

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA
CIVIL APPEAL NO. 92 OF 2009

(Arising from Njeru Magistrate Court Civil Suit No.0367 of 2007)

KIZITO MUBIRU ::: APPELLANT

VERSUS

KALIISA AUGUSTINE::: RESPONDENT

JUDGMENT

BEFORE HONOURABLE JUSTICE EVA LUSWATA.

A Introduction

- 1] The appellant brought this appeal against the judgment and decision of Her Worship Mary Ikiti delivered on 9/7/2009. In her judgment, the learned Magistrate adopted the following facts as representative of the appellant's claim.

- 2] Kaliisa Augustine, the respondent/plaintiff sued Kizito Mubiri, the appellant/defendant for a permanent injunction, vacant possession and general damages for trespass. On 17/6/2006, the respondent/plaintiff purchased from Ketty Namusoke land/plot with houses therein situated at Namuwaya Mbiko, Njeru Town Council (hereinafter referred to as the suit land). That Mubiru encroached on the suit property and forcibly occupied a house on the plot and has since continued trespassing there on. That Kaliisa was deprived of the use and enjoyment of the suit property trespassed upon by the Mubiru and has suffered loss and damage.

- 3] In defence to the suit, Mubiru denied the acts of trespass, stating that he acquired the suit land from his aunt Namusoke Ketty who relinquished the right to own the same in his favour and he made developments thereon.
- 4] In her decision, the learned magistrate believed the testimonies of the respondent and her witnesses and dismissed the appellant's claim. Being dissatisfied with that decision, the appellant filed this appeal on the following grounds:-

B Grounds of appeal.

- a) **That the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence.**
 - b) **That the trial magistrate erred in law and fact in not visiting locus in quo.**
- 5] It was reported that Mubiru passed on 19/8/2014, after filing the appeal. His widow Lunkuse Oliver was granted Letters of Administration in respect of his estate and she continued with prosecution of this appeal. I have seen a certified copy of the Letters of Administration granted by the Grade One Magistrate of Njeru Court dated 19/08/2014. On 27/10/17, there was a request, in Kaliisa's presence for substitution of Lunkuse as appellant. I honour that request and in line with my powers under Order 24 rr. 3 (1) CPR, Lunkuse Oliver is substituted for the late Mubiru as appellant in this appeal.

The duty of the 1st Appellate court.

- 6] The duty of the first appellate court has been reiterated in numerous cases. It is to re- evaluate and re- appraise the evidence on record and come to its own

conclusion. In the case of **Banco Arabe Espanol versus Bank of Uganda, SCCA No.8 of 1998**, *Order JSC held that;*

“The first Appellate Court has a duty to re-appraise or re-evaluate evidence by affidavit as well as to evidence by oral testimony, with the exception of the manner and demeanor of witnesses, where it must be guided by the impression made on the trial judge.”

7] It was further clarified in the decision of **Selle & Another Vs Associated Motor Boat Company Ltd & Anor (1968) EA 123** at 126 that the first appellate court is not necessarily bound to follow the trial Judge’s findings of fact where it is evident that she failed to take into account of particular circumstances or probabilities.

D PRELIMINARY POINT OF LAW.

8] Counsel for the respondent raised a point of law in his submissions. He argued that the appeal was filed out of time. The judgment of the lower court was delivered on the 9/7/2009 and the appeal was lodged in this honourable court on 7/8/2009 which is approximately 28 days from the date of judgment.

Section 220 of the Magistrates Courts Act Cap 16 provides that:

1) Subject to any written law and except as provided in this section, an appeal shall lie—

from the decrees or any part of the decrees and from the orders of a magistrate’s court presided over by a chief magistrate or a magistrate grade I in the exercise of its original civil jurisdiction, to the High Court;

Section 79 of the Civil Procedure Act Cap 71 provides that:

(1) Except as otherwise specifically provided in any other law, every appeal shall be entered—

(a) **Within thirty days** of the date of the decree or order of the court.

9] It is clear that the appeal was lodged within the statutory 30 days allowed for lodging an appeal. The arguments for appellant's counsel are valid. Failure to file a notice of appeal is not fatal to an appeal. A notice only serves to show that the losing party has intentions to appeal. It is the memorandum of appeal which is the vital document to alert the respondent of the likely or intended grounds of appeal.

10] I find no merit in the objection and it fails.

Ground one.

That the learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence.

11] In her decision, Magistrate found the testimony of Namusoke Ketty PW4 convincing. She believed the fact that Namusoke sold the suit land to Kaliisa Augustine, which evidence was well supported by the latter's witnesses. She did not believe the Mubiru's testimony that Namusoke gave him the suit land as they would be no reason for them to move to Katosi together. She concluded by finding Kaliisa to be the legal/rightful owner of the suit land and houses therein, and issued a permanent injunction against Mubiru, his servants and those under his authority from carrying on any activity thereon.

13] It was the testimony of Augustine Kaliisa that he purchased the suit land (which is developed with eight semi-permanent rooms) from Ketty

Namusoke for Shs. 5,100,000 on 17/6/2006 and a sales agreement to that effect was executed and witnessed by Talemwa Boses, Nkwanja Yowasi, Nsubuga, Namuswe, L.C1 Chairman, Defence secretary, and even some of Mubiru's brothers. That Mubiru who had previously resided on the suit land with Namusoke, refused to vacate after the sale even after Namusoke gave him notice to vacate on 14/9/2006. Mubiru returned to the land after the sale and continues to occupy two rooms on the suit land and has also planted bananas. That Mubiru was one of the people who looked for buyers and but did not participate in sale transaction because he was away fishing. He tendered in a sale agreement and a notice to vacate the land which was marked as **EXH.1** and **2** respectively.

- 14] **PW2** Nsubuga Stephen, supported much of PW1's testimony. He added that Mubiru who was Namusoke's nephew, came to live with and care for her during her old age. That after Namusoke sold the land to Kaliisa in 2006, they both moved to Katosi but Mubiru returned, occupied two rooms and refused to vacate. That PW2 was present during the sale and participated in mapping out measurements of the plot and that Kaliisa is unable to occupy the premises on the suit land because Mubiru refused to vacate. On his part, **PW3 Taremwa Moses** stated that on 17/6/2006 he witnessed Kaliisa purchasing a plot with rentable rooms from **Namusoke**. Similar to PW2, he stated that Mubiru was not present during the sale.
- 16] On the other hand, PW4 Namusoke Ketty, Mubiru's paternal aunt stated that she previously owned the suit land which she had purchased from Asin Maidu in 1983 and constructed houses thereon. She conceded having sold the suit land to Kaliisa in 2006 for the sum of Shs. 5 Million. That she signed an agreement of sale which was prepared by the area LCI chairman

and Mubiru was present at the time. She then vacated and handed over the suit land to Kaliisa and moved to Katosi with Mubiru. That while in Katosi, Mubiru told her that he was returning to Namuwaya to pick up his property and instead took up occupation of the suit land and refused to leave. That following a complaint by Kaliisa, she issued a notice of vacant possession against Mubiru (in the presence of Kaliisa and Nsubuga) but he defied it.

- 17] Conversely, Mubiru testified that he lived with his aunt Namusoke between 1990 and 2006. He was aware that Kaliisa bought Namusoke's house in June 2006 but did not know the size of the land purchased. That his late father had land at Kasanja zone and before his death, he gave it out to his children but Namusoke his aunt suggested that he forfeits his share for land that she would give him at Namuwanya. That Namukasa allowed him to construct a room adjacent (as an extension) to her house. That when he married, the aunt directed him to construct a house on the land she had given him in 1995. That his land neighbors Kaliisa's land that he acquired in 1994.

That during 2006, Kaliisa demolished his pit latrine and cut down an avocado tree, a matter that he reported to court/police a result of which Namukasa demarcated for him his boundaries. That what Namuksas demarcated is right next to what Kaliisa bought and he resided there with his wife and four children. He insisted that Namukasa never sold off the portion that she gave him. He contested the fact that what Kaliisa purchased includes the portion that he occupies. He also denied the fact that Namukasa and her brother ever issued him with a notice to vacate the land in issue.

- 18] On the other hand, **DW2** Lunkuse Oliver stated that when she got married, the defendant told him that Namusoke his aunt had given him a piece of land

on which they reside. That in 1994 Namusoke showed them the piece and they constructed a house in 1994 or 1995 and occupied it in 1996. That Namusoke showed them the land boundaries of what she gave them. That there is a wall fence separating what Namusoke gave them and her house. That she first learnt that Kaliisa bought Namusoke's land when Mubiru was arrested. She conceded Namusoke informed them that she had sold her house but that their portion was not sold and thus, Kaliisa intended to trespass on their land. She denied ever seeing letter directing them to vacate the suit land, but admitted that Mubiru's uncle, Nsubuga, also LC1 Chairman Kizungu zone who directed them to vacate the suit land. That it is aunt who gave them land.

- 19] On his part, **DW3 Senyonga Patrick** stated that following the death of Mubiru's father, Namukasa lived with the Mubiru and his wife. In 1994, he gave them the suit land where they constructed a house in 2005 and begun residing in it during in 2006. That Mubiru's son was even buried on the land in 2007. That in 2006 Namukasa got problems and wanted to sale the whole portion of land including the portion that he had earlier given to Mubiru, but Senyonga refused to witness the agreement as it included Mubiru's land.
- 20] According to Mubiru, he was given a portion of the suit land by Namusoke and with her directions, constructed a house on it in which he resided with his family. That testimony was supported DW2 and DW3 but denied by Namusoke who insisted that he lived there only as a visitor/relative, and left with her after the suit land was sold.
- 21] The said donation is construed in law as a gift inter vivos. In the case of **The Registered Trustees of Kampala Archdiocese v Nabitete Nnume Mixed**

Co-operative Farm Limited (HCCS NO. 1559/2000) [2017] UGHCLD 4;

It was held that a gift inter vivos is defined in Black's Law Dictionary 8th Edition at page 710 as;

"...a gift of personal property made during the donor's life time and delivered to the donee with the intention of irrevocably surrendering control over the property." Following the decision in **Joy Mukobe vs. Willy Wambuwa HCCA No. 55 of 2005**, the court held that;

"...for a gift intervivos to take irrevocable root, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift."

- 22] Delivery of the gift must be actual or constructive made during the donor's lifetime in a manner that depicts that the donor has stripped themselves of all dominion over the gift. See for example my decision in **Namugambe Balopera & Ors Vrs Frederick Njuki & Anor HCCS No. 341/2013 (unreported)**. And to illustrate that point further, **Todd & Watts In Cases & Materials on Equity & Trusts 3rd Ed at 130** states as follows

For a gift to be perfect, the donor must actually complete the disposition of the subject matter in favour of the intended donee or execute a formal "deed of gift". Only then can a volunteer or donee enforce it. Intention not to be mistakenly inferred, must be joined by action.

- 23] There appears to have been no contention from Mubiru and Lunkuse that the suit land was sold to Kaliisa and that Mubiru was fully aware of it. His contention was that Namusoke had previously given him a portion of it, showed him the boundaries during 1994, and allowed him to construct on it and reside there with his family, which he did. Infact, the evidence that Mubiru constructed on the suit land was not seriously challenged in cross examination and it was **DW3's** testimony that in 2006 when Namusoke

attempted to sale the suit land, he declined to sign the sale agreement because she wanted to include the portion that she had previously given to Mubiru and on which the latter's deceased's son was buried. Lunkuse also stated that there is a wall fence separating what Namusoke gave them and her house.

- 24] Unfortunately the above facts would still not satisfy the requirements of a gift inter vivos. It appears that our laws still do not recognize a verbal gift of land. See for example **Norah Nassozi & Anor Vrs George William Kalule HCCS N0, 5/2012**. Again the advise of **Clive V. Margrave Hones in Mellons: The Law of Succession 5th Ed at Pg 9-10** is instructive. He stated that “*various formalities are necessary for gifts inter vivos. Thus a gift of land must be by deed....*” As rightly pointed out by the trial magistrate, save for the evidence of Mubiru and Lunkuse, there was nothing else to show that Namusoke gifted Mubiru with part of the suit land. The only evidence that she relinquished her interest to it was the sale agreement between her and Kaliisa.
- 25] Further to the above, there is evidence that Namusoke had not stripped herself of all control or dominion of the suit land. At the time Mubiru defended the suit, he was clearly in possession of a portion of the suit land. However, Namusoke explained that after the sale, she went to leave in Katosi with Mubiru and who later mislead her to believe that he was returning to the suit land to collect his property but instead forced his way into two rooms on the structure on the suit land, over which he claimed ownership. Mubiru did not contest the testimony of his alleged departure and return to the suit land.

- 26] Both Mubiru and Lunkuse denied knowledge of Exhibit 1, but the latter admitted that Mubiru's uncle at some point requested them to vacate. Mubiru even admitted that Namusoke informed him about the sale of the suit property. This would not matter because by selling off the land and moving away to another place, was indicative that Namusoke did not strip herself of all dominion of the suit land, at the time is alleged she gave it to Mubiru or his estate cannot enforce it.
- 27] I would accordingly find no fault with the decision of the trail Magistrate to believe Namusoke and Kaliisa testimonies.
- 28] Thus, ground one fails.

Ground Two.

That the trial magistrate erred in law and fact in not visiting *locus in quo*.

- 29] It is a fact that the Court did not visit the locus in quo. According to the decision of **Manweri Manwa Anthony Civil Appeal NO. 007 OF 2010) [2015] UGHCCD 134 (1 June 2015)**, the practice of visiting a *locus in quo* is not mandatory and depends on the circumstances of each case. In **Yeseri Waibi Vs Edisa Lusi Byandala**. It was held that the practice is necessary in order to check on the evidence by the witnesses. Yet again the Court in **Kwebiha & Anor VS Rwanga & 2 others (Civil Appeal No.21/2011 [2017] UGHCCD 148** advised that the purpose of visiting locus in quo, is to clarify on evidence already given in court. It is for purposes of the parties and witnesses to clarify on special features such as confirming boundaries and neighbors to the disputed land, **to show whatever developments either party may have put up on the disputed land**, and any other matters relevant to the case.
- 30] Counsel for respondent argued that this was not a boundary issue which required an investigation at the locus. Conversely, appellant's counsel argued that the facts raised by Mubiru required clarification by the Court visiting the locus. I respectfully disagree.
- 31] The court believed Namusoke's testimony that she never gave out the suit land or any part of it to Mubiru. Whether or not Mubiru or his successors in title were in possession, or that there was a boundary discrepancy would thus not be in issue. I have also found that Mubiru and the administrator of his estate cannot enforce the alleged gift inter vivos. Under such circumstances, the Court was not required to visit the locus.
- 32] Ground two accordingly fails

33] In conclusion, I find no merit in the appeal and it is dismissed with costs to the respondent. The trial magistrate's judgment and order are upheld and the appellant (by his administrator) shall pay costs of the lower court as earlier ordered.

I so order

Signed

EVA K. LUSWATA

JUDGE

17/06/2019