THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 28 OF 2016

ARISING FROM KALISIZO CIVIL SUIT NO. 015 OF 2012

1. MULINDWA
2. KAYONDO
3. NABIGAAGA
4. KASAJJA
5. MISUSEERA
6. NALONGO NAMUDDU
7. NALUKWAGO
8. NAMISANGO STEFANIA MEEME
9. TEREEZA WANYANA
10. NABYONGA GAUDENSIA
11. KAJUBI
12. SERERE DEO
13. SENYONDO ROBERT :: APPELLANTS

VERSUS

SSEBUGWAWO VINCENT :: RESPONDENT

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Respondent/Plaintiff instituted Civil Suit No. 015 of 2012 against the Appellants/Defendants for an eviction order, permanent injunction, damages for trespass and costs of the suit. The Plaintiff`s claim is that he is the lawful owner of land measuring 10 acres at Byembogo/Kikaabya, Kayonza Parish, Dwaniro S/County in Rakai District (the suit land) which he acquired by purchase from Waliggo Simon Mukasa, the registered owner of Mailo land Block 103 Plot 6, in 2008. There were no tenants on the land at the time and the Defendants/Appellants have since trespassed on the land without a claim of right.

In their Written Statement of Defence, the Defendants denied the claim and averred that they have been in occupation of the land since 2006 as employees of the beneficiaries of the

estate of the late Stephen Kajubi, the former owner of a kibanja on the land measuring 25 acres. They stated that they were brought onto the land by the 8th, 9th, 10th, 11th, 12th and 13th Appellants.

PW1, Ssebugwawo Vincent, the Respondent stated in his evidence that he bought his land on the 25th/07/2008 at Ugx. 7,000,000/=. The land is 10 acres and was vacant when he purchased and it boarders a River to the South, Bulendesi's family to the North, Birimuye and Joseph to the West. He did not take possession and when he went to survey the land in 2010, he found the Defendants trespassing.

PW2 Waliggo Simon Mukasa stated that he sold to the Plaintiff 10 acres of land and there were no occupants on the land at the time. The land sold to the Plaintiff is on the River side neighboring Pascal. The Defendants have their own bibanja. He gave the tenants the first option to purchase before selling to the Plaintiff. He never showed the Plaintiff his boundaries. The Plaintiff bought the part where he had constructed part of his house. Kajubi was a caretaker on the land occupying 5 acres.

PW3 Ssemiyingo Hannington stated that the land was vacant at the time of the purchase and the Plaintiff is the rightful owner. The defendants do not have bibanja on the land.

PW4 Mukasa Charles stated that Waligo told him of the sale and he witnessed the sale agreement. The land was estimated to be 10 acres. He knows the land and there are no bibanja holders. The plaintiff has never taken possession.

PW5 Paskale Nabenda stated that he knew the land before it was sold to the Plaintiff and the land was vacant. He used to pay Busuulo to Waliggo. The 8th Defendant cultivated on the land. The 8th Defendant's grandfather had a kibanja on the land but she started cultivating on the Plaintiff`s land.

That was the Plaintiff's case.

DW1 Stephania Namisango the 8th Appellant stated that Kajubi is her grandfather and used to pay Busuulu to one Ruth Nakirrijja the mother to Waliggo. She inherited the kibanja on

the land from her grandfather. When the Plaintiff bought, they had moved to find rest on another area (paddock system). There were coffee and eucalyptus trees on the land. They were never given the first option to purchase. She does not hold letters of administration and Kajubi had distributed the land during his life time.

DW2 Matovu Godi stated that the kibanja belongs to the estate of Kajubi and his grandchildren are utilizing the kibanja. He sold to the Plaintiff who is now trying to evict him from the portion he remained with. Kajubi's kibanja was about 3-4 acres and the crops thereon were planted by kajubi.

DW3 Sennyondo Robert stated that the land belongs to his family as grandchildren of Kajubi. Kajubi bought the kibanja from Ruth Nakirijja and DW3 grew up thereon. They use the kibanja for cultivation of seasonal crops. They were never given the option to purchase and the agreement for sale was for land between Kibaya and Kabugu.

In her judgment, the trial Magistrate relied on evidence of the Plaintiff's witnesses that the land was vacant at the time of purchase to hold that there was no need for applying Section 35 of the Land Act on the first option to purchase. The trial Magistrate further relied on evidence at locus that the suit land had just three coffee trees to disallow the Defendants' claim that they have been cultivating on the land. The trial Magistrate found that the Plaintiff proved his case and judgment was entered for him.

Being dissatisfied with the judgment of the trial Magistrate, the Appellants/Defendants filed this appeal on the following grounds;

1. The learned trial Magistrate erred in law and fact when she held that the Respondent is the lawful owner of the suit land and that the Appellants are trespassers thereon whereas the Respondent is not a land owner and has never been in possession of the suit land;
2. The learned trial Magistrate erred in law and fact when she held that the portion of land sold to the Respondent is separate from the Kibanja of the late Kajubi whereas the portion sold to the respondent is unascertained and not surveyed;

3. The learned trial Magistrate erred in law and fact when she failed to consider the fact that the Respondent had no locus to sue the Appellants as a land owner;
4. The learned trial Magistrate erred in law and fact when she ruled that Section 35(2) of the Land Act was not applicable to the Appellants;
5. The learned trial Magistrate erred in law and fact when she failed to weigh and evaluate the evidence so as to come to a just decision in the case.

Counsel for the Appellants filed written submissions and I will consider them in my determination.

Determination of the appeal;

Ground one; The learned trial Magistrate erred in law and fact when she held that the Respondent is the lawful owner of the suit land and that the Appellants are trespassers thereon whereas the Respondent is not a land owner and has never been in possession of the suit land;

Counsel for the Appellants argued that the Respondent did not adduce evidence to prove that he is a lawful owner of the suit land since the purported agreement of purchase was not tendered into evidence.

The Appellants did not challenge the Respondent's evidence that he purchased the suit land and it was also their evidence that they were informed that the Respondent indeed purchased the land. This fact therefore stands unchallenged and uncontroverted. In the case of ***Uganda Revenue Authority versus Stephen Mabosi Supreme Court Civil Appeal Number 26/1995 Karokora JSC cited with approval the case of Criminal Appeal No. 5/1990, James Sawoabiri & Fred Musisi v Uganda (unreported)*** as he then was ruled that an omission or neglect to challenge the evidence in chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently credible or probably true.

By seeking to challenge the purported sale on appeal, the Appellants are departing from their pleadings which is contrary to Order 6 Rule 7 of the Civil Procedure Rules.

The Appellants in the lower court challenged the validity of the sale on the basis that they were not given the first option to purchase as sitting tenants. Counsel for the Appellants argued that the agreement dated 25th July 2008 admitted into evidence as DExh1 was a temporary agreement. This was not a temporary agreement but rather an agreement with a condition precedent in regards to delivery of vacant possession. The condition does not invalidate the agreement.

I therefore find that the Appellants cannot argue on appeal that the Respondent was not a lawful owner since the sale agreement was not adduced into evidence. They recognized him in the lower court as purchaser and the agreement is sufficient evidence to show that he has an equitable interest in the land.

Counsel further argued that the Respondent had no locus to institute the suit in trespass yet he was not in possession.

It is trite law that trespass to land occurs when a person makes an unauthorized entry onto land thereby interfering with the possession of the person on the land***. (Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)***

In the instant case, PW2 testified that he sold the land to the Respondent after he had encroached on the land by constructing his house onto the suit land. PW1 and PW2 both testified that the Respondent has never taken possession of the suit land.

There is no record of the locus proceedings hence this court is not able to establish what is on ground.

The evidence on record also shows that since the land has never been surveyed and subdivided to give the Respondent his certificate of title, the Respondent cannot rely on constructive possession. It is therefore evident that the Respondent has never taken possession of the suit land and as such has no locus to sue on a claim for trespass.

The Appellants however recognize the Respondent as the purchaser of the suit land and the agreement of purchase dated the 25th July 2008 further proves that he purchased the land. However, since the Respondent has never taken possession of the land, he cannot sue in trespass and as such, the trial magistrate was in error for holding that the Appellants were trespassers on the suit kibanja.

Ground one therefore succeeds.

Ground two; The learned trial Magistrate erred in law and fact when she held that the portion of land sold to the Respondent is separate from the Kibanja of the late Kajubi whereas the portion sold to the Respondent is unascertained and unsurveyed;

Counsel relied on the evidence that the Respondent was never showed the boundaries and a survey not conducted to argue that the Respondent's land is unascertained and faulted the trial Magistrate for finding that the Appellants kibanja is separate from the Respondent's land.

In their evidence, the Appellants consistently stated that they have been in occupation of the suit kibanja since the 1990s and that they use the kibanja for cultivation. DW2 stated that there are graves on the kibanja and DW1 stated that there are coffee and eucalyptus trees on the kibanja.

It was also the Appellants' evidence that their grandfather the late Kajibi used to pay Busuulu to the former registered proprietor, Rose Nakirijja evidence of Busuulu tickets paid to the said Rose Nakirijja by the Appellants' grandfather and later on the 8th Appellant were adduced into evidence.

PW5 also stated in her evidence that the 8th Appellant grandfather had a kibanja on the suit land. It was also PW2, the seller's evidence that the late Kajubi had about 5 acres as a kibanja holder on the suit land. A letter dated the 17-02-2009 addressed to the Commissioner of Lands and Surveys written by PW2 shows that he acknowledged the family of the late Kajubi as sitting tenants. It was further indicated in the agreement dated

25-07-2008 that the Respondent was purchasing land between the '*abasenze'* Paskale Bujegere and the family of the late Kajubbi.

I find this to be sufficient evidence that the Appellants have a kibanja on PW2's land since the certificate of title shows that the land was transferred from Rose Nakirija to Simon Mukasa Waliggo, PW2 who didn't adduce evidence to prove that he acquired a different parcel of land from Block 103 Plot 6.

The Respondents' evidence is that he has never surveyed the land or taken possession and for the trial Magistrate to hold that the kibanja owned by the Appellants is different from the Respondent's land was unfounded since there is no evidence to clearly establish which portion was sold to the Respondent.

Ground two therefore succeeds.

Ground three; The learned trial Magistrate erred in law and fact when she failed to consider the fact that the Respondent had no locus to sue the Appellants as a land owner;

This ground was already resolved concurrently with Ground one.

Ground four; The learned trial Magistrate erred in law and fact when she ruled that Section 35(2) of the Land Act was not applicable to the Appellants;

Counsel argued that the seller was duty bound to give first priority to sitting tenants before any valid sale could be made to the Respondent. Further that the notices issued prove that the late Kajubi's family members were tenants on the land but did not receive the notices. Counsel also argued that since the notices were issued after the purported date of the purchase, they were of no effect and therefore the sale was made in bad faith.

Section 35 (2) Land Act cap 227 provides for the obligation to give the first option to purchase of a reversionary interest to the tenant by occupancy.

DW1 testified that the tenants were never given the first option to purchase prior to the purchase by the Respondent. To rebut this, PW2 testified that he gave notice to the tenants

on the land and gave them the priority to purchase. The notice dated 17/02/2009 was adduced into evidence to prove that the bibanja holders were given the first priority to purchase.

Counsel for the Appellants challenges the said notice on grounds that it was issued on the17th February 2009 yet the Respondent claims to have bought the land in 2008 which would make the notice of no effect. Further, that the notice was not served on the Appellants.

PW2 Waligo Simon testified that the Notice dated 17/02/2009 was one of the three notices he issued to the sitting tenants giving them priority to purchase. The other notices were not adduced into evidence. The evidence on record is therefore not sufficient to prove that the sitting tenants were given the first option to purchase.

Failure to give notice under Section 35 (2) does not in itself make the sale invalid but the purchaser takes the land subject to the interests of the tenants on the land. Having found that the Appellants have a kibanja interest on the land, it was necessary for them to be given the first option to purchase and the trial Magistrate erred in finding that Section 35 (2) of the Land Act was not applicable to them.

Ground four also succeeds.

Ground five; The learned trial Magistrate erred in law and fact when she failed to weigh and evaluate the evidence so as to come to a just decision in the case.

Counsel sought to challenge the procedure of how the locus in quo visit was conducted. I have not had the opportunity of perusing the locus proceedings since they are not on the record. I therefore have no basis of resolving the issue of locus proceedings.

Having found that the Appellants have a kibanja interest on the suit land and that the Respondent's land is unascertained, the Respondents claim for trespass cannot stand. The Respondent indeed purchased land from PW2 Waliggo Simon, the Appellants' landlord but

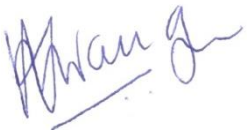
the parcel is not ascertained and therefore, the trial Magistrate erred in holding that the Appellants are trespassers.

This appeal therefore bears merits and is hereby allowed. Judgment of the trial Magistrate is hereby set aside. The Respondent is advised to clearly ascertain the parcel of land he purchased from PW2 and in the process, the rights of the Appellants/family of the late Kajubi as valid bibanja holders should be respected.

The Appeal is hereby allowed with costs.

I so order.

Dated at Masaka this 12th day of November, 2021

Signed; 

Victoria Nakintu Nkwanga Katamba

Judge