

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL APPEAL NO. 59 OF 2019
(ARISING FROM KALISIZO 84 OF 2017)

DDUMBA PADDY APPELLANT

VERSUS

MUGERA JIMMY RESPONDENT

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

Background of the Appeal;

The Respondent instituted Civil Suit No. 084 of 2017 in the lower court for trespass on a kibanja situate at Kyakonda Village, Kyotera District (the suit kibanja), seeking a declaration that he is the rightful owner of the suit kibanja, damages for trespass, an eviction order, permanent injunction and costs of the suit. The Respondent/Plaintiff's case was that he bought the suit Kibanja from a one Nakamya Nanyonga Kevina and her grandson Kibira Vincent vide an agreement dated 22/11/2016 (PE2). When he went to cultivate on the suit kibanja, the Respondent was chased by the Appellant/Defendant. A family meeting was held and it was discovered that the kibanja belonged to Nakamya Kevina who had given it to her son Kasiita Archileo and it was also resolved that the kibanja be distributed amongst his children; Kibira Vincent, Ddumba Paddy and Kasiita Paul. A consent was written and duly signed, and Kibira Vincent was left with the portion which he had sold to the Respondent. The Appellant and his brother kept cultivating on the Respondent's kibanja despite the consent agreement.

The Appellant's case was that his brother inherited the kibanja from their father. They were never informed of the said sale and the sale agreement is a forgery. Their father bequeathed

the suit kibanja to his widow and two children and during his last funeral rites, no one revealed that they owned the suit kibanja.

The Plaintiff's case opened on the 23/5/2018 with the testimony of PW1 Kevina Nanyonga who testified that she bought the suit kibanja from a one Yozefu and allowed her son Akileo to construct there. The house is still there and Akileo's sons (the Defendants) stay in it. She authorized Kibira to sell the said kibanja to the Plaintiff vide PE1. Akileo was buried on the said kibanja. PW2 the Plaintiff testified that he bought the suit kibanja from one Vincent Kibira and PW1 on 11/10/2016. He was stopped from utilizing the same by the Defendants. He paid the purchase price to Kibira Vincent after the dispute and the distribution. The boundaries of the kibanja are Kalisa, Kaboobi, Namata and the 2nd Defendant. The 1st Defendant/Appellant was present as well as his uncle Lubega Ambrose. He inquired from the 2nd Defendant about the kibanja before the purchase. Pw3 Kibira Vincent testified that he sold the suit kibanja to the plaintiff. He got the kibanja from the grandmother. He sold it because the Defendants used to disturb him as they are from different mothers. Pw4 Lubega Ambrose testified that Kibira sold the suit kibanja to the Plaintiff because the Defendants were disturbing him. He witnessed the sale and division of the kibanja by local leaders.

DW1 the Appellant testified that his father Achileo died and left the family living on the said kibanja and cultivating on the same. The Plaintiff claimed that he bought the kibanja from Kibira, yet the Defendant's family was utilizing the kibanja and his father is buried on the kibanja. His father divided his property before his death and left the suit kibanja to Kasiita Paul. The clan members divided the kibanja and gave the suit kibanja to Kibira. DW2 Kasiita Paul testified that he was told that the Plaintiff bought the suit Kibanja. He grew up knowing that the suit kibanja was his. DW3 Natelo Prossy testified that the kibanja belonged to her husband Achileo the Defendant's father. The suit kibanja was for Kasiita. She never signed any document concerning the kibanja. Kibira got his share elsewhere.

The court conducted locus in quo and the Plaintiff stated that he never bought the portion with graves as it was intentionally left out by Keviina. He bought 111 feet and it was measured at the time of the purchase.

In her Judgment, the trial Magistrate found that Kibira sold what rightly belonged to him after being given as a share from his father's property. She relied on evidence of the consent agreement (PE3) for the distribution of the property which was signed by the Defendants and their mother, the evidence established at the locus in quo that the graves do not form part of the suit kibanja. The Defendants failed to explain the portion they claim was given to Kibira which does not form part of the suit kibanja. The trial Magistrate found that the Plaintiff/Respondent is the rightful owner of the suit kibanja having purchased it from Kibira. The Appellant/Defendant and his brother were found to be trespassers, an eviction order and permanent injunction were issued against them and their agents and costs of the suit were awarded to the Plaintiff/Respondent.

The Appellant being dissatisfied with the decision of the trial Magistrate filed an appeal in this court on the sole ground that;

1. That the trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on the record and thus arrived at a wrong decision.

Both parties were directed to file written submissions but only the Respondent filed.

Counsel for the Respondent submitted that the trial Magistrate's decision was rightly made when she held that the Appellant had failed to prove their case on a balance of probabilities and that instead the Respondent proved his case on a balance of probabilities that the suit land was his personal property having rightly purchased it from Kibira and Nanyonga. The Respondent's evidence was consistent, uncontested and solidified the case of the Respondent and thus properly considered by the trial Magistrate. Counsel prayed that the judgment of the lower court be confirmed and the appeal be dismissed with costs to the Respondent.

Determination of the Appeal;

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

The Appellant raised one general ground of appeal. **Order 43 Rules (1) and (2) of The Civil Procedure Rules** require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Such general grounds of appeal relating to evaluation of evidence and not clearly stating where the trial Magistrate was at fault, are used by litigants and advocates as a fishing expedition on appeal.

In the interest of justice and for this matter to be put to rest, I will proceed to determine the appeal on its merits.

Ownership of the suit Kibanja;

Certificate of title is conclusive evidence of title as per *Section 59 of the Registration of Title Act*. In the instant case, the land is unregistered land and in such circumstances, ownership can be proved by adducing evidence of equitable interest in the property either of purchase or claiming under a Will or estate.

The Appellant claims to have obtained the suit kibanja as a bequest under his father Achileo's Will. The Respondent on the other hand claims to have purchased the suit Kibanja vide sale agreement dated 22/11/2016 (PE2).

PW2 the Respondent testified that he bought the suit kibanja from a one Kibira and the sale agreement for the said purchase was also adduced in evidence. This evidence was corroborated by Kibira the vendor and his grandmother who was a co-vendor in the said sale.

The Appellant testified that he obtained the land as a bequest from his father. He also testified that he and his family grew up on the suit kibanja and that they grew knowing that they own it. This evidence although corroborated by the testimony of DW2 and DW3, was not supported by documentary evidence of the said Will. DW1 stated that the Will is in Lubega Ambrose's custody but he was never cross examined about that allegation.

Section 101 of the Evidence Act Cap 6 requires any party alleging the existence of a fact to prove the same. *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.* The Appellant claims that his interest arises from a Will, he did not however adduce the Will into evidence.

I have perused the record of proceedings and from the locus proceedings, it was established that the graves are not on the suit kibanja. This conflicts the evidence of DW3 and DW1 that the suit kibanja has the late Achileo's grave. I find this evidence, in addition to the testimony of PW3 who confirmed that he sold the suit kibanja to the Respondent which fact is supported by evidence of a sale agreement (PE2), compelling to prove that the Respondent of the rightful owner of the suit kibanja. The trial Magistrate was therefore right in finding that the Respondent is the rightful owner of the suit kibanja.

Trespass;

The law on trespass to land was clearly stated in the case of *Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)*. In that case, Mulenga JSC held:

“Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby 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 the land, but against the person who is in actual or constructive possession of the land.

Having held that the Respondent is the rightful owner of the suit kibanja, the Appellant is a trespasser on the suit kibanja. The trial Magistrate was therefore right in declaring that the Appellant is a trespasser on the suit Kibanja.

In the final result, I find that the learned trial Magistrate was right in holding that the Respondent/Plaintiff is the rightful owner of the suit kibanja and therefore uphold her decision wholly.

This appeal has no merits and is therefore dismissed with Costs.

I so order.

Dated at Masaka this 24th day of March, 2021

Victoria Nakintu Nkwanga Katamba

Judge