsel questioned the omission by the respondents and their grandfather (PW1) to apply for letter of administration in respect of the estate of the late Ssenfuka, as well as the alleged gift *inter vivos* purportedly given to the respondents by the same Ssenfuka. Conversely, he argued that there was uncontroverted evidence that the appellant had been in possession of the suit land from 1978 till she decided to sell it off, and through those decades of occupation her ownership of the suit land was never challenged. Mr. Tugume did also raise technical issues. He argued that the suit before the trial court was time barred and should have been instituted within 12 years from the time Ssenfuka purchased the land in 1979. He further argued that the failure by the trial magistrate to visit the *locus in quo* constituted a miscarriage of justice given that the size of the disputed land was in issue.

On his part, learned counsel for the respondents supported the findings of the trial magistrate. Mr. Ssempala contended that faced with self-contradictory oral evidence from the appellant and DW2 viz the documentary evidence of the sale agreement and the respondents' consistent oral evidence; the trial magistrate rightly decided in favour of the respondents. It was counsel's contention that the allegation of fraud implicit on the appellant's submission on forgery was neither pleaded nor proved before the trial court. He cited the case of **F. Zaabwe vs. Orient Bank & Others CA N0. 4 of 2006 (SC)** in support of this argument. With regard to the issue of limitation, Mr. Ssempala argued that the cause of action against the appellant arose in 2006 when she refused to vacate the suit land; while on the question of the omission to visit the *locus in quo*, learned counsel contended the dispute before the trial magistrate was in respect of ownership not boundaries therefore it was not necessary to visit the *locus in quo*.

This court proposes to consider the procedural issues raised in grounds 2 and 5 of this appeal, prior to a consideration of the substantive grounds 1, 3 and 4. Before delving into the grounds of appeal I must point out that there was no memorandum of appeal duly received and properly stamped on the court record. However, this issue was never raised by counsel for the respondents. On the contrary what is on the court file is a copy of a memorandum of appeal dated 21st July 2010 and duly received by the respondent counsel's law firm on 29th July 2010, against which counsel premised their respective written submissions. Respondents' counsel is, therefore, deemed to have accepted the improperly presented memorandum and it is on that

premise that this court proceeds to determine this appeal. In any event, this court has seen a minute on the file dated 22nd July 2010 and duly signed by the registrar indicating that a memorandum of appeal was filed.

Grounds 2 & 5

The question of limitation raised in ground 2 of this appeal hinges on when the cause of action under consideration accrued. While the appellant contends that she had occupied the suit land since 1978, it was the respondent's case that the appellant was merely permitted to till the land until 2006 when she was asked to vacate the land and she declined to do so. It was argued for the appellant that since she had been on the land since 1978, the cause of action in issue presently accrued when the respondents' father purported to have bought the same land in 1979 and, therefore, the civil proceedings before the trial court were time barred.

The law on trespass to land was clearly stated in the case of **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)**. In that case, Mulenga JSC held:

“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. ... Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land.” (*emphasis mine*)

Citing the case of **Wuta-Ofei v Danquah (1961) 3 All E.R.596 at p.600**, his lordship held that for purposes of the rule cited in **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company** (supra) above, possession did not mean physical occupation; rather, the slightest amount of possession would suffice. In **Wuta-Ofei v Danquah** (supra) the Privy Council put it thus:

“Their Lordships do not consider that, in order to establish possession, it is necessary for the claimant to take some active step in relation to the land such as enclosing the land or cultivating it.”

In the present case PW3, one of the respondents, testified that following her father's death she and her siblings used to till the suit land with their mother who later died in 2000. The witness testified that it was after the death of their mother that PW1 allowed the appellant to till the land.

Under cross examination, PW3 stated that in 2002, after her mother's death, the appellant stopped her siblings and herself from tilling the land. She further stated that in 2006 she and her siblings asked their grandfather to send the appellant off their land. PW4, another respondent, attested to the respondents tilling the suit land and stated that while she and her siblings lived with the appellant she often sent them to join their mother in tilling the suit land but did not use to till it herself. This witness further testified that following their mother's death the appellant stopped them from tilling the land and sent them away from it. Under cross examination the witness clarified that the appellant sent she and her siblings off the land in 2006. For present purposes, the gist of the respondents' evidence is that prior to their mother's death in 2000, the respondents used to till the suit land with her; in 2002 the appellant stopped them from tilling the land; in 2006 she sent them off the land, and in the same year the respondents asked PW1 (their grandfather) to send the appellant (his wife) off the suit land. On the other hand, the appellant's evidence sought to prove that she, and not the respondents' father, had bought the suit land. The only witness called by the appellant also sought to underscore this position.

It is trite law that trespass to land is a continuous tort. See **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company** (supra) and **Oola Lalobo vs. Okema Jakeo Akech Civil Suit NO. 20 of 2004**. In the present case it would appear that after depriving the respondents of possession of the suit land between 2002 and 2006, the appellant sought to lay claim to the land herself, contending that she had been the owner thereof since 1978. Without going into the merits of this appeal, even if this were so, trespass to land being a continuous tort the moment the respondents, as purported recipients of a gift *inter vivos* in respect of the suit land sought vacant possession of the suit land and the appellant declined to oblige, a cause of action in trespass accrued. On the basis of the decision in **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company** (supra), the respondents were so entitled to sue in trespass to land even if they had relinquished possession of the suit land. I am therefore inclined to agree with learned counsel for the respondents and do hold that the present cause of action accrued in 2006 when the appellant denied the respondents vacant possession of land in respect of which they had a right of claim. Ground 2 of the appeal therefore fails.

With regard to ground 5, the question would be whether or not visits to *locus in quo* are mandatory and, if not, the circumstances under which they would reasonably be required. This question was addressed quite persuasively in the case of **Safina Bakulimya & Another vs. Yusufu Musa Wamala Civil Appeal No. 68 of 2007**. In that case, Mulyagonja Kakooza J held:

“Visits to the *locus in quo* are (also) provided for by Practice Direction No. 1 of 2007, where guideline 3 provides that during the hearing of land disputes the court should take interest in visiting the *locus in quo*, and lays down what should happen when it does so. However, a visit to the land in dispute is not mandatory. The court moves to the *locus in quo* in deserving cases where it needs to verify the evidence that has been given in court, on the ground. It is my view that such visits are necessary to enable the court to determine boundaries of the land in dispute or the

special features thereon, especially where this cannot be reasonably achieved by the testimonies of the witnesses in court.”

In the present appeal, as quite rightly argued by counsel for the respondents, the boundaries of the suit land were not in dispute. A perusal of the pleadings before the trial court reveals that what was primarily in dispute was the interests of either party in the suit land. The parties attested to this issue at length, providing sufficient evidence to enable the trial court draw conclusions as to their respective interests in the suit land. Further, the agreed issues framed in the trial court did not include any question on the boundaries, description or location of the land so as to warrant the verification thereof by a visit to the *locus in quo*. I do recognise that in the course of evidence issues can arise that may not have been directly raised in the pleadings, however, that was not the case in the present appeal. Paragraph 3 of the plaint stated quite clearly that the land in dispute was about 2 acres. This was not disputed in the written statement of defence. The fact that PW3 testified that the land was about 1 acre constituted a departure from her pleadings and was subject to evaluation as such. The size of land is typically conclusively confirmed by the opening of its boundaries by surveyors and other related professionals. PW3 was no such professional therefore, evaluating her evidence in that context; I would hold that the disparity in the size of the suit land was not a material contradiction. Consequently, in so far as the size of the suit land did not go to the root of the dispute between the parties and would not have been conclusively resolved by a visit to the *locus in quo* by the court, on a balance of probabilities, the omission to so visit the *locus in quo* did not occasion a miscarriage of justice in this case. Ground 5 of the appeal is, therefore, untenable.

Grounds 1, 3 and 4

Under this set of issues the appellant faulted the trial magistrate for what he deemed as failure to evaluate the evidence on record; allowing a claim based on what he considered fraud and forgery, and her finding that the appellant had no interest in the suit land. It would appear to me that the main issue for consideration here is whether or not the respondents had a legally recognisable interest in the suit land, and if so, whether such interest was procured with fraud. I shall address both issues simultaneously.

In proof of their interest in the suit land, the respondents relied on a sale agreement dated 6th September 1979 and allegedly executed by their father and a one Joseph Ngubu, as well as oral evidence adduced by PW1, PW3 and PW4. The appellant, on the other hand, contended that she purchased the suit land vide an oral agreement between herself and the same Ngubu in 1978 and relied on oral evidence in proof thereof.

It is well settled law that a first appellate court is under a duty to re-evaluate the evidence on record and arrive at its own independent conclusion. See **J. Muluta vs S. Katama Civil Appeal No.11 of 1999 (SC)**. It is also well settled law that an appellate court will always be loath to interfere with a finding of fact arrived at by a trial court and will only do so when, after

taking into account that it has not had the advantage of studying the demeanour of the witnesses, it comes to the conclusion that the trial court is plainly wrong. See **Kasifa Namusisi & Others vs Francis M.K. Ntabaazi Civil Appeal No. 4 of 2005 (SC)**, **Jiwan Vs Gohil (1948) 15 EACA 36** and **R.G.Patel Vs Lalji Makaiji (1957) EA 314**. Indeed, in the case of **Banco Espanol vs Bank of Uganda Civil Appeal No. 8 of 1998 (SC)** cited by learned counsel for the respondents, it was held that the first appellate court has a duty to re-appraise or re-evaluate evidence, save for the manner and demeanour of the witnesses where it must be guided by the impression made on the trial judge. Further, it is trite law that the applicable standard of proof would be by balance of probabilities. See **Sebuliba vs. Cooperative Bank Ltd (1982) HCB 130**. I take due cognition of these rules of evidence applicable to a first appellate court as I proceed to re-evaluate the evidence on record and determine the present grounds of appeal.

The sale agreement presented in support of the respondents' claim over the suit land was admitted on the court record as Exh. P1a, with the English translation thereof admitted as Exh. P1b. It clearly outlined the parties thereto; described the land in question; spelt out the consideration that was paid; was duly signed by the buyer and vendor, and was witnessed by 6 persons. PW1, PW3 and PW4 attested to the purchase of the suit land by a one Donna Ssenfuka, the buyer cited in the sale agreement. While PW1 attested to having been a witness to the sale agreement in which his deceased son purchased land in a place called Kanaaba; PW2 testified that another witness thereto, Rose Nabirye (deceased at the time of trial), had taken her to the physical location of the suit land in the same place –Kanaaba. PW2 further testified that Rose Nabirye used to till the land while she was alive. PW3 attested to tilling the suit land with her siblings and their mother while she was still alive and that it was only following the death of their mother that PW1 allowed the appellant to till the land. This was the gist of PW4's evidence too. Conversely, the appellant attested to having bought the same piece of land in 1978 vide an oral contract with Joseph Ngubu, and paid Ushs. 10,000/- cash for it at her home. She testified that after she had purchased the kibanja in issue she used to till the land with the respondents while they were younger, and had since sold her portion too but the sale agreement in respect thereof had been stolen from her. Under cross examination, the appellant initially stated that only a one Sentongo had witnessed her oral contract with Ngubu but later stated that the oral agreement was witnessed by Ngubu's wife, Nanyanzi and a one Senkoyo John alias Serunkuma. She later purported to clarify the witnesses stating that her son, a one Senoga witnessed the agreement with the said Senkoyo. DW2, a 'son' to the appellant, supported the appellant's testimony that she had bought the suit land from Ngubu in 1978. Under cross examination DW2 stated that a one Mrs. Kalyesubula, Musisi Kalyesubula and himself witnessed the oral agreement between Ngubu and his mother; that he paid Ngubu for the same at a junction to Kalyesubula's home, and that his mother would be telling lies if she said that she paid for the land herself or that the purchase price was paid at their home. Under re-examination, DW2 reiterated that he and not his mother paid for the suit land but later contradicted himself stating that he took Shs. 10,000/- to Ngubu and his mother paid Shs. 10,000/- too.

Clearly, the appellant and her witness' evidence were self-contradicting. They contradicted each other on the persons that witnessed the alleged oral agreement; on the circumstances under which the alleged consideration was paid, and even on whether it was Ushs. 10,000/- or 20,000/-. These are, in my view, material inconsistencies in so far as they pertain to proof of an agreement that allegedly passed an interest in the suit land to the appellant. Further, this court finds it quite strange that the appellant, a 50 year old woman at trial could have a 50 year old son. This relationship was not explained in the record. On the other hand, the respondents' evidence was fairly consistent, and therefore comparatively more cogent and credible than that of the appellants.

The trial magistrate premised her preference of the respondents' evidence over that of the appellants on the latter's inconsistencies. Having unearthed the same inconsistencies I cannot fault the trial magistrate's decision on whether or not the appellant had any proven interest in the suit land or indeed whether she could legally sell the land off. Consequently, grounds 1 and 4 of this appeal do not succeed.

Before I take leave of this issue I shall briefly address the question of the suit land having been a gift *inter vivos*. Simply put, a gift *inter vivos* is defined as a gift given during the life of the grantor. PW1, under cross examination stated quite clearly that during his son's lifetime he indicated that upon his death his kibanja (the suit land) should revert to his children, the respondents. Therefore, it cannot be said that the respondents were recipients of a gift *inter vivos* but rather inherited their deceased father's reversionary interest in the suit land.

I now revert to a determination of the issue of fraud. It was the appellant's case that the sale agreement between Ssenfuka and Ngubu was a forgery and/ or procured by fraud.

It is trite law that fraud should be specifically pleaded and proved. When a claim is based on fraud it must be specifically so stated in the pleading, setting out particulars of the alleged fraud, and those particulars must be strictly proved. However what is required is for the pleading to explicitly disclose the facts which, if proved strictly, would constitute fraud. See **Tifu Lukwago vs Samwiri Mudde Kizza & Another Civil Appeal No. 13 of 1996 (SC)**. Reference is also made to the case of **B.E.A Timber Co. vs Inder Singh Gill (1959) EA 463**, where Forbes V.P held:

“It is of course established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. Fraud however is a conclusion of law. If the facts alleged in the pleading are such as to create a fraud, it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out and then it should be stated that these acts were done fraudulently but from the acts fraudulent intent may be inferred.” (*emphasis mine*)

The decisions cited above posit that fraud, though not explicitly pleaded, may be inferred from the facts alleged in pleadings that are such as to create fraud. This court has carefully perused

the pleadings in the present appeal. As quite rightly stated by counsel for the respondent, fraud was never pleaded by the appellant in her trial court pleadings. The appellant only sought to raise the inference of fraud at the hearing of this appeal through what would appear to me to have been evidence from the bar. Consequently, ground 3 of the appeal does not succeed either.

In the result, I would dismiss this appeal with costs of the appeal and in the lower Court to the respondents.

Monica K. Mugenyi
JUDGE

16th November, 2012