

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL NO. 02 OF 2015
(ARISING FROM CIVIL SUIT NO. 58 OF 2012)**

1. WOTALI ERINA

2. MUKISA ISSA:.....APPELLANTS

VERSUS

NAMULONDO MONICA:.....RESPONDENT

JUDGMENT

BEFORE: HON. LADY JUSTICE EVA K. LUSWATA

1. Introduction.

The appellant through his lawyers M/s Kaggwa-Owoyesigire & Co. Advocates filed this appeal against the judgment and decision of Her Worship Nassozi Rehema Ssebbowa delivered on the 27/11/14 on the following grounds;

- 1) The learned trial Magistrate erred in law and fact when she failed to attribute acts of fraud to the respondent and consequently held that she was a bona fide purchaser for value without notice, hence rightful owner of the suit land.**
- 2) The learned trial Magistrate erred in law and fact when in reaching her decision, she engaged in conjecture and speculation thereby basing her decision on erroneous assumptions not supported by evidence on record.**
- 3) The learned Magistrate misdirected herself on the law relating to award of general damages without the report of the valuers, hence occasioning a miscarriage of justice.**
- 4) The learned Magistrate erred in law and fact when she evaluated the evidence of the Plaintiff in isolation of that of the Defendants thereby occasioning a miscarriage of justice.**
- 5) The learned trial Magistrate misdirected herself when she held that the Defendants had trespassed on the plaintiff's land hence occasioning a miscarriage of justice.**

2. Brief facts of the appeal

The facts of appeal as gathered from the judgment of the trial court can be briefly stated as follows;

Namulondo Monica, the respondent sued the respondents in the lower court for trespass with respect to land measuring two acres situated at Mulama Magada Sub County in Namutumba District, with a claim for general damages and an injunction. She claimed to have purchased the suit land for the sum of Shs 1,050,000/= on 3/12/12 from one Samanya Joshua, brother of Wotali Erina, the 1st appellant who had in turn received it from the late Ngobi Gulele and that an agreement which was witnessed by Mukisa Issa the 2nd respondent (among others) was executed on the same day. That she was therefore a bona fide purchaser for value and the respondents' actions in May 2012 to enter upon the suit land and destroying her growing crops amounted to trespass.

Wotali in contesting Namulondo's claim stated that she was owned the land as a bequest of a will which the clan handed over to her in 2009. On his part, the 2nd appellant, Mukisa Issa a cousin of both Samanya and Wotali, denied any connection or claim to the suit land. He however admitted being present when Namulondo was purchasing the suit land and when the clan gave it to Wotali.

In her decision, the trial Magistrate agreed with Namulondo's evidence, in whose favour judgment was entered, and thus this appeal.

The duty of the 1st Appellate Court:

The duty of the first appellate court is to re-evaluate the evidence on record and come to its own conclusion bearing in mind that it never saw or heard the witnesses in the lower court. In the **case of Kifamunte Henry Vs Uganda, SC, (Cr) Appeal No. 10 of 2007**, it was held that:

'...the first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge (Learned Magistrate). The appellate court

must then makeup its own mind not disregarding the judgment appealed from but carefully weighing and considering it..”

Resolutions of the grounds of appeal by court.

I will resolve ground 1, 2 and 4 concurrently.

Ground 1: The learned trial Magistrate erred in law and fact when she failed to attribute acts of fraud to the respondent and consequently held that she was abona fide purchaser for value without notice hence rightful owner of the suit land.

Ground 2: The learned trial Magistrate erred in law and fact when in reaching her decision she engaged in conjuncture and speculation thereby basing her decision on erroneous assumptions not supported by evidence on record.

Ground 4: The learned Magistrate erred in law and fact when she evaluated the evidence of the plaintiff in Isolation of that of the defendants thereby occasioning a miscarriage of Justice.

On a thorough analysis of the judgment, the trial judge did not hold that Namulondo was abona fide purchaser for value without notice. Instead, after a balanced evaluation of the evidence of both sides, the Magistrate was satisfied that Namulondo purchased the suit land from Samanya, the latter who claimed to have had received it from his father Ngobi Gulule. She rejected the will that Wotali purported to adduce for not being properly executed or attested and could not be given effect without letters of administration or probate. She disregarded Wotali and Mukisa’s evidence which she found to be contradictory, and concluded that Samanya had a right to sell the suit land to Namulondo.

I see no error in judgment on the fact that the Namulondo purchased the suit land from one Samanya Joshua. A sale agreement dated 3/1/2012 and its English translation were introduced into evidence as D.I D 1. It was properly executed and witnessed by many people including Mukisa, His protestations that he signed a document which he did not understand was unbelievable since there was evidence to show that it is him who acted as the broker and introduced Namulondo to Samanya. It may well be doubtful that the LCs officially witnessed the agreement but since there were other witnesses to it, it cannot be invalidated by that one fact.

Beyond that, and with due respect, the decision of the Magistrate in particular relating to property belonging to a deceased's estate was erroneous, and the following are my reasons:-

All the parties and their witnesses agreed to the fact that the suit land at same point belonged to the late Ngobi Gulele (herein after referred to as the deceased) who passed on sometime in 2008. Wotali claimed the deceased left the land as an inheritance to his seven daughters to be held jointly by them, or at least land belonging jointly to all the deceased's children including Samanya. She also admitted that Samanya had been born and resided on the suit land for all his life. She produced a will, purported to have been attested by the deceased to support her assertions.

Both Namulondo and Samanya contested the will. Samanya denied its existence, contents and the fact that it was ever read out by the clan's men following the deceased's death. He argued that the deceased distributed all his land amongst his three sons (him inclusive) and nothing was given to the daughters. That after the distribution, one of his brothers sold to him his portion. That he then sold his inheritance and what he had purchased to Namulondo, which was in his right to do.

The decision of the Magistrate to reject the will was correct. Although attested by a thumb print, it was not witnessed and there appeared to be no English translation. It is taken then that the deceased died intestate, and his estate by law, should have been distributed as such.

Samanya agreed that the deceased had given him the suit land together with his brothers, that evidence was supported by DW2 and DW3. However none of them were clear when the gift was actually made, and certainly no document was adduced to support that fact.

Only Musimami Fred (DW7) claimed to have been physically present on 21/3/2018. That after introducing all his children to Musimani, the deceased the deceased proceeded to give Samanya a portion of the suit land measuring two sticks of 12ft each. The other two sons Gulele and Kakubagabe also received their portions and the balance of 1 ½ sticks was reserved for the

daughters. That portion was then entrusted with Wotali for custody. That testimony would seriously contest Samanya's evidence that his sisters were not given any land.

Proof of a gift made in contemplation of death or a gift *intervivos* is proved through three ways:-

- 1) There must be a donative intention
- 2) There must be actual or constructive delivery to the donee during the donor's lifetime to strip himself of all dominion of the gift
- 3) There must be acceptance by the donee

See **Black's Law Dictionary 10th Edition paragraph 804**

Ordinarily deeds of gift of land must be by deed and according to the decision in **Noah Nassozi & Anor Vs. George William Kalule HCCS 5/2012** followed in **Namugambe Balopela & Ors Vs. Fredrick Njuki & Anor HCCS 341/2013**, our laws do not recognize a verbal gift of land.

Although Samanya's long occupation of the land was not contested, Wotali argued that it was due to the fact that he was the eldest child and had been born there. There was no evidence that that occupation was exclusive to him as one who had received it as a gift and in fact, there was considerable variance with respect to the size of his alleged portion. In fact, there was evidence that Wotali did use the land after the deceased's death during 2000s and later entrusted it to one Akisofeli as a care taker.

That notwithstanding, no evidence was adduced to show that the deceased even executed a deed of gift unequivocally entrusting the land to Samanya. In fact, Samanya and other witnesses testified that the deceased continued to reside on and use the suit land right up to his death. The alleged physical exercise of distribution would thus not suffice.

Having found so, it is wrong for the Learned Magistrate to hold that Samanya owned the suit land and could sale it to Namulondo. In fact according to the LCI Chairperson, Samanya had conceded to the fact that the suit land was clan land or at least, belonged to him and his siblings, and even offered to refund the purchase price. He instead became evasive, which prompted Namulondo to file the suit.

On the other hand, the contestation by Wotali that the clansmen gave her the suit land in 2009 would also have no merit. I have found that the deceased did not leave the will and his estate was therefore subject to intestate succession.

Section 191 of the Succession Act is clear “

Except as hereafter provided, but subject to section 4 of the Administrator General’s Act , no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted by a court of competent jurisdiction”

Neither Samanya nor the clan heads could deal with the suit land before a grant of Letters of Administration was made with respect to the deceased’s estate. Even then, only the appointed administrator had powers of administration, including equal distribution to all the deceased’s lawful beneficiaries. Thus the actions by Samanya and the clansmen would amount to intermeddling contrary to Section 268 of the Act. On the other land, the action of Wotali could be tolerated because she proceeded to re-gain possession of the suit land and then referred the matter to the concerned authorities and the dispute eventually ended up in Court. Such acts are permitted if carried out by a beneficiary to protect their interest in an estate especially when done to preserve its integrity and prevent waste.

In conclusion of these three grounds, I find that the question of fraud or bonafide purchase never arose. Although she came to a wrong decision on the law, the Magistrate did not rely on conjuncture and speculation. Her findings although erroneous, were properly supported by the evidence on record. She equally and in a balanced manner weighed the evidence of the plaintiff and defendants, but her decision was wrong, and certainly resulted into a miscarriage of justice.

Thus the first ground succeeds only in part.

Namulondo could not be the rightful owner of the suit land, which originally formed part of an intestate's estate and for which no administration or formal distribution in accordance with the law, had ever been done.

The Magistrate's decision although erroneous was based on the available evidence, which was evaluated as a whole. Ground two and four would thus fail.

Ground 3:

The learned Magistrate misdirected herself on the law relating to award of general damages without the report of the valuers hence occasioning a miscarriage of justice.

The Magistrate made an award of Shs. 7,000,000/= in general damages. She relied solely on Namulondo's oral testimony. I have held that Samanya did not own the suit land in his own right and Wotali's entry upon it cannot be deemed as trespass. Therefore, would be no basis to make an award of general damages in trespass. Even then, even if an award was justified in the circumstances, there ought to have been better particulars given either in a valuation report or by Namulondo herself, to enable a proper assessment of fair general damages in the circumstances.

Ground three succeeds

Ground 5:

The learned trial Magistrate misdirected herself when she held that the defendants had trespassed on the Plaintiffs land hence occasioning a miscarriage of justice.

In the case of EMN Lutaya Vs Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)

“ It was held that trespass to land occurs when a person makes an authorized entry upon land, and there by interferes, or portends to interfere with another person's lawful possession of that land.

Needless to say, the tort of trespass to land is committed, not against land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass.”

I have found that Namulondo purchased from a person who had no powers to sell property belonging to an intestate's estate. The agreement of sale notwithstanding, that sale was void and she cannot be deemed to have constructive or legal possession the suit land. At page 41 paragraph 1 of the record, Namulondo stated in her testimony that it is Wotali and her agents who are in occupation. That is possession that I believe Wotali regained as a beneficiary of the deceased's estate. It was thus wrong for the Magistrate to have found that Wotali was in trespass. Monica Namulondo's remedy if she so wishes, would be to pursue a refund of the purchase price from Samanya from whom it was proved she purchased the suit land

Ground five accordingly succeeds

In conclusion, this Appeal has succeeded in part. However, the decision of the lower court is dismissed as there was a total disregard of the provisions of the Succession Act regarding administration of the estate of an intestate. The following orders are made.

- a) The suit land should revert to the estate of the late Ngobi Gulele.
- b) An administrator be appointed to administer the estate and carry out its distribution according to law.
- c) Since the appeal only succeeded in part, the appellants are entitled to one half of the costs of the appeal, and the full costs of the court below.

I so Order.

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EVA K. LUSWATA
JUDGE
20/12/2018

