THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

CIVIL APPEAL NO. 016 OF 2020

(ARISING OUT OF CIVIL SUIT NO. 30 OF 2018)

ABDUL WAMALA :: APPELLANT

VERSUS

1. HAJJU SULAIMAN JULUNGA
2. DAVID SSENYONDWA
3. MATIA MATOVU :: RESPONDENTS

Before; Hon Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Appellant/Plaintiff instituted Civil Suit No. 30 of 2018 against the Respondents/Defendants seeking a declaration that he is the lawful owner of the suit kibanja situate at Lutunga, cancelation of the sale between the 1st and 2nd Respondents, declaration that the donation of the portion of the suit kibanja to the 3rd Respondent is null and void, an eviction order, general and punitive damages, and costs of the suit.

The Appellant/Plaintiff`s claim is that he is the biological son to the 1st Defendant whose father (Plaintiff`s grandfather) during his lifetime in 1991 donated the suit kibanja to the Plaintiff. The Plaintiff and his grandfather remained on the suit land until 1992 when the grandfather died. Since 1992, the Appellant continued in peaceful possession of the suit kibanja until around May 2018 when the 1st Respondent without claim of right and without the Plaintiff`s consent, trespassed onto the Plaintiff`s kibanja and sold part of it to the 2nd Respondent and later donated part of the suit kibanja to the 3rd Respondent.

In his written statement of defence, the 1st Respondent/Defendant denied the claim and averred that the disputed land belonged to his late father Hajji Yunusu with whom they stayed on the land until 1991 when he died. He stated that prior to his death, his father allocated to him part of the disputed land on which he constructed a house and lived with his family, and upon his father`s death in 1991, the 1st respondent requested the Appellant to look after the land and the estate. sometime in 2016, he gave the 3rd Respondent part of the land as a share from their father's estate and he also sold part of the disputed land which he had received from his grandfather. The Plaintiff is only entitled to the portion which the 1st Respondent gave him.

Plaintiff`s case;

In his evidence, PW1, Abdul Wamala the Appellant stated that the disputed kibanja is at Lutunga and he got it from his late grandfather Yunus Kezimbira in 1991 in the presence of Nakalanda Grace and Namyalo. The boundaries of the kibanja that he received are; Baale Leonsio to the upper side, Manuel Sembusi to the right, his kibanja on the left side and Waswa to the lower side. He stated that he started living with his grandfather from 1980 and his father has never utilized the disputed kibanja. He also stated that his grandfather introduced him to the landlord and he adduced a Busulu ticket dated 12/1/2012. He is in possession of the suit kibanja and he built a house thereon in 2000. He went to the 1st Defendant`s home in 2018 to discuss a sale of the disputed kibanja but he kept quiet about it.

PW2 Fr. Andrew Muddu stated in his evidence that he saw the Appellant growing up on the late Hajji Yunus`s kibanja and the late used to say that if he died, the Plaintiff should take the kibanja. He is the Administrator of the estate of the late Herbert Togo, the former landlord on the kibanja and the Appellant paid Busuulu for the kibanja. In cross examination, he stated that the late Yunus never told him that the kibanja was for the Plaintiff but rather told his father who then told PW2.

PW3 Sawuya Tizita stated that her father, the late Yunus told her that he left the suit kibanja to the Plaintiff to take care of it and it was being inherited by different people. She got part

of it and sold it to the Plaintiff. The 1st Respondent had a house thereon but left and he left, and he also produced the Plaintiff when he had already let the kibanja. The kibanja is in two pieces and each piece was for a different wife. The 1st Defendant was not given a kibanja near the disputed kibanja.

That was the Plaintiff/Appellant's case.

DW1 Hajji Julunga Sulaiman, the 1st Respondent stated in his evidence that his father the late Yunus gave him the disputed kibanja in 1954. He planted bananas and coffee thereon and later built a house, had his home and produced his children thereon including the Plaintiff. After his father`s death in 1993, the 1st Respondent asked the Plaintiff/Appellant to care take the kibanja. He gave part of it to their step brother Matia Matovu, the 3rd Respondent, and sold a portion to the 2nd Respondent. The part he sold to the 2nd Respondent was given to him by his father in the 1950s.

DW2 Kyeza Sulaiman stated that the disputed kibanja is for the 1st Respondent who inherited it from his father. He saw the 1st Respondent cultivating on the portion he sold to the 2nd Respondent around 1958/59 before he had married the Plaintiff`s mother. Sometime in the 1960s the father to the 1st Defendant was complaining that the 1st Defendant was moving to Buyamba yet he had given him the disputed kibanja. In 2018, the 1st Respondent wanted to sell the kibanja and the Plaintiff offered 3 million.

The trial court conducted a locus visit on the 11/11/2019 at which the Plaintiff stated that the banana plantation belongs to him and was planted by his grandfather. The 1st Respondent stated that the houses thereon are his, main house is for his father and the other was constructed by him for cultural things.

In her judgment, the trial Magistrate observed that the claim for purchase of part of the disputed land by the Plaintiff was departure from his pleadings and legally unacceptable. She also relied on evidence of the Plaintiff in cross examination about the sale of kibanja by the 2nd Defendant, as well as the uncontroverted evidence that the 1st Defendant is heir to the late Yunus to find that he was right to give part of the land to the 3rd Defendant. The trial

Magistrate found that the Plaintiff had not proved that the disputed kibanja was a donation to him as claimed and dismissed the case with costs.

Being dissatisfied with the judgment of the trial Judgment, the Plaintiff/Appellant 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 disputed kibanja;
2. The learned trial Magistrate erred in law and fact when she relied on a will which was never tendered in evidence to prove that PW3 had an interest in the suit kibanja which he passed to the Respondent hence occasioning a miscarriage of justice;
3. The learned trial Magistrate erred in law and fact when she selectively evaluated the evidence of the Respondent against that of the Appellants thereby arriving at a wrong decision;

The Appellant prays for the appeal to be allowed, the trial Magistrate`s judgment set aside and costs of the appeal to be borne by the Respondents.

Determination of the appeal;

The duty of this court, as a first appellate court, is to re-evaluate the evidence adduced at the trial and subject it to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inferences and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in that respect. ***See: Fredrick Zaabwe v. Orient Bank &5 O'rs, S.C.C.A. No. 4 of 2006 Kifamunte Henry v. Uganda, S.C.C.A No 10 of 1997; Banco Arabe Espanol v. Bank of Uganda, S.C.C.A No. 08 of 1998***. With this duty in mind, I proceed to consider the grounds of appeal.

Ground two; The learned trial Magistrate erred in law and fact when she relied on a will which was never tendered in evidence to prove that PW3 had an interest in the suit kibanja which he passed to the Respondent hence occasioning a miscarriage of justice;

The Appellant faults the trial Magistrate for relying on a Will that was not tendered into evidence to prove that PW3 had an interest in the suit kibanja which he passed to the Respondent.

I have carefully perused the judgment of the trial Magistrate and the trial Magistrate did not rely on the Will. The trial Magistrate rather relied on evidence that the 1st Respondent is the heir to the late Yunus and donated part of the estate to his step brother, the 3rd Respondent, as heir to the estate.

I am in agreement with the trial Magistrate's observation that evidence that the 1st respondent is heir was not controverted and as such is taken to be admitted. 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.

The Appellant did not challenge the evidence in cross examination as to whether the 1st respondent is indeed heir to the estate or whether the 3rd Respondent is indeed the step brother with a right to the estate. I therefore find that the trial Magistrate was right inholding that it was right for the 1st respondent to donate part of the estate to the 3rd Respondent as a beneficiary.

This ground therefore fails.

Grounds one and three;

The learned trial Magistrate erred in law and fact when she held that the Respondent is the lawful owner of the disputed kibanja;

The learned trial Magistrate erred in law and fact when she selectively evaluated the evidence of the Respondent against that of the Appellants thereby arriving at a wrong decision;

I will resolve the two grounds concurrently.

The Appellant claims to have received the suit land as a gift from his late grandfather.

A gift ***inter vivos*** is defined in ***Black's Law Dictionary 8th Edition at page 710 as***;

"…***a gift of personal property made during the donor's life time and delivered to the donee with the intention of irrevocably surrendering control over the property***."

The law, as it relates to the issue of *gifts intervivos*, is well established. In the case of ***Joy Mukobe vs. Willy Wambuwu HCCA No. 55 of 2005 (cited in Trustees, Kampala Archdiocese v Nabitete Nnume Mixed Co-operative Farm Limited (Civil Suit-2000/1559) [2017] UGHCLD 4 (14 June 2017)*** relying on other decided cases, the court held that;

"…***for a gift intervivos to take irrevocable roots, the donor must intend to give the gift, the donor must deliver the property, and the donee must accept the gift***."

It was the Appellant`s evidence that his late grandfather gave him the suit land in the presence of Nakalanda Grace and Namyalo. The Appellant stated that the two witnesses are alive yet he never brought them to testify to his claim. This court wonders why he never brought the two witnesses to prove his case. PW2 in trying to support the allegations testified that the Appellant`s grandfather informed him that the suit kibanja was for the Appellant. In cross examination, he contradicted himself and recanted his evidence when he stated that the Appellant`s grandfather informed his (PW2) father and not PW2. PW2`s evidence was full of inconsistent which will be resolved in favor of the Respondent.

The law relating to contradictions and inconsistencies is well settled that when they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. If, however, they are minor and capable of innocent explanation, they will normally not have that effect. ***(See Makau Nairuba Mabel v. Crane Bank Ltd., HCCS No. 380 of 2009 per Obura J.; Okecho Alfred v.Uganda, S.C.Crim.Appeal No24 of 2001; Alfred Tarjar v. Uganda Crim. Appeal No 167 of 1969(EACA).*** PW2 in his evidence was inconsistent as to the history of the land and in cross examination, he changed his evidence in chief which points to deliberate untruthfulness. These inconsistencies shall be resolved in favor of the 1st Respondent.

It was also the Appellant`s evidence that the 1st Respondent has never lived on the suit kibanja and yet at the locus visit, the court observed that there is a cultural house which was set up by the 1st Respondent. This evidence was not challenged by the Appellant. furthermore DW2 stated in his evidence that the Appellant`s grandfather informed him that the suit kibanja was given to the 1st Respondent. I have carefully perused his evidence and it is not only consistent but it was also not challenged in cross examination.

I also find that the evidence of DW2 as to the sale of the suit land by the 1st respondent which was proposed to the Appellant was relevant to the ownership of the suit land. This evidence corroborated the 1st Respondent`s evidence and further, the Appellant in his own evidence stated that he was invited and the 1st respondent spoke of the intended sale. Why then didn`t he challenge the sale at that point if he indeed believed that he had an interest in the suit land? I find the evidence of DW3 more believable and reliable in proving that the 1st Respondent received the suit land from the late Hajji Yunus.

In my view, there was no failure on evaluation of evidence by the trial Magistrate. It is trite law that there is no set form of evaluation of evidence and the manner of evaluation in each case varies according to the peculiar facts and circumstances of the case. ***(see Mujuni Apollo versus Uganda SCCA No. 46 of 2000).*** The court should be careful not to base its findings on surmises and conjecture since where the facts are proved give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture,

then the Plaintiff will have failed to prove his case. ***(See Lancester versus Blackwell Colliery Co. Ltd 1918 WC Rep. 345)***

If the conclusion arrived at by the trial Court is only backed by assertion rather than by acceptable reasoning based on the proper evaluation of evidence and suffers from infirmity of excluding, ignoring and overlooking material aspect of the evidence, which if considered in the proper perspective would have led to a conclusion contrary to the one taken by court, the trial Court would have failed in its duty to make a proper evaluation of the evidence.

The appellate court will interfere with findings of fact if it is established that they were based on no evidence, or on a misrepresentation of the evidence, or that the trial Court demonstrably acted on the wrong principles in reaching those findings ***(See Peter versus Sunday Post Ltd [1958] EA 429).***

In this case, the trial Magistrate did a good job in as far as evaluating the evidence on record was concerned. I therefore find that the trial Magistrate was right in holding that the Plaintiff/Appellant did not adduce sufficient evidence to prove that he is the rightful owner of the suit land.

This appeal bears no merits and is hereby dismissed.

I so order.

Dated at Masaka this 22nd day of October, 2021

Signed;

Victoria Nakintu Nkwanga Katamba

JUDGE