THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL APPEAL NO. 31 OF 2016
ARISING FROM CIVIL SUIT NO. 53 OF 2013

ZAASA FRED ::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

OKWARE JUMA :::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

1. This judgment is in civil appeal No. 53 of 2013. The Appellant framed 5 grounds of appeal. These are:

   i. The learned trial magistrate erred in law and fact when he inferred and held that there was a third agreement and that the Respondent had rights in the property.

   ii. The learned trial magistrate erred in law and fact when he inferred and held that there was a third agreement which gave the Respondent rights in the suit property.

   iii. The learned trial magistrate erred in law and fact when he raised irrelevant issues thereby misleading himself to a wrong conclusion.

   iv. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence.

v. The learned trial magistrate erred in law and fact when he held that the suit land/kibanja was below 500,000 or its value was not ascertained to warrant an oral agreement.

2. The Appellant prayed for orders that the ruling and orders of the trial magistrate be set aside with costs here and in the lower court.

3. The Appellant was represented by Mr. Songon Mustapha of M/s. Songon & Co. Advocates and the Respondent appeared in person.

4. Briefly, the Appellant filed civil suit No. 53 of 2013 in the Chief Magistrates Court of Kiboga against the Respondent for an order of specific performance for a piece of land he bought at Ug. shs: 3,000,000/= but only paid Ug. Shs. 1,500,000/= over a period of five years; a declaration that the Respondent is not the lawful owner of the suit land because he failed to pay the due balance by the agreed date of 30th November 2008; a declaration that the Appellant agreed to refund the first deposit of Ug. shs: 1,500,000/=; a permanent injunction retraining the Respondent, his agents or any other person claiming from him from further trespassing on the suit land; costs and any other relief the court deems fit.

5. It was the Appellant's case that on 26th September 2008, he sold land to the Respondent at Ug. shs: 3,000,000/= and the Respondent paid Ug. shs: 1,500,000/= promising to pay the balance on 30th November 2008 but he defaulted. On 19th March 2009, both parties consented to have the Appellant refund the Ug. shs: 1,500,000/= on or not later than 30th January 2010. When that date came, the Respondent refused to pick the refund, continued to refuse the refund, threatened the Appellant's family members which was reported to police. The Appellant insisted that he was and is willing to refund the money to the Respondent.

6. It was the Respondent's defence that before he could pay the Appellant the balance of Ug. shs: 1,500.000/= he conspired with his family and children to defraud him and

made several complaints against him for having illegally purchased family land. The Respondent was summoned on several occasions to the office of children and family protection unit in Kiboga and Kyankwazi. The Respondent had been in occupation of the suit premises since 2008 and did not pay because of the misunderstandings between the Appellant, his family and himself and there was an agreement between the parties for the Respondent to remain with the part he was developing. The Appellant had complained to many authorities, all of which advised that the status quo be maintained.

7. The trial court found that the suit kibanja was family land that had been sold with the consent of the Appellant's wife. The agreement of sale was breached by the Appellant but was over taken by a new agreement of 19th March 2009 to refund the Respondent's money. Further that this agreement was also overtaken by an oral agreement between the parties wherein the Appellant was to give the Respondent two yards of the suit kibanja as communicated by the LC letter of 12th November 2013. Court found that this was a binding contract on which it based to order the Appellant to give the Respondent the two yards and dismissed the suit with costs. The Appellant was dissatisfied hence this appeal.

8. The Appellant called four witnesses. He testified as PW1. PW2 was his wife Ms. Nyiramanzi Yunia, PW3 was Mr. Sentongo Dan an elder in the village and PW4 as Mr. Mutesasira George the Appellant's son. The Respondent had three witnesses. He testified as DW1, DW2 was Mugisha Moses a neighbor to both parties and DW3 Lubowa John the Appellant's brother and the vice Chairman of Bugulama A village.

I so order.

9. The Supreme Court in **Father Nanensio Begumisa and 3 Ors v. Eric Tiberaga SCCA No. 17 of 2004,** observed that the legal obligation of the first appellate Court is to re - appraise evidence and is founded in common law, rather than rules of procedure. On a first appeal, the parties are entitled to obtain from the Appeal Court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the Appeal Court has to make due allowance for the fact that it has never seen or heard

the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. Also see **FK Zabwe v. Orient bank and others SCCA No. 4 of 2006.** I will adopt this standard and re - evaluate the evidence in my determination of the grounds of appeal.

10. Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages to the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible or substantially fails to perform his promise. *See* **Ronald Kasibante v. Shell (U) Ltd, HCCS No. 542 of 2006; [2008] ULR 690.**

11. Section 61(1) of the Contracts Act provides that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. Subsection 4 provides that in estimating the loss or damage arising from a breach of contract, the means of remedying the inconvenience caused by non performance of the contract, which exist, shall be taken into account.

Analysis

12. The Appellant's case is that the suit land was family property that should have never been sold by him. He also faults the trial magistrate for holding the third oral agreement before the LC as the final agreement that superseded the written agreement between the parties. In addition the Appellant seems to suggest that DW3 who is his brother is not a reliable witnesses since they have family wrangles, to the extent his testimony simply corroborates the Respondent and DW2 and he was simply one of the members of the LC executive committee that witnessed the oral agreement. The LC chairman Ssali Francis and the LC secretary Mugisha Moses who testified as DW2 also communicated the oral agreement to Hoima district.

13. If the Appellant was not comfortable with the involvement of his brother - DW3, in these matter, he should have raised this to the LC committee timely to require him to recuse

himself from these matters. He did not. Moreover, even if I disregard DW3's testimony, it does not pale the communication of the LC1 executive committee of the oral agreement to the Hoima district office.

14. In the circumstances of this case, after exercising caution, I find it difficult to believe the Appellant's claim that any wrangles between himself and his brother - DW3 affected anything in the matter before court.

15. In addition, nothing barred the trial magistrate in his assessment discretion to consider the validity and reliance on the oral agreement. Therefore his finding that the oral agreement was of probative value, valid and reliable was not erroneous.

16. After considering all the evidence on record, I am inclined to consider that when the Respondent was ready to pay the second instalment, the Appellant, his wife and other family members in a scheme to make him look like a defaulter, with the sole purpose of defeating his acquisition of the suit land made themselves unavailable to receive the money. Also as part of this scheme, the Appellant and his relatives tried to take possession of the suit land, a scuffle ensued and resulted in the Respondent being charged and convicted for assault. All this complicated the payment of the balance.

17. I am therefore reluctant in the circumstances of this case to consider that the Respondent willingly defaulted on the payment of the 1.5 million balance for the suit land to the Appellant. In this case because the Respondent has already used the suit land under section 64 (2) (a) of the contracts Act, specific performance is impossible. Under section 114 of the Evidence Act, the Appellant is estopped from retaking his land when he already sold it to the Respondent.

18. The third oral and final agreement between the Appellant and the Respondent in which it was agreed that the Appellant surrenders two yards and retains one yard of the suit land is legally binding and a fair determination of the dispute between the parties. Accordingly grounds 1 and 2 which are the same and 3,4 and 5 which are also largely the same are resolved in the negative. After all these years from 2008, it is

unconscionable for the Appellant to consider that he refunds the 1.5 million that the Respondent paid in 2008 as if the value does not change.

19. All in all, I find that the trial magistrate properly assessed all the evidence before him and reached a legally correct and fair decision. I therefore find no reason to tamper with his findings. My assessment also arrives at the same and I accordingly dismiss this appeal with the costs for the Respondent in this and the lower court.

I so order.

Lydia Mugambe
Judge
18th December 2019.