

1. ABBAS NDAMWE
2. SADIKI LUTEKA
3. SARAH KAMUKA
4. SARAH NANDUDU :::::::::::::::::::::::::::::: APPELLANTS

VERSUS

1. SELINA MUTONYI
2. ALICE NDAMWE :::::::::::::::::::::::::::::: RESPONDENTS

1. Introduction:

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5. The Appellants claimed that the Respondents forcefully occupied the said plot and rented it out to tenants without their consent claiming that their husband one Daudi Ndamwe purchased the said half part of the plot and business houses from the Plaintiffs' father and they have been in in actual possession to date.
6. The Defendants/Respondents in their written statement of defence contended that they are widows of the late Daudi Ndamwe who operated business in the names of Wakholi John and also known as John Wakholi. That Daudi Ndamwe worked with Asians up to 1972 when he bought Plot 19 Block B in Sironko District from Motibhai Tulshibhai Patel and took immediate possession of the suit plot and were staying in the same since 1972 until their husband's death in 2002. Upon his death, they continued in possession of the said property without any interruptions save for recent interruptions by the Plaintiffs.
7. The Respondents further claimed that the Plaintiffs' father is not John Wakholi but he was called Issa Ndamwe and that their husband has never been the heir of the Plaintiffs' father. They contended that they have been in possession of the said property since 1972 and have continue to stay therein being beneficiaries of the estate of late Daudi Ndamwe who was also known as John Makholi who was the lawful owner of the suit property.
8. The issues for the trial court's resolution were-
 - (a) Whether the defendants are trespassers on the suit property?
 - (b) What remedies are available to the parties?
9. The Trial Magistrate resolved the above issues in favor of the Respondents. The Appellants were aggrieved with the decision of the trial court, hence this Appeal.

10. Grounds of Appeal

- (a) That the learned trial magistrate erred in law and fact when she ignored the sales agreement which showed that the land was bought by the Plaintiffs' father
- (b) That the learned trial magistrate failed to properly evaluate the evidence on record as a result reached a wrong decision that the suit property rightfully belongs to the Defendants
- (c) The Learned trial magistrate erred in law and fact when she held that the Plaintiffs are trespassers on the suit land
- (d) That the decision of the learned trial magistrate occasioned a miscarriage of justice.

11. The Appellants prayed that the appeal be allowed, judgment/decree in the court below be set aside or quashed and the Appellants be granted costs herein and in the court below.

12. Legal Representation

13. Counsel Obeddo Deogratus represented the Appellants whereas Counsel Nakwaya Nyabbo represented the Respondents.

14. Duty of the first Appellate Court

15. I am aware of my duty as a first Appellate Court which is to evaluate all the evidence on the court record without isolation. See: **Fr. M. Begumisa & Ors Vs E. Tibegana SCCA No. 17 of 2003.**

16. I will resolve grounds No. 1 and 2 together and the other grounds will be resolved separately.

Ground No.1: *That the learned trial magistrate erred in law and fact when she ignored the sales agreement which showed that the land was bought by the Plaintiffs' father*

Ground No.2: *That the learned trial magistrate failed to properly evaluate the evidence on record as a result reached a wrong decision that the suit property rightfully belongs to the Defendants*

17. Determination of Court

18. Counsel for the Appellants submitted that there was a gross misapprehension of the evidence by the trial court which resulted to it reaching a wrong conclusion. He argued that in the lower court the Appellants' evidence were exclusively dependent on the purchase agreement dated 1/1/1972 which shows a one Wakholi John as the purchaser/buyer which was admitted and exhibited for the Appellants as Pexh.1 and Dexh.1 for the Respondents.

19. Counsel contended that according to the evidence of PW1 and PW2, the suit land being occupied by the Respondents was acquired by the Appellants by way of inheritance after the death of their late father Wakholi John who died in 1984 and left the suit property with Daudi Ndamwe the husband to the Respondents who have refused to vacate the same.

20. Counsel submitted that the late Wakholi John left the Appellants when they were still young and they only came to know about the alleged property because of the agreement in the name of their late father Wakholi John.

21. Counsel submitted that the main contention was whether Wakholi John shown as a buyer in the purchase agreement dated 1st/1/1972 is the father of the Appellants OR Whether Daudi Ndamwe (Respondents' Husband) is the same Wakholi John shown in the agreement dated 1st/1/1972. He argued that from the evidence on record, all the Respondents' witnesses to wit; DW1 DW3 and DW4 save for DW2 all informed court that Wakholi John was the father of the Plaintiffs/ Appellants, a name in the purchase agreement.
22. Counsel submitted that although DW1 and DW2 testified that the name Wakholi John belonged to their father in law and that their late husband used that name for all his businesses and whenever he would buy anything, he would buy in names of Wakholi John, no evidence or proof was brought to court to show that Daudi Ndamwe's properties were in the name of Wakholi John.
23. Counsel referred court to the case of **Fina Bank Ltd V. Spares & Industries Ltd (2000) 1 EA 52**, where it was held that the function of court in regard to agreements is to read and enforce agreement.
24. Relying on the above authority, counsel submitted that the purchase agreement shows Wakholi John as the purchaser of the suit land and there is overwhelming evidence on record pointing to the fact that the father of the Appellants was Wakholi John. Counsel contended that by virtue of the said agreement, it is the Plaintiffs' father who bought the suit plot hence upon his demise, the same reverted to the plaintiffs as his children through the law of inheritance.
25. Counsel argued that DW1 and DW2 contradicted themselves regarding the name of the Plaintiffs' late father. Whereas DW1 said that the Appellants' father was called Wakholi John, DW2 said he was called Issa Ndamwe. He cited the case of **Adam Bale & 2 other V. Willy Kumu Civil Appeal No. 12 of 2005**, where it was held that contradictions and inconsistencies which are major and are intended to mislead or tell deliberate untruthfulness, the evidence will be rejected and if they are minor and capable of innocent explanation, they will normally not have any effect.
26. He submitted that the Respondents' testimonies regarding who purchased the suit plot were deliberate lies and inconsistencies that were intended to mislead court that cannot be ignored.
27. Counsel for the Respondent on the other hand submitted that the evidence of DW1 in corroboration with that of DW2 clearly showed that the suit land and property rightly belonged to their husband (Daudi Ndamwe)

having acquired it from Patel Motibhai on the 1st day of January, 1972 by way of purchase. He argued that according to their evidence, their late husband was an employee of the Indian Patel and bought the suit land at a consideration of 8000/= which he paid in two installments that's; 6000/ and 2000/= and the same was signed in DW1's presence.

28. Regarding the use of the name of John Wakholi; Counsel submitted that this was confirmed by DW1 that the said name was at all material times the business name of their late husband (Daudi Ndamwe) since he used the same in most of his agreements and documents as per Dexh.3 which shows that John Wakholi was at all times the business name of their late husband. He further submitted that the Respondents' late husband used the name Wakholi John in the purchase of the suit land because he did not want the Indian (his employer) to know he was the one purchasing the same.

29. Counsel argued that the evidence of DW3 indicates that the Appellants' father never bought any shop or house for himself in Sironko but only used to stay in Daudi Ndamwe's house wherein he fell sick and eventually died from. Counsel submitted that that evidence was never questioned by any of Appellants.

30. Analysis of the above grounds by Court

31. The two grounds on the glance relate to failure to evaluate evidence. Therefore, for this court to be able to resolve them, I will refer to the evidence adduced in the trial court to establish whether the suit land belonged to the Appellants' late father or the Respondents' late husband and whether Daudi Ndamwe was the same person as John Wakholi.

32. I have studied the trial court's record and noted that the Appellants led evidence of two witnesses to prove their case. In their evidence, they came to know that the suit land belonged to their late father Wakholi John when they saw the sale agreement in the names of their late father. The sale agreement was tendered in court as PEXH.1. The Respondents on the other hand called a total of 4 witnesses to prove their case. In their evidence, DW4 said; ***"I used to stay in Daudi's home (the suit property) while going to school. I stayed there in 1968 to 1972 while studying."*** That piece of evidence was buttressed by DW1 who said that; ***"Our husband used to work for an Indian so he stayed in that building for 2 years then he bought it afterwards."***

33. The above evidence indicates that late Daudi Ndamwe lived in the suit property even before he purchased it.



34. The evidence of all the Respondents' witnesses shows that the father of the Plaintiffs used to stay at late Daudi Ndamwe's home. DW4 in particular said; ***"I used to stay at Daudi Ndamwe's place with the father of the plaintiffs (Wakholi John) when he had not yet married..... Daudi Ndamwe was the one educating John Wakholi....."***
35. DW3 also said; ***"John Wakholi used to stay in Daudi's house....."*** DW1 and DW2 said they have lived in the suit property since they got married to their late husband (Daudi Ndamwe) in 1970 and given birth to their children in the suit property and the Appellants' late father stayed with them.
36. According to the above evidence, it is evident that the Appellants' late father was called Wakholi John. Although DW1 and DW2 said that he changed the religion and became Issa Ndamwe, the same did not come to be known by the other Respondents' witnesses. Meaning, he was known by his original name Wakholi John.
37. DW1 and DW2 further contended that their late husband used the name Wakholi John as a business name in all his transactions. However, according to DEXH.4, the Respondents' late husband had so many properties but the Respondents did not tender any other agreement to prove that indeed their late husband used the name Wakholi John in any other transaction other than the present one. DEXH.3 which was tendered in support of their allegation though not very clear in color, the little I could see is a transfer of the land in dispute now and yet he had so many other properties which the Respondents could bring to court. I therefore I did not believe in that of their evidence.
38. Be as it may be above, the same evidence quoted above indicates that the Appellants' late father stayed at the suit property (late Daudi Ndamwe's home) as he was being educated by him, which means at the point when the suit land was purchased, the Plaintiffs' father did not have any source of income and was still a student.
39. PW2 said that he was told by their grandmother that their late father used to sale cloths. If this is true, he did it much later when the suit property had already been purchased because at the time of its purchase, he was still a student educated by the Respondents' late husband.
40. Therefore, having established that the father of the Appellants did not have any source of income to enable him purchase the suit property at the time, I will now handle the issue of why the suit property was purchased in the names of Wakholi John which is the name of the Appellants' late father.

41. The general principle is that, in law, the real owner is recognized over the ostensible owner. However, before recognizing such a transaction, the intention of the maker must be established to avoid illegality, which is called *the abenami transaction*. See: **Union of India & Anor Vs. M/S. Ganpati Dealcom Pvt. Ltd Supreme Court Civil Appeal No. 5783 of 2022**
42. Also in **Bhim Singh & Anr vs Kan Singh AIR 1980 SC 727**, the Supreme Court of India held that;
- “Under the English law, when real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of the purchaser. It is, however, open to the transferee to rebut that presumption by showing that the intention of the person who contributed the purchase money was that the transferee should himself acquire the beneficial interest in the property.”*
43. In the instant case, DW1 and DW2 told court that their late husband purchased the suit property in the names of Wakholi John because he did not want the Indians he was working for to know that he was the one buying the property.
44. DW1 and DW2 further told court that they have lived in the suit property since 1970 to date. In other words, the late Daudi Ndamwe established his family in the suit property yet according to DEXH.4 the Respondents’ husband had more properties. If this property was not his or had any other intentions, he wouldn’t have established his family in the suit property.
45. PW2 told court; ***“We were at our grandmother’s place in Ginnery Cell in Sironko Town Council. When our father died, our mother first took us to our grandmother and after that, our uncle (the defendants’ husband) came and picked us.....”*** This evidence was buttressed by the evidence of DW3 when he said that; ***“.....John Wakholi used to stay in Daudi Ndamwe’s house and even fell sick and died from Daudi’s houseDaudi Ndamwe was a caretaker of Wakholi John since he was an elder brother and heir of their late father John Ndamwe (the Appellants’ grandfather) and he was the one educating Wakholi John.....”***
46. The above evidence read together does not show that the father of the Appellants had a home or property in the area. The fact that the Appellants’ father fell sick and still treated by the Respondents’ late

husband is evident that he did not have a permanent home which is the reason, the Appellants were taken to their grandmother upon the death of their father.

47. Secondly, if the suit property was for the Appellants' father, it is at that point of sickness that he ought to have told some of his close relatives regarding the suit property but none was shown to the trial court to have known of the same.
48. Thirdly, at the point of the Appellants fathers' death, the Respondents and their entire family were already living in the suit property, which means they lived there even during the life time of the Appellants' father.
49. As guided by the case of **Bhim Singh & Anr vs Kan Singh (supra)** the person who pays the purchase money is presumed the purchaser unless the same is rebutted. According to the evidence adduced, the Appellants failed to prove that it was their late father who purchased the suit property.
50. From the foregoing, I am persuaded to believe that the father of the Appellants was only the *ostensible owner* by virtue of PEXH.1, as it is clear from the evidence that he was still a student in 1972 when the suit property was purchased by the Respondents' late husband and only used the name of John Wakholi in the purchase agreement because he did not want the Indians his employers, to know that he was the one purchasing the alleged property.
51. In any event, if late Daudi Ndamwe had intended to donate the suit property to the father of the Appellants by virtue of the purchase agreement, he ought to have shifted his family to another place which he did not.
52. Therefore, the fact that the name of the Appellants' late father appears on the purchase agreement (PEXH.1), it does not make the suit property to belong to him considering the intentions of the purchaser.
53. However, I fault the Respondents' late husband for failure to transfer the suit property into his names even after he ceased to work for the Indians.
54. In the circumstance, I find that the trial magistrate properly evaluated the evidence on the court record.
55. Grounds No.1 and 2 are answered in the negative.

56. **Ground No.3:** *The Learned trial magistrate erred in law and fact when she held that the Plaintiffs are trespassers on the suit land*

57. Determination of Court

58. Counsel for the Appellants submitted that the trial magistrate's holding that the Appellants' did not lead evidence to suggest that they have been in possession of the suit land was a misconceived assertion since PW1 and PW2 informed court that the Respondents were the ones who took care of them and brought them up on the suit land and all witnesses informed court that the Appellants' father was staying on the suit land with his brother Daudi Ndamwe and upon his demise, he left his children (Plaintiffs) to be taken care of on the suit land.

59. Counsel further submitted that the trial court's judgment revealed that when it visited locus on 30th/06/2017, there were signs of burnt houses with cement floor on the suit land and that it was Appellant (Abbas Ndanwe) who was the one repairing bicycles from the suit land which clearly indicated that the Appellants were in possession and for the trial court to hold otherwise was an error on its part.

60. Counsel for the Respondents on the other hand submitted that the trial magistrate properly evaluated the evidence on record to find that the Plaintiffs are trespassers on the suit land.

61. Analysis of court by the above ground

62. In Justine E.M.N. Lutaaya vs Sterling Civil Engineering Co. SCCA No.11 of 2002 trespass to land occurs

"When a person makes an unauthorized entry upon land, and thereby interfering, or portends to interfere, with another person's lawful possession of that land".

63. Court in that case also stated that the tort is committed not against the land, but against person who is in actual or constructive possession of the land.

64. In Sheikh Muhammed Lubowa versus Kitara Enterprises Ltd CA No. 4 of 1987 the Court of Appeal observed that one must prove;

- *That the disputed land belonged to the Plaintiff*
- *That the Defendant had entered upon it, and*

- *That entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the disputed land.*

65. In the instant case, all the Respondents in their evidence admitted that the Appellants are their relatives being children of the brother to the owner of the suit property (late Daudi Ndamwe). They further told court that upon the death of the Appellants' father, late Daudi Ndamwe picked the Appellants from their grandmother and started to live with them, took care of them and raised them. They stayed at his home till his death. That evidence indicates that the Appellants were late Daudi Ndamwe's dependents or relatives who were allowed to enter the suit property by him.
66. From the evidence, it is not clear whether after the death of late Daudi Ndamwe, the suit property was distributed to someone and it ceased to be a family where the Appellants also belonged and had access to.
67. Accordingly, I find that; the Appellants having been brought or grown up in the suit property, they cannot be considered trespassers.
68. Ground No.3 is answered in the affirmative.

Ground No.4: That the decision of the learned trial magistrate occasioned a miscarriage of justice.

69. Having resolved grounds No.1 and 2 in the negative, this ground of appeal also fails.
70. In the final result, this court makes the following orders-
- (a) The trial Court's decision, judgment and orders are upheld except-
 - (i) The Appellants are declared not to be trespassers on the suit property.
 - (b) Costs of this court and those in the court below are awarded to the Respondents.

I so order.

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LUBEGA FAROUQ
JUDGE

DATE: 05/03/2024