

(Formerly MSD Civil Appeal No.37 of 2017)

VERSUS

(An appeal from the Judgment and orders of H/W Toloko Simon, Magistrate Grade 1 Hoima Chief Magistrate's Court at Kagadi delivered on the 29th day of May 2017)

JUDGMENT

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- [4] It was the contention of the Appellant/Plaintiff that the suit land being a family land, no one had a right to sell and cultivate it without consulting the heir or caretaker. That his brother **Joseph Kurikagira** therefore sold the suit land to the Appellant/Plaintiff without the consent of the family members and the elders as they were not aware of the transaction.
- [5] The Respondent/Defendant on the other hand denied the Appellant/Plaintiff's claim and contended that he bought the suit land from the late **Joseph Kurikagira**, the brother to the Appellant/Plaintiff in 2000 for it had been given to him as his share before the demise of their late father **Yohana Kitembo**.
- [6] Lastly, that in later 2013, a family meeting of elders and family of the late **Yohana Kitembo** resolved that the Appellant/Plaintiff ceases to disturb the Respondent/Defendant.
- [7] The trial Magistrate on his part found that the suit land was sold to the Respondent/Defendant by the late brother of the Appellant/Plaintiff in 2013 at a consideration of **Ugx 8,000,000/=** cash who is in possession and occupation and that the transaction was witnessed by biological brothers to the Appellant/Plaintiff who supported the sale of the land. The Appellant/Plaintiff's suit was accordingly dismissed with costs to the Respondent/Defendant and the Appellant/Plaintiff was further prohibited from interfering with the quiet possession of the Respondent/Defendant on the suit property which he lawfully purchased from the late **Joseph Kurikagira**.
- [] The Appellant/Plaintiff being aggrieved and dissatisfied by the decision of the trial Magistrate lodged this appeal on the following grounds:
1. *The learned trial Magistrate erred in law and fact in finding that the transaction that led to the defendant's occupation of the suit land was lawful thereby reaching a wrong decision.*
 2. *The learned trial Magistrate erred in law and fact when he held that the plaintiff had no cause of action thereby reaching a wrong decision.*
 3. *The learned trial Magistrate erred in law and fact when he wrongly construed the plaintiff's proposal to refund the purchase price as an*

admission to the good title on the part of the defendant thereby reaching a wrong full decision.

- [9] This court shall first consider **ground 2** of appeal for it is in form of a preliminary objection and then, deal with **grounds 1 and 3** together since they both revolve around evaluation of evidence that was before the trial Magistrate.

Ground 2: The learned trial Magistrate erred in law and fact when he held that the plaintiff had no cause of action thereby reaching a wrong decision.

- [10] In **Jeraj Shariff & Co. Vs Chotal Fancy Stores (1960) EA 374 at p.375**, it was held that whether or not a plaintiff discloses a cause of action must be determined upon perusal of the plaint alone, together with anything attached to form part of it, and upon the assumption that any express or implied allegations of fact in it are true. In **Auto Garage Vs Motokov (1971) EA 514**, Spry V.P held that for a cause of action to arise, the plaintiff must show that he/she enjoyed a legal right, the right has been violated and that the defendant is liable.
- [11] In the instant case, in his pleadings, the plaintiff stated that before the death of his father, the late **Yohana Kisembo**, in the year 2002 he had bequeathed the suit land to the heir **Tusiime Omuhhereza** who later got married and left the said land to him, the Plaintiff. It was the contention of the plaintiff that the suit land is therefore a family land for which his brother **Joseph Kurikagira** was not permitted to sell without the family consent.
- [12] In my view, by his pleadings, the plaintiff established that he has a right over the suit land. The plaintiff alleged that the family land was unlawfully sold to the defendant by the late **Joseph Kurikagira**, his brother without his or the family consent, thus showing that his right was violated. The plaintiff further averred in his pleadings that upon purchase, the defendant in early 2016 trespassed onto the land and began cultivating on it. This established that his right over the suit land which has not only been

violated but has also held the defendant liable. A cause of action was thus in my view established.

- [13] In the premises, I find that the learned trial Magistrate erred in law and in fact when he held that the plaintiff had no cause of action. The Appellant/Plaintiff had a right to the suit land as a beneficiary and or caretaker thereof, the right was violated by the Respondent/Defendant and he holds the Respondent/Defendant liable.

Grounds 1 & 3: Evaluation of Evidence

- [14] The duty of the 1st Appellate court as in the instant case is to review the record of evidence for itself in order to determine whether the decision of the trial court should stand. In so doing, court must bear in mind that an appellate court should not interfere with the discretion of a trial court unless court in its exercising its discretion has misdirected itself in some matter and as a result, arrived at a wrong decision or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of discretion and that as a result, there has been a miscarriage of justice, see **Stewards of Gospel Talents Ltd Vs Nelson Onyango, HCCA No.14 of 2018** and **NIC Vs Mugenyi [1987] HCB**.
- [15] This court shall apply the above principles in determining the present appeal by reconsidering all the evidence before the trial court and coming up with its own decision.
- [16] Counsel for the Appellant **Mr. Simon Kasangaki** filed the Appellant's submissions as directed by this court but the Respondent did not. This court is therefore proceeding to determine this appeal in the absence of the counsel for the Respondent's input. Besides, since submissions are a mere guidance of counsel, I find that to proceed and determine this matter in the absence of the Respondent's input shall not prejudice the Respondent.
- [17] Counsel for the Appellant submitted that the late **Kurikagira Joseph**, brother to the Appellant without the consent of the heir **Omuhereza**

Tusiime, the Appellant and other family members illegally sold the suit land to the Respondent. That the land had no distinctive shares to enable the late **Joseph Kurikagira** determine his share before the distribution of the estate. That the seller had no letters of administration to enable him lawfully sell estate property.

[18] Counsel relied on **S.192 of the Succession Act** for the proposition that it is only a person who has letters of administration that is entitled to sell the estate of the deceased person, **Rev. Onesifolo & Anor Vs Moses Matovu & Anor**, HCCS No.107/2003.

[19] That in the instant case, the Appellant and other siblings are beneficiaries of the estate of the late **Yohana Kisembo** who died intestate in the late 2002 leaving behind an estate comprised in the suit land which was never distributed among his children during his life time. The estate has no legal representative. That on 13th October 2013, the late **Kurikagira Joseph** sold off the suit land in the sum of **Ugx 8,000,000/=** to the Respondent falsely claiming to have been given the same by their grandfather. This was without any proof or documentary evidence to that effect. He appropriated the consideration sum for his own personal benefit to the detriment of other beneficiaries including the Appellant.

[20] Counsel concluded that the late **Kurikagira Joseph** who was not the administrator of the estate of the late **Yohana Kisembo** could not legally sell any portion of his father's estate to the Respondent without first taking out letters of administration and thereafter distributing the entire estate among all beneficiaries. That doing so would be illegal and the same cannot be sanctioned by court. 2ndly, that the suit land was not a gift inter vivos to the late **Kurikagira Joseph** in order for him to sell individually. That there was no any valid gift inter vivos as was held in the case of **The Registered Trustees of Kampala Archdiocese Vs Nabitete Nnume Mixed Co-op. Farm Ltd**, HCCS No. 1559/2000 [2017] UGHCLD 4.

[21] The law of evidence is that "he who alleges the existence of facts must prove so", **S.101 of the Evidence Act**. The standard of proof in civil cases is on a balance of probability; **Kamu Enterprises Ltd Vs Krystalline Salt**

Ltd, SCCA No.8 of 2018. The Appellant/Plaintiff therefore had the burden to prove the case on a balance of probability.

[22] In the instant case, the Appellant/Plaintiff pleaded under **para 4 of the plaint** thus;

"That before the death of the plaintiff's father, the late Yohana Kisembo in the year 2002, he had bequeathed a piece of land at Karalike village to the plaintiff's sister Tusiime Omuhereza as heir to late Yohana Kisembo who later got married and left the said suit land to the plaintiff Baguma Wilson."

In evidence, the Appellant/Plaintiff testified at **page 4 of the proceedings** as **PW1**, thus;

"Our grandfather gave him (his brother Joseph Kwirikagira who sold the land to the Respondent) that land to cultivate but not to sell.... When he shifted the land was given to our late father. Time came when my late father was the i/c he gave the land to us and the portion to my sister, the heir."

In evidence, **Omuhereza Tusiime** (PW2), the sister to the Appellant at **p.5 of the proceedings** testified thus:

"The land belongs to our grandfather. He was called Paul Isoke. Our grandfather gave Joseph Kurikagira to cultivate in 1978. He got some money and went and bought land somewhere else. Joseph handed the land to our late father before he died. The land was not divided ... he decided to sell the land to the defendant."

[] During cross examination, **PW2** explained that her grandfather told her that that the land was not to be sold. She had a WILL to that effect which was admitted as **D.Exh.1** (it was wrongly typed as P.Exh.1).

[24] The Respondent on the other hand adduced evidence that he bought the suit land from **Kurikagira**, the young brother of the Appellant/Plaintiff on the 13/10/13 as per the sales agreement admitted in evidence as **P.Exh.1**.

[25] As clearly seen from the evidence of both the Appellant as **PW1** and his sister as **PW2**, none of them adduced any evidence to the effect that the

suit land was bequeathed to the Appellant's sister **Omuhereza Tusiime** as the heir and no WILL is either on record or was pleaded by the Appellant to that effect. What the Appellant adduced as a "WILL" under **D.Exh.1** is not a WILL bequeathing any land to the Appellant. There is however evidence to the effect that Appellant's grandfather gave the suit land to the vendor **Joseph Kurikagira** to cultivate in 1978. Both the Appellant's brothers **Tibenda Joshua** (DW2) and **Byaruhanga William** (DW3) testified that the suit land belonged to their later brother **Joseph Kurikagira** who sold it to the Respondent at **Ugx 8,000,000/=** and the Respondent had been on the land even before the death of their father.

- [26] The trial Magistrate found that the testimony of the witnesses especially those who were present and witnessed the agreement were biological brothers to the Appellant/Plaintiff who supported the purchase of the land by the Respondent from the late **Joseph Kurikagira**, implying that the issue of the family consent did not arise. As a result, he dismissed the Appellant/Plaintiff's suit with costs to the Respondent/Defendant.
- [27] From the foregoing, I find that it is not correct as counsel for the Appellant submitted that the suit land the Respondent purchased was "family land" that required a family consent before the vendor could sell it to the Respondent. The vendor, the late **Kurikagira Joseph** sold his beneficial share he got from his grandfather and therefore did not need to first obtain letters of Administration as under **S.192 of the Succession Act** or consent of the family because, there is no evidence that this was estate of the deceased property. The authorities of **Rev. Onesifolo Ngaga Vs Moses Matovu & Anor**, HCCS No.107/2003 and **Wavamuno Semanda Vs Security Group Ltd**, HCCS No.269/2015 cited in support of the Appellant's case are not applicable to the instant case. The trial Magistrate rightly found that the Respondent/defendant lawfully purchased the suit land from the Appellant's brother **Joseph Kurikagira** and there was therefore no justification for any order for refund of the purchase price to the Respondent.
- [28] As a result of the totality of the above, I find that **grounds 1 & 3** are devoid of any merit and they therefore accordingly fail.

[29] In the premises, the entire appeal is generally found to have no merit. The trial Magistrate on the whole properly evaluated the evidence before him and rightly dismissed the Appellant's suit with costs. This appeal is therefore dismissed with costs to the Respondent.

Dated this 25th day of January, 2024.


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Byaruhanga Jesse Rugyema
JUDGE.