THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT – 05 – CV – CA - 026/2007

(FROM MB-CS-140-1995)

SAM MUGISHA KAGANZI :: APPELLANT

VERSUS

PHILLIP MWESIGWA:: RESPONDENT

BEFORE: **HON. JUSTICE MR. BASHAIJA K. ANDREW**

JUDGMENT

SAM MUGISHA KAGANZI (hereinafter referred to as "the Appellant") filed this appeal challenging the judgment and decision of the Chief Magistrate, His Worship Mr. Isaac Muwata (hereinafter referred to as "the trial Court") in favour of **PHILLIP MWESIGWA** (hereinafter referred to as the "Respondent"), which was delivered on 21/09/2007. The Appellant advanced four grounds of appeal as follows:-

1. ***The learned Chief Magistrate erred in Law and misdirected himself on the evidence when he found that the sale of the suit land to the Respondent by Irene Keitiba was valid and passed good title to the Respondent, when the evidence on record clearly showed that the said Irene Keitiba had no title to pass and as a result wrongly entered judgment for the respondent.***

2. ***The learned Chief Magistrate erred in law and misdirected himself on the evidence when he decided to base his decision on speculation, instead of going by the evidence on record and as a result wrongly entered a judgment which was against the weight of the evidence on record.***

3. ***The learned Chief Magistrate erred in law when he held in the alternative that the respondent was a bona fide purchaser and thereby wrongly applied the doctrine, going by the totality of the evidence on record.***

4. ***The learned Chief Magistrate erred in law and misdirected himself on the evidence when he awarded the Respondent both general damages and mesne profits at ago, when the Respondent had not proved them in court.***

The Appellant prayed that the appeal be allowed with costs in this court and the court below; and that judgment be entered for the *Respondent.* I believe there was a mix-up because the last prayer was meant to be a prayer for judgment for the *"Appellant*" and not the *"Respondent",* for the obvious reason that it was the Appellant who filed this appeal and could not make prayers on behalf of the Respondent.

The brief facts are that sometime on 3/11/1991 the Plaintiff; now the Respondent, purchased a piece of land which was held under customary tenure from one Irene Keitaba, the grandmother to the Defendant; now the Appellant. A sale agreement was duly executed between the parties. Irene Keitaba was quite elderly and as such appointed her son one Geresom Kaganzi, who is the father of the Appellant, to sign the sale agreement on her behalf. This was in her presence and other witnesses. The Respondent took vacant possession of the land and started cultivating it and constructed a semi-permanent house thereon.

Sometime in 1993, the Appellant entered on to the land and demolished the Respondent's house claiming that the land was his. The Appellant claimed that Irene Keitaba, his grandmother, did not possess any title to the suit land which she could pass on to the Respondent. The Appellant also claimed that the suit land belonged to him, because it had been granted to him by his father Gereshom Kaganzi as a gift *intervivos* sometime in 1990 prior to the aforesaid sale to the Respondent.

In the lower court, the Respondent sued the Appellant for declaratory orders that the Respondent was the rightful and lawful owner of the suit land, and also that the Appellant was a trespasser. The Respondent further prayed for a permanent injunction restraining the Appellant from

continued trespass on to the land, general and special damages, mesne profits, and costs of the suit. The trial court granted all the reliefs sought, hence this appeal.

Before embarking on resolution of the issues raised in the grounds of appeal, it is called for to restate the duty of this court. As a first Appellate court, it is legally duty-bound to subject the entire evidence of the trial court to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the appellate court has to bear in mind that it has neither seen no heard the witnesses and should, therefore, make due allowance in that respect. This principle was laid down in the celebrated case of ***Selle vs. Associated Motor Boat Co. [1968] E.A 123,*** and has been applied in other cases. See ***Sanyu Lwanga Musoke vs. Galiwango, S.C Civ. Appeal No.48 of 1995.***

Bearing the above legal duty in mind, I now proceed to resolve the grounds of appeal in the order they were presented. The first ground is that-
The learned Chief Magistrate erred in law and misdirected himself on the evidence when he found that the sale of the suit land to the Respondent by Irene Keitaba was valid and passed good title to the Respondent, when the evidence on record clearly showed that the said Irene Keitaba had no title to pass and as a result wrongly entered judgment for the Respondent.

When he testified at the trial, the Appellant stated *(on page 12 of the record of proceedings)* that his father, one Gereshom Kaganzi, gave him the suit land as a gift *intervivos*. He further stated that he did not live on the suit land, but sold it to one Zikasooka Busimba and Jaires, and that he left out the grave-yard area thereon untouched. The Appellant tendered in court a document as evidence of a gift *intervivos* by his father. It was marked as Exhibit "DI" (and its English translation as Exhibit"D2"). The document is dated 11/3/1990.
The Appellant further testified *(on page 13 of the record of proceedings)* that he learnt of the sale of the suit land to the Respondent by his grandmother Irene Keitaba sometime in 1992. Further, that Irene Keitaba could not pass title to the Respondent because the suit land did not belong to her.

For his part, the Respondent testified and relied on a copy of the sale agreement of the suit land between him and the said Irene Keitaba. It too was tendered in evidence and marked as Exhibit

"PI". It is dated 3/11/1991 and was witnessed, among others, by the Appellant's father Gereshom Kaganzi, who represented his mother Irene Keitaba in the sale transaction and signed on her behalf.

I have noted that throught the whole trial, it was an agreed fact that Irene Keitaba was the owner of the suit land since 1952, and that she had never dispossessed herself of the same. It was, accordingly, general knowledge that the suit land belonged to her. This is also contained in the evidence of PW3 Ngazoire Manasi *(on page 9 of the proceedings)*. In spite of this position, the Appellant maintained that Irene Keitaba erroneously sold the suit land to the Respondent; and she later "confessed" to have made the error by selling land which belonged to the Appellant. The said confession was tendered in court as Exhibit "D3" by the Appellant.

I consider ground one to be the major one because its resolution one way or the other in some way resolves issues raised in the other grounds. After subjecting the evidence to further exhaustive scrutiny evaluation, it emerged that the so-called confession of Irene Keitaba was made long after the Respondent had taken vacant possession of the suit land and utilized it undisturbed by anyone. The Respondent purchased the suit land on 3/11/1991, and the purported confession was made on 3/1/1993. It is my considered opinion that the trial court rightly reasoned out the effect of the purported confession in which it was alleged that Irene Keitaba rescinded the sale to the Respondent. On page 3 of the trial court's judgment, the trial court observed, and rightly so in my view, as follows;

> ***"Any variation of the sale had to be done by consent of both parties and since this was not done the agreement (sale agreement) still stands."***

I agree with the trial court that the above was the correct interpretation of the facts; and I can only add that the sale agreement between Irene Keitaba and the Respondent could not be rescinded unilaterally by the vendor merely confessing a mistake. Even if it was a mistake it could not be visited on an innocent the purchaser.

Accordingly, I find the Appellant's counsel's criticism of the trial court's application of the principles of *a bona fide* purchaser to the facts of this case quite unjustified. The said criticisms are in ground three of the appeal. The evidence, particularly that of PW3 and contents of Exhibit "P1" show that the Appellant's father Gereshom Kaganzi is a signatory to the sale agreement on

behalf of the vendor, his elderly mother Irene Keitaba. The land was put up for sale, and the Respondent in company of other witnesses and the Appellant's father conducted an inspection. A consideration of Shs. 150,000= was paid to the vendor and a sale agreement was duly executed. Quite evidently, the Respondent is a *bona fide* purchaser for value without notice. I therefore find the claim by the Appellant quite absurd that the suit land was gifted to him by his father in 1990, when the same father participated in selling it to the Respondent a year or so later.

The Appellant's claim is even more untrue given that there is no evidence to show how his father came to own the suit land, which was all along known to belong to Keitaba Irene. The land never belonged to Appellant's father in the first place. It becomes difficult to find that he could gift same to the Appellant. In my view, the trial court properly applied the principle of a *bona fide* purchaser for value without notice.

Before taking leave of this point, let me restate some of the cardinal principles which underlay the doctrine of *bona fide* purchaser. These were also considered and applied in the case of ***David Sajaaka Nalima vs. Rebecca Musoke, Civil Appeal No. 12 of 1985***. Whereas the burden of proving the case on balance of probabilities lies on the Plaintiff, the onus of establishing the plea of a *bona fide* purchaser lies on the person who sets it up. It is a simple plea and is sufficiently made out by proving purchase for value and leaving it to the Plaintiff to prove notice; if he can. Applying the same test to the instant case, it is my view that the Respondent effectively proved that he was a *bona fide* purchaser for value without notice. He not only demonstrated good faith but also absence of notice; and therefore, genuine and honest absence of such a notice. I cannot fault the trial court's finding on that point, in the same way I cannot fault its finding that the suit land never belonged to the Appellant.

Similarly, I have not come across any evidence of the "imputed fraud" alleged against the Respondent in the sale transaction. The allegation was clearly a statement from the Bar by counsel for the Appellant, and lacked evidential support. It should be regarded as an erroneous inference based on misapplication of the law relating to fraud to the facts of this particular case.

For the foregone reasons, ground one of appeal fails. The resolution of this ground also takes care of issues raised ground three of the appeal, which is about the Respondent not being a *bona fide* purchaser which also fails.

Ground two

The learned Chief Magistrate erred in law and misdirected himself on the evidence when he decided to base his decision on speculation, instead of going by the evidence on record and as a result wrongly entered a judgment which was against the weight of the evidence on record.

The part of the trail court's judgment with which the Appellant has problems is on page 2 of the trial court's judgment (at the bottom) where it stated that the land which the Appellant's father could have given as a gift to his son was different from the one that the Respondent purchased, and therefore, different from the one in dispute.

I do agree in part with the submissions of learned counsel for the Appellant in that, at some point, the trial court incorporated extraneous matters in its judgment which were neither pleaded nor canvassed at the trial. Indeed, it would have been best to exclude them altogether from the judgment. However, they would still not change the outcome that the Respondent was a bona fide purchaser of the suit land, and as such, occasioned no miscarriage of justice. They should be treated as unnecessary surplusage.

It would appear that the trial court in doing so the trial court was simply making a presumption of facts; which under certain circumstances is allowed under the law. ***Section 113*** *of the* ***Evidence Act (Cap 6)*** states as follows;

> ***"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to facts of the particular case"***

Applying the above provision of the law to the facts of the instant case, it is clear that the trial court simply made a presumption of facts; and it is settled that inferences may be made as to the existence of one fact from the existence of some other facts founded upon a previous experience of them. ***See SARKAR on Evidence 14th Ed. Vol. 2 at page 1505.*** It is also trite law that the

presumptions of fact, such as the trail court made, are nothing more than logical inferences of the existence of one fact drawn from other proved or known facts without reference to any artificial rules of law. In addition, such presumptions are rebuttable. The court has the option of whether or not to draw such inferences, but the legal consequence is to cast on the opposite party the duty of producing contrary evidence to the presumptions.

In the instant case, when the trial court did not come across evidence of how the Appellant's father who never owned the suit land could grant the same as a gift *intervivos* to his son, the trail court presumed the fact that the land which was given as gifted was different from the one in dispute. While presumption of the existence of a separate piece of land was not called for, the trial court was not at fault to presume as it did. It was rightly within its discretion to make such a presumption. But just I have already found, it was unnecessary to do so. Ground two of the appeal lacks merit and it fails.

Ground four.

The learned Chief Magistrate erred in law and misdirected himself on the evidence when he awarded the Respondent both general damages and mesne profits at ago, when the Respondent had not proved them in court.

It is settled position of the law that when a claim for damages is included in an action, the claimant is required to adduce evidence in support of the claim, and to give facts upon which the damages could be assessed. Simply put, before assessment of damages can be made, the claimant must furnish evidence to warrant the award of damages. Facts must be provided to form the basis of assessment of the damages a claimant is entitled to. Failure to do so is fatal to the claim.

Also under ***Section 11*** of the ***Evidence Act (Cap 6),*** it is provided, in general terms, that in suits for damages facts tending to determine the amount of damages are relevant. Certainly, damages unless expressly admitted are put in issue and require proof.

In the instant case, the Respondent prayed for damages at trail, but did not lead evidence to support the claim. Therefore, there was no basis for the award of damages which the trail court

made. No facts were proved which tended to determine the amount granted or claimed. The award of damages was obviously in error, and it is accordingly set aside.

On the issue of *mesne* profits, it is the established principle that burden of proving the profits received lies on the person who claims that it was received, and not on the one in possession as a wrong doer; for the latter cannot be relied upon to provide an honest and accurate account of the monies realized during the time of his or her possession and/ or occupation. Therefore, in a claim for *mesne* profits, just as in other cases, it is incumbent on the claimant to establish; not only the existence of his right, but also the extent of it. It is for the person out of possession to prove what profits the one in possession of property made out of it. As soon as the claimant *prima facie* establishes that profits were somewhere about the sum alleged, the burden shifts to the Defendant.

In the instant case, there was no extent of the claim for *mesne* profits which was proved by the Respondent. It is not clear what the quantum was of the profits the Appellant allegedly received from his possession/occupation of the suit property. No evidence was led by the Respondent to establish *prima facie* that the profits were somewhere about the sum which the trial court awarded. Accordingly, ground four of appeal has merit and it succeeds.

The net result, therefore, is that the appeal fails, save only for ground four in as far as the issue of damages and *mesne* profits is concerned. The appeal is dismissed with costs to the Respondent.

BASHAIJA K. ANDREW
J U D G E
02/05/2012.