

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL APPEAL NO. 032 OF 2017
(Arising out of Kamuli Civil Suit No. 047 of 2011)**

MAYINJA S/O ODERE.....APPELLANT

VERSUS

ALIFUNSI KALALI.....RESPONDENT

**JUDGMENT ON APPEAL
BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

Introduction

This is an appeal from the decision of His Worship Sheila Fionah Angura, Magistrate GD1 Kamuli delivered on 27/02/2017.

Background:-

The facts admitted by the lower court are that the respondent purchased the suit land measuring approximately five acres from Ibinika and Okello Lyada on 25/4/1971. An agreement of sale was made and submitted and boundary marks planted. The respondent took and enjoyed quiet possession of the suit land until 2011, when the appellant entered thereon, claimed ownership and constructed on it a shelter.

The trial magistrate rejected the defence presented that the appellant obtained the suit land by inheritance. She ruled that, the respondent's claim to the suit land was protected by the Constitution, and the appellant's claim if any, was barred by limitation statute. She accordingly

entered judgment in favour of the respondent by declaring him the rightful owner of the suit and, issued a permanent injunction against the appellant and awarded general damages of Shs. 500,000, and costs.

The appellant being unsatisfied with the above decision presented this appeal on the following four grounds:-

1. That the learned trial Magistrate erred in law in fact when she failed to evaluate the evidence adduced in court so as to come up with a proper decision.
2. That the learned trial Magistrate erred in law and in fact when she failed to understand that the appellants/ defendant just inherited the suit land from their father the late Odere Ndereya who also inherited it from his father the late Kasiba Tagaya.
3. That the learned trial Magistrate erred in law and in fact when she gave her evidence basing on the respondent/ plaintiff evidence which was full of lies and contradiction.
4. That the learned trial Magistrate failed to understand the one the respondent allege to buy the suit land was not a resident of the area village met witnesses the sale

Resolution of the grounds of appeal:-

Arguments in support and against the appeal were presented by written submissions. As rightly put by counsel for the appellant, the four grounds rotated round the issue of evaluation of evidence. Counsel then proceeded to submit on four grounds generally. In my view, the grounds were repetitive and grounds 2 and 4 even appeared argumentative which would offend the provisions of Order 43 rr 1 (2) the Civil Procedure Rules. It was enough for counsel to have raised one concise ground on their client's dissatisfaction of how the evidence was evaluated in the lower Court.

That being so, I will only address the first ground and under it, generally consider how correctly the evidence was addressed and evaluated by the lower Court. I will when doing so, consider the following points which I believe are circumvated in the other grounds i.e.

- i) Did the appellant inherit the suit land from his late father and grandfather and if so, of what bearing was that on the respondent's claim?
- ii) Was the respondent's evidence in the lower court full of lies and contradictions?
- iii) Did the respondent ever purchase the suit land?

Powers of my Court on appeal:

While considering the correctness of the Magistrate's decision, I am mindful of the fact that I am sitting as a first appellate Court. I therefore bear the duty to re- evaluate the evidence presented in the lower court and come to my own conclusion. I will give respect to the fact that it is the trial court that had the opportunity to listen to and record the evidence at first hand, and thus with the advantage of observing the witnesses and their respective demeanor. See for example, **Father Nanensio Begumisa and 3 Ors Vrs Eric Tibesiga SCCA No. 17/2000.**

Ground 1,

1. The Learned trial Magistrate erred in law and in fact when she failed to evaluate the evidence adduced in court so as to come to a proper decision.

In her judgment, the trial Magistrate was convinced that the respondent had acquired the suit land by purchase in 1971. She concluded that the appellant had on the other hand not brought forward any evidence to show how his parents acquired it and thus, the law benefited the respondent, a bonafide occupant. She also found that the appellant's claim if any, was extinguished by limitation.

The respondent presented his evidence through his son and attorney Ekaju John, PW1. His evidence was that the suit land is situated in Kibogo LCI Nkore Parish, Kagulu Sub-County. He conceded that the suit land, a Kibanja, had once belonged to Erifazi Otayi. That his father the plaintiff purchased the suit land from Okello Lyada and Ibinika on 25/4/1971 at Shs. 200/=, and then settled on it. That in 1982, the respondent left the land in charge of PW1 and the latter was later joined by Odikai and Peter Ochieng in 1997. That on 8/4/2011, the appellant entered on the suit land and begun building on it.

The appellant had no serious contest to the agreement of sale. His only contention being that he did not know of it and that, neither of his parents ever sold the suit land in their life time.

It also did not seem to be a matter of contention that the suit land did at some point belong to the late Odere Ndereya and before that, the late Erifazi Otayi the appellant's deceased father and grandfather respectively. Indeed, the appellant knew the suit land well and mentioned its neighbours, one of whom was Kalali. However, he produced nothing in court to show that his parents or grandparent left the suit land to him before their demise. Both DW2 and DW3 stated that Kalali owned a small piece of land adjacent to the suit land given to him by Kisoko Chief, Mutabi Tegaiga when he migrated from Teso.

In my considered view, the above evidence would not erase the fact that the suit land may at some point have been sold to the respondent. I will therefore consider EXPI, the agreement of sale.

Save for certain exceptions where parole agreements of sale of land can be enforced, the standard common law principal is that agreements in land must be reduced into writing. See for example **Stanley Beinatabo Vs. Abaho Tumushabe (CA No 11/2/1997)** followed in **John Lwalanda Vs. Ismeal Mayengo HCC No. 271/2009**. Under Section 92 RTA, transfer of registered land is by a transfer instrument. On the other hand, transactions relating to unregistered land/ Kibanja can take any form of some note or memorandum in writing. Once one is made, all the parties involved are required to sign it for it to become a binding document upon each one of them.

I have seen a copy of the agreement. It was drafted by Gerosomu Bomu Kalani PW2 who also acted as witness. Bomu confirmed being present and drafting the agreement. However, I note that out of the three parties to the transaction, only Ibinika signed. In my view that would invalidate that agreement. It was thus erroneous for the Magistrate to have considered it a valid document capable of passing any interest to Kalali.

That said, it is also doubtful that Ibinika and her partner Okello Lyada had the mandate in law to sell the suit land. The land transaction took place after Odere and Otayi had passed on. Although the appellant mentioned that Ibinika had a home on the suit land, it was not shown that she herself owned the suit land or had letters of Administration of Odere or Otayi's estates. Therefore, her actions, honourable as they may have been, amounted to intermeddling and contrary to the Succession Act.

I am persuaded that on the above two points of law, evidence of both sides was recorded and given equal attention.

In my view, that alone should have closed the case in favour of the appellant.

Taking into consideration that the agreement of sale dates back to 25/4/71, which is 24 years before the 1995 Constitution came into force, and the fact of his long term possession, the trial Magistrate came to the conclusion that, Kalali was a bonafide occupant on the suit land. Indeed, there was strong evidence of Kalali and then Ekaju's uninterrupted occupation until 2011 when the appellant re-surfaced to claim what he believed to be his inheritance. There was no contradiction or false hoods by the respondent on many of those facts.

S. 29(2) (a) of the Land Act defines a bonofide occupant to be one who *“before the coming into force of the Constitution had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more.*

Both the Constitution and Land Act gave no definition or at least parameters of the bonofides of a person so protected. In fact it appears in S. 29(2) (a) of the Land Act that a bonofide occupant is one occupying registered land. The facts of this case were somewhat different. Both the appellant and respondent claimed a Kibanja which is a customary tenure envisaged under Sections 1 and 3 of the Land Act.

According to Black's law Dictionary the term 'bonafide' has a variety of meanings. For the purposes of this appeal, it connotes anything done or made in good faith, without fraud or deceit. See **Black's Law Dictionary (Bryan A. Garner) 10th ED at pg 210.**

I have found that the agreement of sale between Kalali and Ibinika was made contrary to common law and the law of succession. It was void at the outset, and Kalali could not have relied on it to obtain any interest in the suit land. He would likewise have no interest to transfer to Ekaju.

S. 29(2) (a) of the Land Act does not seem to differentiate between those persons that obtained occupation of the land through legitimate or illegitimate means. However, it would be absurd and contrary to justice for any court to interpret that section to cover those whose occupancy premised on illegitimate or illegal means as is the case here.

The demonstrated long occupation of Kalali and his successors in title, notwithstanding, he cannot in the circumstances, be deemed to be a bonafide occupant.

I would thus hold that the trial Magistrate came to a wrong decision that that the respondent was a bonafide occupant on the suit land.

Further the decision that the law of limitation acted against the appellant was made in error. Ordinarily, limitation is a shield (and not a sword) against litigation. In fact, it was never raised as an issue by the appellant in the lower court and thus cannot be a subject of appeal.

I would conclude that the entire decision of the Magistrate was made in error. I would reverse it in particular to rule that the respondent Alifunsi Kalali is not the rightful owner of the suit land.

For the avoidance of doubt, the respondent cannot after this judgment lay any claim to the suit land.

I would also reverse the award of Shs 500,000 in general damages.

However, my decision should not be understood to imply or grant ownership of the suit land to the appellant. The strong evidence was that the land originally belonged to Elifazi Otayi (now deceased) and it is to his estate that it must now revert. Any administrator so appointed for that estate may begin the process of reclaiming it.

In conclusion, this appeal has substantially succeeded. However, as I earlier noted, the memorandum of appeal was carelessly drafted and required considerable input by Court. For that reason, the appellant is denied costs of the appeal. Instead, each party shall bear their costs of the appeal.

However, following my decision, the appellant is granted costs of the lower court. I have confirmed from the record that he was unrepresented. Therefore his entitlement shall be restated to that which a successful unrepresented litigant can claim.

In summary, the appeal succeeds with each party bearing their costs.

I so order.

.....

EVA K. LUSWATA

JUDGE

12/04/2019

