



THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

CIVIL APPEAL NO. HCT-12-LD-CA-0094 OF 2014

**(ARISING FROM CIVIL SUIT NO. 0067 OF 2003 BEFORE THE CHIEF
MAGISTRATE MASINDI)**

- 1. OOLA ALBINO**
- 2. ODONG CHARLES OLINGA**
- 3. OKELLO RICHARD OMOL :::::::::::::::::::: APPELLANTS**

VERSUS

MARCELINO OLARA :::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE BYABAKAMA MUGENYI SIMON

JUDGMENT

This is an appeal from the judgment and decree of His Worship Byaruhanga Jesse Chief Magistrate Masindi whereby he dismissed the appellants' counterclaim, declared them trespassers on the suitland and ordered them to vacate the same or be evicted.

The brief background facts to this appeal are that, the respondent sued the appellants together with six others for trespass on a portion of the land comprised in LRV 2930 Folio 12, Plot 19 Kibanda Block 6 at Bweyale, Masindi, of which he is the registered proprietor. The entire leased area covers 197 hectares while the suitland is only 40 acres. He contended that the defendants who were internally displaced persons from Gulu District trespassed onto the suitland between 1992-1998. In their defence and counterclaim the defendants averred they were bona fide and lawful occupants having been invariably given chunks of the suitland by Heneriko Mugenyi, a kibanja holder, who was given 5000 acres of land by Bunyoro Kitara Kingdom in 1948. Court entered judgment for the respondent against the appellants and others, hence this appeal.

The grounds of appeal are that:-

1. The learned Chief Magistrate erred in law and fact when he held that the appellants /defendants did not plead and prove fraud against the respondent/plaintiff.
2. The learned Chief Magistrate erred in law and fact when decided that the appellants/defendants had no interest in the suitland.
3. The learned trial Chief Magistrate failed to evaluate the evidence on record thereby occasioning a miscarriage of justice to the appellants/defendants.
4. The learned trial Chief Magistrate failed to properly conduct locus thereby occasioning a miscarriage of justice.

The appellants seek the following orders on appeal:-

1. This appeal be allowed and the judgment and orders of the lower court be set aside.
2. The appellants/defendants are declared the customary/lawful owners of the suitland.
3. The respondent/plaintiff's title be cancelled.
4. The respondent meets the costs of this appeal and that of the court below.
5. A permanent injunction to issue against the respondent, his agents, workmen, assignees and any other acting on his behalf from further disturbing the appellant's quiet enjoyment of the land.
6. In the alternative and without prejudice to the forgoing, an order for a fresh locus in quo visit and or an order to take additional evidence in locus in quo.

The appellants were represented by Mr. Ocorobiya Lloyd while Mr. Lubega Willy appeared for the respondent.

Both counsel filed written submissions which I have carefully perused and taken stock of the arguments therein.

Ground A:

This ground stems from the finding of the trial Chief Magistrate that the defendants did not plead fraud in their counterclaim and it was not proved therefore.

Learned counsel for the appellants submitted that fraud is a question of fact and law. He referred to aspects of evidence on record to show fraud was proved. These included the failure by the respondent to present an inspection report; the attempt by the respondent to survey the suitland in 2000 which was resisted by the appellants and others, as well as the use of criminal proceedings against the appellants.

In ***FREDRICK ZAABWE VERSUS ORIENT BANK & 5 OTHERS, SCCA NO. 04 OF 2006***, fraud was defined to include anything calculated to deceive whether by single act or combination of acts or suppression of truth or suggestion of what is false, whether it is by direct falsehood or innuendo by speech or silence, word of mouth or look or gesture.

In ***KAMPALA DISTRICT LAND BOARD & ANOTHER VERSUS BABWEYAKA & 3 OTHERS, CIVIL APPEAL NO. 2/2007***, fraud was held to include dishonest dealing in land or sharp practice intended to deprive a person of an interest in land.

In ***KATARIKAWA VERSUS KATWIRENU (1977) HCB 187***, it was held that though mere knowledge of unregistered interest cannot be imported as fraud, it would amount to fraud where such knowledge is accompanied by wrongful intention to defeat such existing interest.

In ***J.W KAKOOZA VERSUS RUKUBA, CIVIL APPEAL NO. 13/1992***, Oder JSC (RIP) held that allegations of fraud must be specifically pleaded and proved. The degree of proof of fraud required is one of strict proof, but not amounting to one beyond reasonable doubt. The proof must, however, be more than a mere balance of probabilities.

In ***COSTA BWAMBALE & ANOTHER VERSUS YOSOFATI MATTE & 3 OTHERS 2001-2005 HCB 76***, it was held that before an order for cancellation of title could be made, it had to be proved that the second appellant had knowledge, actual or constructive about the interests of any of the respondents and ignored it.

Having expounded the law regarding fraud in land related matters, I now proceed to examine the evidence in the instant case pertaining to fraud.

In the first place, where fraud is intended to be raised, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word “fraud” should be used, the facts must be so stated as to show distinctly that fraud is charged. It is not allowable to leave fraud to be inferred from the facts – see ***DAVY VERSUS GARRET, (1878) 7 Ch.D 473; B. E.A TIMBER CO. VERSUS INDER SINGH GILL (1959) E.A 463 & J.W.E KAZZORA VERSUS M.L.S RUKUBA CIVIL APPEAL NO.13/1992.***

I have scrutinized the defence and counterclaim by the defendants/respondents that was filed on 5-12-2003 before the District Land Tribunal in the instant case. Fraud was not specifically pleaded, nor was fraudulent intent pleaded or the facts set out in the counterclaim such as to create fraud. Yet in the plaint, the fact of the plaintiff being the registered owner and proprietor of the suitland was specifically pleaded and the certificate of title attached to the plaint as annexure ‘A’. It cannot therefore be said the defendants were not adequately alerted or informed about the plaintiff’s claim. The matter would probably have been considered differently if title was procured after the commencement of the suit.

In their respective testimonies at the trial, the respondents generally denied knowledge that the land was surveyed. None of them alluded to any fraudulent act with regard to the respondent’s acquisition of the suitland.

It is clearly evident it is in the submissions of the appellants' counsel that a strong case of fraud is being raised, by arguing that the respondent did not present an inspection report and that he attempted to survey the land in 2000.

With respect to counsel, the respondent's evidence is to the effect he started the process of registering the land in the 1970s and got a formal lease offer in 1981. He received instructions to survey and secured title in 1990 for a five year period. It was never put to him during cross-examination that the first attempt at surveying the land was in 2000 and not earlier than that.

As for the inspection report, the respondent's evidence was to the effect:-

“My land was inspected. The inspection report might be with the Uganda Land Commission of Masindi DLB”

This evidence was not rebutted. It is noteworthy Kisakye Ruth (PW3) was the Ag. Secretary Masindi DLB. She stated:-

“We have records from the Uganda Land Board.... I have been in Land Office for the last 6 years. By then it was the District Land Committee which would go to the field and inspect the land, whose report the commission depends on.”

In cross-examination PW3 was not challenged to produce the inspection report pertaining to the suitland. In essence, the respondent's assertion that the land was inspected was accepted as unassailable.

In a nutshell, the trial Magistrate came to the correct finding that fraud was not pleaded in the counterclaim and raising it during submissions was an afterthought.

I therefore find no merit in the first ground and the same accordingly fails.

Ground B & C:

I will consider these grounds concurrently for they both concern the complaint that the trial Magistrate did not properly evaluate the evidence.

The evidence of Oola Albino (1st appellant) was to the effect he was denoted 5 acres of land by Neriko Mugenyi in 1979 and he has lived on the land since then.

Odongo Charles Olinga (2nd appellant) testified that he was born on the suitland and the said Mugenyi Neriko was his maternal uncle.

The evidence of Okello Richard Omul (3rd appellant) was to the effect Mugenyi Neriko gave his father land measuring 20 – 30 acres in 1973 and he has since lived on the land.

The evidence of Mugenyi Eneriko (DW1) was to the effect he was allocated 5000 acres of land by the King of Bunyoro Kitara Kingdom and donated some of it to various people including the three appellants. He however contradicted Odongo Charles (2nd appellant) by stating the latter has lived on the land for six years (by 2008 when DW1 testified). Yet the 2nd appellant's testimony was that he was born on the suitland. DW1 further testified that the respondent and his sons disturbed him by destroying his crops. As a result he left the land and secured another piece where he settled.

Considering that the respondent's title covers only 197 hectares (492.5 acres), I find it rather incredible that DW1 was forced to abandon a whopping 4500 acres of land where he was not being disturbed by the respondent. Further, the kingdom's document of allocation DW1 presented to court states the land is situated at Pachenyi Village and its boundaries were simply described as 'Rukoni'. Yoram Nsamba (Locus witness No. 3), the Private Secretary to the King, categorically stated the boundaries as described in the document did not make sense.

On the other hand, the respondent's evidence was that his land is situated at Nyamasasa Village. He admitted he knew Mugenyi Erineriko (DW1) but that his land is not adjacent to that of Mugenyi nor has the latter ever claimed the same. There is also evidence that the appellants and others settled on the suitland in 1993 after they were displaced by the LRA rebellion in Northern Uganda. He reported the matter to the Police and also filed a case of criminal trespass in the courts.

The most intriguing aspect about the evidence of Mugenyi Erineriko (DW1) is the assertion that the appellants and others were paying rent to the respondent for utilizing the land and they (land users) approached him to assist them. If the appellants had customary interests in the suitland, some having been born thereon, why would they pay rent to the respondent? I wish to observe none of the appellants refuted DW1's evidence on this point. Furthermore, DW1's evidence would imply the appellants were licencees as opposed to their claim of customary ownership.

The evidence of the 1st appellant was that the land Mugenyi Neriko donated him is approximately 5 (five) acres. But his son Okello Richard Omuro (DW4) stated the land given to his father is between 20 – 30 acres. DW4 also stated Mugenyi (DW1) had two homes, one at Nyamasasa and the other at Puchani.

According to Mugenyi (DW1) the suitland is at Nyamasasa but he resided at Kicwabugingo. He was specific in that:-

“I am not currently staying on the suitland. I got another land.”

DW1's evidence therefore implies Okello Richard Omuro(DW4) told a lie when he stated DW1 also had a home at Nyamasasa where the suitland is located.

Oola Albino (DW2) testified that his relatives including his mother were buried on his five acres and there were in all seven graves. However, during the locus visit the trial Magistrate observed:-

“The 3rd defendant Albino is not able to show the graves of his people.”

The contradictions in the appellants' case were not minor. They related to the credibility of their contention that their respective portions of the suitland were donated by Mugenyi (DW1). The evidence was thus incapable of leading to the finding the respondent acquired title to defeat the customary interest of the appellants. I am satisfied the trial Chief Magistrate properly evaluated the evidence and came to the correct finding that the appellant had no tangible claim over the suitland.

Grounds (b) and (c) accordingly fail.

Ground D:

Counsel for the appellant submitted that the trial Magistrate did not properly conduct the proceedings during the locus visit. He charged that the trial Magistrate did not record concisely the proceedings at the locus quo. One aspect he pointed out was that whereas the first appellant identified the graves of Heneriko Mugenyi (DW1) and that of his father on the suitland, court deliberately omitted to record these facts.

With due respect to counsel's assertions, the record is to the contrary.

Firstly, Okello Richard (DW1) did testify in cross-examination that Mugenyi was buried in Kyaruhoko near Puchani Village, Kicwabugingo Parish. The suitland is in Nyamasasa.

Secondly, the record of the locus proceedings shows the 1st appellant (Albino) failed to show the graves of his relatives he had mentioned in open court.

Thirdly, a scrutiny of the said proceedings also reveals the appellants were in attendance, they respectively took oath, were examined and their answers recorded. It is worth noting Odong Charles Olinga (2nd appellant) stated as follows with regard to where Mugenyi (Dw1) was buried:-

“Erineriko Mugenyi is now deceased but his family is in Salongo Village, Kiryandongo and this is where he was buried.”

The said evidence clearly contradicted that of Okello Richard (3rd appellant) who said Erineriko Mugenyi was buried in Kyaruhoko near Puchani Village. Conversely, their evidence is a rebuttal of their counsel's claim that the trial Magistrate did not record the fact the 1st appellant (Albino Ola) pointed out the grave of Erineriko Mugenyi on the suitland.

I clearly see no merit in this ground as the appellants have not shown that any miscarriage of justice was occasioned to their prejudice while at the locus in quo.

On the whole, the evidence adduced at the trial revealed that respondent obtained a lease and title was issued in 1990. The contradictory evidence of the appellants did not demonstrate the respondent procured registration to defeat their unregistered interests which interest he had knowledge of. It is trite a certificate of title is conclusive evidence of ownership of the suit property, unless its being obtained was due to proved fraud, lack of consideration or illegality – see - ***KATARIKAWA VERSUS KATWIREMU & ANOTHER (SUPRA); MARKO MATOVU & OTHERS VERSUS MUHAMED SSEVIRO & ANOTHER, CIVIL APPEAL NO. 7/78 & HARIS PRASAD RAMABAI PATEL VERSUS BABUBHAI KALIDAS PATEL (1992 – 1993) HCB 137.***

In the final analysis, all the grounds of appeal having failed, this appeal stands dismissed with costs to the respondent.

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BYABAKAMA MUGENYI SIMON

JUDGE

7-1-2016