

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

CIVIL APPEAL NO.50 OF 2012

SAJJABI JOHN ::: APPELLANT

VERSUS

ZZIWA CHARLES::: RESPONDENT

BEFORE: HON. JUSTICE STEPHEN MUSOTA

JUDGMENT

In this appeal, Sajjabi John, through his lawyers M/s Katende Sempebwa & Co. Advocates filed this appeal against the judgment and orders of the Chief Magistrates Court of Mengo. The appeal is against the whole decision. The respondent Dr. Charles Ziwa is respresented by M/s. Karuhanga Tabaaro & Associates.

The grounds of appeal are two:

1. That the learned Chief Magistrate erred in law when she tried an issue before her when she lacked jurisdiction to try the issue.
2. The learned Chief Magistrate erred in law in holding that the respondent was a bonafide purchaser of the property in dispute.

The appellatnt proposed to ask this court for orders that:

1. The appeal be allowed.
2. The decision and orders of the learned Chief Magistrate be set aside.
3. The respondent pays the costs of the appeal and the lower court.

The background to his appeal as can be deduced from the evidence on record and submissions by respective counsel, is that the respondent filed Civil Suit No. 595 of 2009 claiming that he had purchased the land comprised in Kibuga Block 7, plot 713 from one Nalumansi Jane a widow of the late Wamala Edward. The late Wamala died intestate in 2003 and he is survived by the said widow and several children, one of whom is the appellant, Sajjabi John. According to the respondent, he purchased the suit land at UGX. 40.000.000= . The widow was registered on the certificate of title on 5th October 2006 although her husband had handed her signed transfer forms way back before his death.

Subsequently, the respondent got registered as the proprietor of the suit land.

The sale agreement between the respondent and the widow provided for payment in two installments and after payment, the respondent was supposed to be granted vacant possession after six months. However after the expiration of six months, before the respondent could enjoy vacant possession of his newly acquired property, the appellant, a son of the late Wamala occupied the suit land claiming that as son to the deceased, he had interest as the beneficiary.

He also claimed that the widow fraudulently sold the land without letters of Administration yet the land constituted part of the estate of his late father. As a first measure, the respondent petitioned the office of the Resident District Commissioner (RDC) Rubaga Kampala. The RDC made a report and directed the appellant to vacate the respondent's land but the latter resisted the directive, prompting the respondent to file a Civil Suit which has given rise to this appeal.

In the Chief Magistrate's Court the respondent claimed for eviction orders, vacant possession and a permanent injunction against the appellant. He contended that he was a bonafide purchaser for value who bought from a registered proprietor and widow of the late Wamala. On the other hand the appellant averred that the purported sale between the respondent and the vendor was fraudulent as he at the time of the impugned sale knew that the appellant as a beneficiary was in

occupation of the suit land with his step-mother. Therefore, the respondent could not be a bonafide purchaser for value without notice.

The respondent contended that even if the widow became a registered proprietor after her husband's death, there was no fraud since the land was a gift *intervivos* to her and the transfer forms had been signed by her late husband in her favor before his death.

Judgment was given in the respondent's favor hence this appeal.

As a first appellate court, this court has the power and ultimate duty to re-evaluate the evidence before the trial court, subject it to fresh scrutiny and come to its own conclusion. While doing so, this court should be mindful that unlike the trial learned Chief Magistrate, it did not have the privilege of physically observing the witnesses testify, their responses to questions and observing their demeanor. See: **Banco Arabe Espanol Vs Bank of Uganda, SCCA No. 8 of 1998.**

I will go ahead and execute my duty starting with ground two.

Before I delve into the merits of this ground, I will make a brief comment on the assertion by learned counsel for the appellant that the lower court judgment is just two pages, that it does not deal with the witnesses' evidence on court record which leaves a lot to be desired and as such the appellant was very aggrieved.

Learned counsel for the respondent down played the concern by learned counsel for the appellant. Whereas I agree that the number of pages of a judgment may not reflect the quality therein, it is important that even if a judgment is short, it should be well reasoned and contain the known traditional components of a judgment. These include:-

- (a) The nature of the plaintiff's claim.
- (b) The nature of the defense.

- (c) A summary of the relevant evidence produced before the court and reasons for the court's acceptance or rejecting of the evidence.
- (d) The decision of the court together with the reasons for the decision and reason for conforming to the submissions by learned counsel.
- (e) The remedy, if any, to which the plaintiff is entitled; and
- (f) If the plaintiff is entitled to a remedy, the order of the court necessary to enforce it.

In the instant case therefore, I agree with learned counsel for the appellant that the Chief Magistrate's judgment was so brief to be desirable in view of the nature of the cause of action. I will however determine the correctness of that judgment after re-evaluating the evidence adduced at the trial.

After a careful re-evaluation of the evidence on record, I am inclined to agree with the submission by learned counsel for the respondent that the testimonies of Pw1 Zziwa Charles and Pw2 Nalumansi Jane remained uncontroverted.

Pw1 testified that at the time of purchase of the suit land, he went with a surveyor to open up the boundaries of the suit land without any objection from anybody. That this confirmed to him that the land was free from any third party claims. He further testified that he did not take immediate possession of the same upon understanding with Pw2 to give her a grace period to arrange to relocate to an alternative place and that the defendant used this opportunity to forcefully occupy the land and even rent it to some tenants without the plaintiff's consent.

Pw2 testified that she was given transfer forms by her late husband way back in 2002 which she safely kept. She had been in actual possession of all documents relating to the suit property. This is consistent with the testimony of Dw1 Sajjabi John, the appellant who testified that Pw2 had always had possession of the certificate of title of the suit property.

I am, in agreement with learned counsel for the respondent's submission that although the learned Chief Magistrate made a short judgment, she carefully evaluated the evidence before her and came to the right conclusion. She based her conclusions on both the oral and documentary evidence before her.

In the uncontroverted testimony of both Pw1 andPW2, the issue of whether the suit land formed part of the estate of the intestate came out clearly. Pw2 testified that she was given transfer forms by her late husband way back in 2002, she safely kept those forms. Secondly Pw2 has always been in actual possession of all documents related to the suit property. Because she did not have money at the time, she only transferred the suit property into her names in 2006. Then in 2008, she transferred the same into the names of the respondent.

From the evidence of Pw2, It is apparent that her late husband trusted her and kept the title documents in her custody. The father of the appellant did not at any one time complain of the loss of any of the title documents in his life time. The appellant acknowledged this in his testimony.

As rightly submitted by learned counsel for the respondent, this only points to the fact that the deceased was aware that the title to the suit property was in the custody of his wife and intended that she keeps it for her personal and exclusive use. This in my view was a gift intervivos.

Learned counsel for the respondent referred to the term gift intervivos as defined in **Halsbury's Laws of England Vol.18 pp 364 para 692** as:

“The transfer of any property from one person gratuitously while the donor is alive and not in expectation of death. It is an act whereby something is voluntarily transferred from the true possessor to another person with full intention that the thing shall not return to the donor and with full intention on the part of the receiver to retain the thing as his own without restoring it to the giver.”

Learned counsel for the appellant went legalistic while disputing the fact that the suit property was a gift *intervivos* to Pw2. He submitted that although the Registration of Titles Act does not explicitly define the term “transfer” a transfer is perfected when title to land actually passes to the transferee. Learned counsel appears oblivious of the fact that in this country, a lot of gifts *intervivos* exchange hands and beneficiaries take legal steps to put those gifts into their names later. It doesn’t make it less of a gift if I sign a transfer form for my car I have donated to my son even if it is still in my names or a piece of my Kibanja which the beneficiary later decides to bring under the domain of the Registration of Titles Act or transfer the car into his names.

On this one I agree with the submission of learned counsel for the respondent that after the suit land was donated to the widow in this case, it no longer formed part of the estate of the deceased. The deceased voluntarily handed over the certificate of title and transfer forms to his wife and unequivocally. This property could no longer be part of the deceased to be distributed to the beneficiaries if any.

Whereas Dw2, the appellant could indeed have been a beneficiary to the estate of his deceased father, he was not and was indeed never intended to be a beneficiary to the suit property.

On whether the respondent was a bonafide purchaser for value without notice, the answer can be found in the uncontroverted evidence of Pw1. He stated that he bought land from Nalumansi Jane at UGX 40.000.000= on 15th April 2008, he paid a deposit of 2.500.000=. The balance was to be paid on 6th June 2008. He was given a photocopy of the title. He did a search at the Land Registry and found no encumbrances. The land was found to belong to Pw2. A sale agreement Exh.P1 and P2 were executed thereafter. The land was not occupied by the appellant at the time. The parties agreed that Pw2 was to grant vacant possession after six months which she did. It was during this period that the appellant sneaked on to the land and occupied it. Pw2 testified that:

“.....when I sold, Sajjabi was not in occupation of the land, Sajjabi was not allowed by me to occupy the land, he came after I had left.....”

As rightly submitted, without proof of fraud, the Land Registrar should be treated as notice to the whole world that the person whose name appears therein is the lawful owner.

Dw1 and Dw2's allegations that the suit land formed part of the estate of the late father lacked merit. The deceased died intestate and the suit land was not indicated anywhere that it formed part of the estate.

The appellant has throughout the trial unsuccessfully labored to make it appear that he has always lived on the suit land in order to defeat the respondent's title. However, his contradictory evidence on where he lived between 2008 and 2009 betrayed his claim.

During his examination in chief, the appellant as Dw1 stated:

"In 2008, I was staying at home, it is where I was working from, I did not know anything, nobody told me anything, I was still living in this same property."

However during cross examination, the appellant said,

"I tried to lodge a caveat but this was in 2009. In 2008 I could not lodge a caveat; I was busy at school with my studies and I finished school in 2006....."

The appellant was claiming that he was working in 2008 and lived on the suit property, but on the other hand he claimed he was very busy with studies in 2008, yet he said he had finished school in 2006. The only logical conclusion from these discrepancies is that the appellant was never on the suit land in 2008 and he is merely telling lies to further his selfish interests. This renders credence to the assertion by Pw2 that the appellant abused the drugs (marijuana) and had been banished from the suit property by his father during his life time and she never allowed him near the suit property. Pw2 testified that:

“Sajjabi, son (a) to my husband. He refused to study, he smokes marijuana and the father sent him away from home.”

I am convinced on a balance of probabilities that the appellant only returned to the suit property to torment his step mother after the death of his father yet the step mother had sold the property to the respondent and granted him vacant possession. The actions of the appellant which are rampant in circumstances like these should be condemned and stiffly fought in order to protect the interests and rights of widows like the instant one. The actions by the appellant were uncalled for. He cannot explain his presence on the suit land. He was not a dependant at the time of the sale. He was not a minor. He was not a lawful tenant or bonafide occupant. He had no legal or equitable interest that the respondent defeated. His actions are completely unjustifiable. Children in this country must endeavor to acquire their own property instead of waiting for the demise of their parents to disturb those who are more entitled to shares in estates of deceased persons.

Finally on this ground, although the appellant consistently imputed fraud on the respondent and Pw2, there was no evidence to prove this. None of the family members has ever sued Pw2 in any court of law for fraud, and or for the cancelation of her certificate of title. Under S. 59 of the RTA, a certificate of title is conclusive evidence that the person named in the title is the proprietor seized of the interest in the title. Her registration in the title is conclusive evidence to the buyer that she was the lawful owner of the suit land. In the absence of proof of fraud, the court cannot go behind the fact of registration. See: **Olinda Desouza Figueredo Vs Kassamali Nanji [1962] 1 E A 756.**

For the reasons I have given in this judgment ground two of the appeal must fail.

Ground 1:

In his submission, learned counsel for the appellant submitted that the learned trial Chief Magistrate could not lawfully pronounce herself on whether the respondent was a bonafide purchaser for value because such decision would come with attendant orders such as cancellation

of title which orders can only be made by the High Court under S. 177 of the Registration of Titles Act.

On the other hand, learned counsel for the respondent submitted that the trial Chief Magistrate had jurisdiction to handle the suit.

The law as it stands now is derived from an old authority of **Kahurutuka & anor Vs Mushorishori & Co. [1975] HCB 12** where a Grade II Magistrate heard and disposed of a suit in respect of land over which a lease had been registered under the RTA. It was held then that:

“Although it is true that only High Court could order cancellation or rectification of title under the then S. 185 of the Registration of Titles Act (now 177) it was not true to say that only the High Court had jurisdiction to hear cases where it might be necessary for the High Court to order that a certificate of title be cancelled or rectified..... It was up to any of the interested parties to file an appropriate application to the High Court”.

The rationale in the above decision was that although title could be subject to cancellation, the suit had been disposed of by a competent court. The above decision was followed in the case of **Munobwa Muhamed Vs Uganda Muslim Supreme Council CR No. 1 of 2006** per Mulyagonja Kakooza J. wherein the judge held *inter alia* that the above decision is still good law.

In my view however, it would be more prudent that cases that may involve interpretation of the Registration of Titles Act and/or eventual cancellation of title as a consequential order by the High Court are handled by professional Magistrates Grade I or Chief Magistrate although it would be preferable if such cases were filed directly in the High Court, which has unlimited jurisdiction in order to avoid double litigation and ensuring expeditious dispensation of justice.

In the instant case, the plaintiff's cause of action revolved around the tort of trespass. The respondent sought for orders of eviction, permanent injunction and general damages for trespass. Therefore the learned Chief Magistrate had jurisdiction to handle the head suit. Consequently I will order that this appeal be dismissed with costs in this court and in the court below.

Stephen Musota

J U D G E

12.05.2014