

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CIVIL APPEAL NO. 137 OF 2012

[Arising from C.S No.279/2009, H.C CS NO. 12/2009]

KASSIM

SSEMPEBWA :::APPELLAN

T

VERSUS

SSEWAGABA

GODFREY:::RESPONDENT

BEFORE: HON. MR. JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Appellant, Kassim Ssempebwa, appealed to this Court against the Orders and decision of Her Worship Bareebe Rosemary Ngabirano, Senior Principal Magistrate Grade 1 dated 11th day of May 2012 in Civil Suit No. 279 of 2009.

The Appellant was represented by M/S Mbogo & Co. Advocates, while the Respondent, Ssewagaba Godfrey was represented by M/S Nandaah Wamukota & Co. Advocates.

The Appeal is against the whole Judgment and decision of the said Magistrate on the following grounds:-

1. The Trial Magistrate erred in law and fact when she completely failed to carefully evaluate the evidence on record and thereby reached a wrong decision that the Appellant, Yusuf Mubiru and Muwanga acquired their interest in the suit land subject to the Kibanja interest of the Respondent.
2. The Learned Trial Magistrate erred in law and fact when she failed to find that the Appellant had a cause of action against the Respondent as he became registered on the land on 21st September, 1999 and not in 2009.
3. The Learned Trial Magistrate erred in law and fact when she failed to hold that it was not necessary to mention that he was suing in representative capacity as a trustee after attaching a photocopy of the certificate of Title to the Plaint which disclosed that he was a trustee.
4. The Learned Trial Magistrate erred in law and fact when she failed to hold that the Respondent's mother did not occupy the Kibanja in 1975 and therefore the Respondent and his mother were bonafide occupants of the suit Kibanja when there is no evidence of their lawful ownership of the kibanja.
5. The Learned Trial Magistrate erred in law when she misconstrued the law on trespass, cause of action and transfer as they related to the late Yusuf Mubiru and the Appellant and thus reached a wrong decision.

6. The Learned Trial Magistrate erred in law and fact when she failed to award the Appellant all remedies sought for and thereby reached a wrong decision.

The case for the Appellant/Plaintiff was that the Appellant/ Plaintiff brought Nakawa Civil Suit No. 279/2009 against the Respondent/Defendant for a declaration that the Respondent was a trespasser on the suit land comprised in Kyadondo Block 219 Plot 57 land at Najjera. He alleged that in or around 1999, the Respondent without the consent or permission of the Appellant, trespassed upon the suit land and constructed thereon illegal structures. On the other hand the Respondent denied the said trespass and claimed that he was a tenant by occupancy born on the suit land. He went on that the L.C had already decided the matter. He thus prayed for the dismissal of the Appellant's suit on account of being resjudicata.

The Appellant called four witnesses including himself, while the Respondent called two witnesses including himself to prove their respective cases and the case was heard by His Worship George Obong Magistrate Grade 1 who unfortunately did not write the Judgment and the same was written by his successor Her Worship Bareebe Rosemary Ngabirano Magistrate Grade 1. In her brief Judgment, the learned Trial Magistrate held that the Respondent's mother lived on the suit property from 1975 until her demise in 2000 and that the Respondent had received the Kibanja from his mother as a gift *intervivos* in 1988. She further held that the Appellant was not the proper person to sue but should have been

the late Yusuf Mubiru. She hence dismissed the suit with costs to the Respondent.

When the Appeal came up for hearing on 14/03/2014, the parties were directed to file written submissions which they did.

As a first Appellate Court, it is my duty to evaluate the evidence of the lower Court on record and decide whether the lower Court decision can be sustained or not. The Appellate Court has to come to its conclusion while bearing in mind that the Appellate Court did not have the opportunity to see the witnesses (demeanour) as they testified in the lower Court. That was settled in the case of **Fredrick Zaabwe Vs Orient Bank & 5 Others, Supreme Court Civil Appeal No.4 of 2006.**

I shall therefore proceed to consider the grounds of Appeal, one by one. The first ground of Appeal was that the learned Trial Magistrate erred in Law and in fact when she failed to properly evaluate the evidence on record, and thereby reached a wrong decision that the Appellant, and Yusuf Mubiru and Muwanga acquired their interest in the suit land subject to the interest of the Respondent.

Counsel for the Appellant submitted that it was wrong for the trial Magistrate to hold that the Respondent was not a trespasser on the suit land. He also attacked the finding and holding of the Trial Magistrate to the effect that by 14/07/1999, Haji Yusuf Mubiru was aware that the Defendant/Respondent was on the land carrying on developments but did not take action, and that by the

time the trustees registered themselves on the land on 21/09/1999, they acquired their Title subject to the interests of the Respondent Kibanja holder. The trial Magistrate held that the Appellant/Plaintiff could not plead trespass where the Respondent's mother occupied the land from 1975 and donated it to the Respondent in 1988. According to the submissions of Counsel for the Appellant, there was insufficient evidence for the above findings that the Respondent was a Kibanja holder. Counsel for the Appellant urged that the Respondent's so called Kibanja interest must be protected by law, otherwise mere occupation of another person's land does not constitute kibanja interest.

Counsel for the Respondent on the other hand submitted that the evidence of PW1 at page 20 of the record, during cross-examination told Court that he came to Najeera in 1995. And that before 1995, he did not know what was happening on the suit property.

As I have already stated it is the duty of the first Appellate Court to re-evaluate the evidence as a whole as was also equally held in **D.R. Pandya Vs Republic [1957] E.A. 336.**

In executing the above duty, I have to examine and scrutinise the evidence of all witnesses at the trial. In my view, and as correctly submitted by Counsel for the Respondent, the relevant pieces of evidence are found at pages 19 - 30 of the record of proceedings filed in this Court.

The evidence of PW1 to PW4 is at pages 19 - 25, while DW1 to DW2 is on pages 26 - 30 of the record. It is correct position that PW1 at page 21 stated that he did not know when the Respondent entered or re-entered the suit land. On page 22 paragraph 2, PW2 stated that he grew up with the Respondent (then Defendant) and went to the same school and that Respondent (Defendant) was born in Najjera. PW3 at page 23 during cross-examination stated that the Respondent/Defendant's mother started occupying the suit land in 1968 and that the Respondent/Defendant was born in 1964. At page 24, PW3, while ending his cross-examination stated that he did not know when the Respondent/Defendant started staying in Najjera. At page 24 of the record, PW4 stated that the Respondent occupied a vacant house in the Kibanja.

The evidence of the Respondent/Defendant and his witnesses on the other hand, contained on pages 26 - 29 was clear on how the Respondent/Defendant acquired the disputed land as a gist intervivos from Lucy Naiga in 1988.

So whereas learned Counsel for the Appellant submitted that the Respondent and his witnesses never gave any evidence that his mother Ruth Naiga started living or occupying the suit Kibanja in 1975, all the same, Counsel for the Appellant on page 5 of his written submissions (last paragraph) concedes to the testimony of Respondent/Defendant that he was born on the suit land and has since lived there with his mother, Lucy Naiga.

Counsel for the Appellant on pages 5 and 6 of his written submissions went on to calculate the years of the Respondent/Defendant by September, 2011 as 45 years and must have been born either in 1966 or 1963 according to evidence of DW2. He even urges that the law applicable by then was the Busuulu and Envujjo law, and that if Ham Mwamuka gave the Kibanja to Lucy Naiga, that it was before the Respondent was born in 1966. He then concludes that such a donation would contravene the Busuulu and Envujjo law. With respect to learned Counsel for the Appellant, the Busuulu and Envujjo law was abolished/repealed by the land Reform Decree of 1975. His detailed submissions and quotations from the Sections of the Busuulu and Envujjo law, which was long repealed, are irrelevant. Counsel for the Appellant goes at length to discuss gist intervivos under the Busuulu and Envujjo law and then under the land Reform Decree of 1975 as relates to the Respondent and his mother Lucy Naigga who have been on that disputed land for a longer duration as compared to the Appellant who acquired interest in 1999.

There is no need in my humble view, of learned Counsel for the Appellant dwelling on Legal Semantics discussing the Busuulu and Envujjo Law when the law applicable now is the Land Act, Cap. 227 Laws of Uganda. S.29 (2) of the Land Act Provides:-

“S.29 (2) (a)” Bonafide Occupant means a person who before the coming in force of the Constitution -

a) Had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more.

Furthermore, S.29 (5) of the Land Act provides:-

“29 (5) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant under this Section shall be taken to be a bonafide occupant for purposes of this Act.”

The above provisions of the law were discussed at length in the case of **Kampala District Land Board and George Mitala Vs 1. Venansio Babweyaka 2. Johnson Mwijuke 3. Sempala Sengendo 4. Apollo Nabeeta; Supreme Court Civil Appeal No. 2 of 2007.** The Honourable Odoki, C.J, while agreeing with the conclusions reached by the Justices of Appeal held on page 22 as follows:-

“It was admitted fact that the Respondents were in occupation of the suit land at the time the lease was granted to the second Appellant. The predecessors in occupation to the Respondents had been in possession of the land since 1970. Although it is my view they were not customary tenants, they were described variously in the lower Courts as squatters, tenants of a tentative nature, licences with possessory interest, or bonafide occupiers protected from Administrative injustice.I agree with the

lower Courts that the Respondents were bonafide occupants as defined in Section 29 (2) of the Land Act. The Respondents purchased the suit land in 1998 from persons who had occupied and utilised the same since 1970, and were therefore deemed to be bonafide occupants in accordance with Sub-section 5 of Section 29 of the Act.....”

In the present case, the evidence on record is clear. The Respondent did not only grow upon the land in dispute, but lived there with his mother Lucy Naiga till she died in 2000 or 2002. How long is that? Having lived, stayed, and/or cultivated the land in dispute for over 30 years, **I reject the submissions by Counsel for the Appellant that since the Appellant and his late father Yusuf Mubiru have never authorised the Respondent and or the late Lucy Nayiga to stay on the land, the Respondent’s occupation on the land is illegal due to the absence of the requisite consent from the Plaintiff mailo owner.** The question is who found who on the disputed land? Since the Respondent was already on the disputed land by the time the Appellant acquired his interest in 1999, then that interest of 1999 was subject to Respondent’s interest as a bonafide occupant. The first ground of Appeal therefore miserably fails.

The second ground of Appeal was that the trial Magistrate erred in law and fact when she failed to find that the Appellant had a

cause of action against the Respondent as he became Registered on the land in September, 1999 but not in 2009.

Counsel for the Appellant on the above ground submitted that since the Appellant had a Certificate of Title, exhibit P1, it is trite law that a Certificate of Title is conclusive evidence of proprietorship under the Registration of Titles Act. Counsel for the Respondent, on the other hand, submitted that whether the Appellant got registered on the land in 1999 or 2009 did not matter. That what is important is the interest of each party in the suit land. I entirely agree with learned Counsel for the Respondents submissions. In the earlier case of **Kampala District land Board and Chemical Distributors Vs National Housing and Construction, Supreme Court Civil Appeal No.2 of 2004**, It was held that where the Respondent had been in possession or occupation of the suit land for more than 12 years at the time of coming in force of the 1995 Constitution, and having utilised the same, without any challenge, the Respondent was entitled to enjoy its occupancy in accordance with Article 237(8) of the Constitution and Section 31 (1) of the Land Act, if the suit land was registered land.

And as far as this Court is concerned, that position of the law applies in the present case because the Respondent's interest pre-existed that of the Appellant. The second ground of Appeal therefore fails and is hereby rejected.

The third ground of Appeal was that the learned trial Magistrate erred in law and fact when she failed to hold that it was not necessary for the Appellant to mention that he was suing in a representative capacity as a trustee when he was a trustee.

Counsel for the Appellant submitted that the suit land comprised in Kyadondo Block 219 Plot 57, land at Najjera has been trust property since 21/09/1999 when the late Haji Yusuf Mubiru and the Appellant were registered on the land as trustees of Uganda Muslim Supreme Mpigi. And that the Appellant was entitled to sue in the absence of the deceased father. Counsel for the Respondent on the other hand submitted that a party is bound by its pleadings. He added that it was important for Appellant to mention that he was suing as trustee and not in individual capacity. I am in the premises inclined to agree with Counsel for the Respondent because it makes a difference when one is suing as a trustee and as an individual. The trustee deed ought to have been attached which was not the case. Also to have been attached was the resolution of the Association.

However, I wish to emphasise in view of the holding under ground 1 and 2 of Appeal that irrespective of whether the Appellant sued as a trustee or not, what was crucial was how each party's interest was acquired. Who acquired interest subject to the other. The conclusion of this Court is that the Respondent and his mother Lucy Naiga acquired interest in the disputed land much earlier since 1970s. The third ground of appeal is also hereby dismissed.

The fourth ground of Appeal was that the learned trial Magistrate erred in law and fact when she failed to hold that the Respondent's mother did not occupy the Kibanja from 1975 and so they were not bonafide occupants. This is where Counsel for the Appellant reiterated that the Respondent's so called kibanja interest must be protected by the law. Counsel for the Appellant in submissions did not define who is a bonafide occupant or did not give any contrary definition provided under the land Act which I have already referred to under ground No. 1 of Appeal.

Needless to emphasise, PW3 at page 23 of the lower Court record during cross-examination stated that Respondent's mother started staying on the kibanja in 1968. There is no evidence on record from the Appellant that the first owner of the disputed land ever disturbed Lucy Naiga, the mother of the Respondent. And that is what the Respondent (as DW1) and DW2 stated on pages 26 - 29 of the lower Court record. The records or evidence reveals that when Appellant purported to threaten Respondent in 1999, the Respondent not only warned the Appellant that he was born on the disputed land, but successfully sued him in LC 1 Court. Appellant lost in LC 1 Court of the area. And as I have already ruled, the legal regime after 1995 favours the Respondent who has been in actual possession and use of the suit land since 1970s. The Respondent is protected under S.29 (5) of the Land Act. I therefore find no merit on this ground which is also hereby dismissed.

Ground No. 5 of Appeal was that the learned trial Magistrate erred in law and in fact when she misconstrued the law on trespass, cause of action and transfer and so reached a wrong decision. Counsel for the Appellant submitted that a cause of action in trespass is the unlawful entry on the land of the Plaintiff by the Defendant. And that the continuance of a trespass constitutes a fresh trespass which is actionable. Counsel for the Appellant in his submissions went on to dwell on the principle of privity of contract, thereby faulting the trial Magistrate in her findings. With all respect to Counsel for the Appellant, this Court as at a complete loss as to how the Principle of Privity of contract applies in the circumstances of the present case. This Court has already ruled and upheld the decision of the lower Court that by the time the Appellant acquired registered interest in the disputed land, the Respondent, and his mother Lucy Nabayika were long there, in occupation and settled. There is no way they can just be evicted without the due process of consent and compensation where necessary and in accordance with the provisions of the Land Act, Cap 227 and the land Amendment Act of 2010 as relates to protection of lawful and bonafide occupants. Ground No. 5 of Appeal also fails.

The last ground of Appeal is that the Trial Magistrate erred in law and fact when he failed to award the Appellant all the remedies sought and thereby reached a wrong conclusion.

This Court is aware of its powers as an appellate Court laid down under **S.80 of the Civil Procedure Act**. The Appellate Court is

seized with original jurisdiction and can grant such remedies as the lower Court. However, having found and held that all the foregoing grounds of Appeal have failed and having disallowed them, then I further find and hold that the Appellant was not entitled to the remedies sought.

In my humble view, the learned Trial Magistrate rightly dismissed the suit. In the circumstances, and in view of what I have outlined, my conclusion is that this Appeal fails and the same is hereby dismissed. I further exercise this Court's discretion to order that each party meets their own costs.

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W. M. MUSENE

JUDGE

22/05/2014

Mr. Turinawe Julius, holding brief for Mr. Kamba for Appellant.

Mr. Wamukota Charles for Respondent.

Parties present.

Aida Mayobo, Court Clerk present.

Court: Judgment read out in open Court.

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W. M. MUSENE

JUDGE