

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL APPEAL NO. 41 OF 2010
(ARISING FROM CIVIL SUIT NO. 110 OF 2019)

NAKINTU ANNET ::: APPELLANT

VERSUS

NAMUYISE OLIVIA ::: RESPONDENT

Before; Hon. Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Plaintiff/Respondent herein Namuyise Olivia filed Civil Suit No. 110 of 2019 against the Defendant/Appellant herein Nakintu Annet on a claim for forceful and unlawful entry onto the Respondent's *Kibanja* at Nsaalu/Muwoomya; seeking an eviction order, permanent injunction, general damages and costs of the suit.

The Plaintiff's claim was that the parties are biological sisters and their aunt Aidah Norah Babirye sold the suit *Kibanja* to the Plaintiff in 1980. The Plaintiff built a mud house thereon and allowed her mother Giradesi Nakaggwa to stay in the house. He mother wrote a letter confirming the Plaintiff as owner of the *Kibanja*. The defendant entered the land in 2016 and destroyed crops thereon without the Plaintiff's consent.

In her Written Statement of Defence, the Defendant/Appellant herein denied the claim and averred that the suit *kibanja* belonged to their mother who stated during her life time that the *Kibanja* would belong to all her children and grand-children equally upon her death.

The Plaintiff Namuyise Olivia as PW1 stated in her evidence that she bought the suit land from her aunt but they never executed an agreement and she took possession immediately.

She has Busuulu tickets for the *kibanja* from 2002 to 2009 admitted as PE1. Her mother was buried on a separate *kibanja*.

PW2 Mbaziira Gerald stated that he was the LC Chairman Misalu Village when the matter was first tabled at which it was confirmed by the Parties' mother that the Plaintiff bought the suit *kibanja*.

PW3 Crespo Mugerwa the Parties' cousin stated that the *kibanja* belongs to the Plaintiff who bought it from her aunt in 1980 and has been using it since and there is a house on the *kibanja* built by the Plaintiff. He also stated that he is a neighbor to the *kibanja*.

PW4 Edward Ndawula, a builder stated that he built the house on the suit *kibanja* from the Plaintiff and the Plaintiff paid for his services.

That was the Plaintiff's case.

DW1 Nakintu Annet the Defendant/Appellant stated in her evidence that the suit *kibanja* belonged to their mother Gladys Nakaggwa who bought the same from her sister Aidah Norah Babirye. That their mother told her eight children that the *kibanja* belongs to them all and that her siblings Paulo Kiwawalo and Cate Nakyejwe built on the *kibanja* with no objection from the Plaintiff. She stated that their mother used to pay busuulu until her death. The mother's house was constructed by all siblings and the Defendant used to send money for construction to the Plaintiff from South Africa. The Plaintiff colluded with the LC1 Chairman to claim the *kibanja*. The children attempted to settle the matter amicably on the 11/06/2017 and the minutes of the meeting were identified as DID1. She used to send money from South Africa for busuulu payment and the tickets bearing the Plaintiff's name were paid fraudulently. The house on the *kibanja* was built between 1994-1996 and the Plaintiff contracted the builder.

DW2 Kiweewa Francis stated that he was caretaking the *kibanja* when Aidah Norah sold it to Gladys Nakaggwa and told him to stop using it. The children built a house for Gladys and Gladys told him that the *kibanja* would go to her children upon her death. The Plaintiff

never objected to their brother Tomusange living on the *kibanja*. The dispute arose because the Plaintiff described herself as the sole owner while she was completing the form for electricity lines.

DW3 Nsereko Ismail stated that the *kibanja* belonged to Gladys and all the children contributed to building the house on the *kibanja* for Gladys. The Plaintiff has never stayed on the *kibanja* and DW3 grew up on the *kibanja* yet the Plaintiff has never stayed thereon. A family meeting was conducted where it was agreed that the *kibanja* belonged to Gladys and should be divided amongst the children. The Plaintiff refused to sign the minutes for the meeting. The Defendant would send money for construction through the Plaintiff and when Gladys died, the Defendant renovated the house.

That was the Defendant's case.

The court conducted locus in quo at which the Plaintiff re-iterated her evidence. The defendant stated that their siblings Kate and Paul built on the *kibanja* and showed court the demolished house structure. Their brother Tomusange stayed in the house.

In his judgment, the trial Magistrate found that the evidence of PW2 corroborated the evidence of the Plaintiff that she is the owner of the suit *kibanja*. The trial Magistrate observed that the Defendant's evidence that she would send money from South Africa was not substantiated and concluded that the suit *kibanja* belongs to the Plaintiff. The trial Magistrate also found that by cultivating on the suit *kibanja*, the Defendant was a trespasser and entered judgment for the Plaintiff.

Being dissatisfied with the judgment and orders of the trial Magistrate, the Defendant/Appellant filed this appeal on the following grounds;

1. The trial Magistrate erred in law and fact when he held that the suit land belongs to the Respondent;
2. The trial Magistrate erred in law and fact when he relied on PEX2 and found that the suit land belonged to the Respondent;

3. The trial Magistrate erred in law and fact when he admitted additional evidence at locus;
4. The trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus arriving at a wrong decision;

Counsel for the Appellant submitted that the suit kibanja belonged to Gladys and the Appellant being a beneficiary to the estate of the late Gladys is entitled to benefit from her mother's estate.

Counsel further argued that PEX2 contained a stamp of the LC office which did not exist at the time which is an illegality that should not be sanctioned by this court.

Counsel further argued that the locus proceedings were marred with irregularities because the trial Magistrate relied on evidence of an independent witness. To support this argument counsel relied on the case of *Paineto Omwero Vs Saulo CS No. 31 of 2020* and prayed for the proceedings to be found to have been null and void.

Determination of the Appeal;

It is the duty of this court as a first appellate court 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 Father Nanensio Begumisa and three Others v. Eric Tibebaga SCCA 17of 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 (*see Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

I will resolve the grounds of appeal concurrently.

The Appellant faults the trial Magistrate for relying on the document dated 29/6/1993 admitted as PEX2; to hold that the Respondent owns the suit Kibanja.

The Appellant's claim is that the suit kibaja belonged to Gladys Nakagwa mother to both Parties, and that Gladys left the kibanja to her children and grand-children to utilize jointly.

On the other hand, the Respondent claims to have purchased the suit kibanja from one Aidah Norah, the Parties aunt in 1980.

Neither of the Parties adduced evidence to prove how they came to own the kibanja. The Appellant did not adduce a Will or letters of administration and distribution of the estate, and the Respondent did not adduce a sale agreement to show that she purchased the suit kibanja.

The trial Magistrate observed that the Parties did not adduce any evidence as above and went ahead to consider the rest of the evidence on the record to reach his conclusion. One of the documents adduced to prove ownership by the Respondent was a letter dated 29/6/1993 purportedly written by Gladys Nakagwa and addressed to the LC1 Muwoomya, Kyabala Parish in which she confirmed that the suit kibanja belonged to the Respondent.

Counsel for the Appellant seeks to challenge the authenticity of the document for bearing a stamp of an office that did not exist at the time. I have carefully perused the judgment of the trial court and established that the trial Magistrate took notice of the fact that the stamp appended to PEx2 was from an office that was non-existent at the time. The trial Magistrate however went on to consider evidence from other witnesses to reach his conclusion. This included the evidence of PW2 Mbaziira who testified that he was the LC1 Chairperson at the time of the sale and was present when Gladys confirmed that the land belongs to the Respondent.

I note that it was the Respondent's evidence that when the said document was executed, the Appellant and Respondent had fought and were tied up with ropes. One wonders why the Parties had to fight to the extent of being tied up yet their mother who knew the truth and was alive at the time did not confirm ownership until the incident? This, in addition to the lack of evidence proving the purchase raises doubt as to the true ownership of the suit kibanja.

In his evidence, PW2 Mbaziira Gerald testified that Aidah Norah was alive when Cate died and the Respondent testified that the parties fought after Cate's burial and that is when PEx2 was executed. When asked in cross examination why he did not call Aidah to clarify the matter, he stated that Aidah had died. The inconsistencies in PW2's evidence go to the root of this matter and since the law on inconsistencies is settled that that grave inconsistencies and contradictions unless satisfactorily explained, will usually but not necessarily result in the evidence of a witness being rejected as per the decisions of *Alfred Tajar v. Uganda, EACA Cr. Appeal No.167 of 1969, Uganda v. F. Ssembatya and another [1974] HCB 278, Sarapio Tinkamalirwe v. Uganda, S.C. Criminal Appeal No. 27 of 1989, Twinomugisha Alex and two others v. Uganda, S. C. Criminal Appeal No. 35 of 2002 and Uganda v. Abdallah Nassur [1982] HCB*), the evidence of PW2 is hereby rejected for being inconsistent. I find that PW2 was an unreliable witness and his evidence is hereby rejected.

DW3 Ismail Nsereko testified that Norah passed away after Gladys and the evidence on record is that Gladys died in 2004. The document PE2 was executed in 1993 during Norah's lifetime. If there were wrangles about the ownership of the suit kibanja during Norah's lifetime from whom the Respondent claims ownership, why was she never called to clarify and confirm the purchase?

Counsel further faults the trial Magistrate for relying on additional evidence taken at locus. I have carefully perused the proceedings and established that the court took evidence from a one Mutebi Fred at the locus yet Mutebi Fred was not among the witnesses that testified in court.

I am in agreement with Counsel for the Appellant regarding the purpose of locus in quo which check on the evidence and not to fill gaps on evidence that witnesses gave in court. As in according to *Order 18 Rule of the Civil Procedure Rules*, the process of locus in quo is intended to be an extension of what transpired in court and at locus, the court is mainly confirming what the witnesses stated in their evidence. It is for that reason that

courts should not take additional or fresh evidence especially from independent persons who never gave evidence on court.

In the instant case, the trial court at locus took additional evidence of one Mutebi Fred and at page 8 of the judgment of the lower court, the trial Magistrate made reference to evidence of the said Mutebi Fred. Although the trial Magistrate expressly stated that he would not base his judgment on the evidence of Mutebi Fred, he relied on it to corroborate the evidence in PEx2 and the evidence of the Respondent and ultimately to hold that the suit kibanja belongs to the Respondent.

I find that this was irregular for the trial court to take additional evidence at locus from an independent witness and further relying on such evidence to corroborate the Respondent's evidence and reach a conclusion that the suit kibanja belonged to her was prejudicial and caused a miscarriage of justice.

The Respondent testified that she allowed her mother and siblings to live on the land, that she built a house for her mother and allowed her siblings to build on the land. The Appellant argued that she used to send money from South Africa to construct the house as well as money for payment of Busuulu.

In her evidence the Appellant stated that she went to South Africa in 1998 and returned in 2016. It was also her evidence that the house was constructed around 1994-1996. This evidence corroborates evidence of PW4 Edward Nsawula who stated that he constructed the house in 1996. The Appellant's evidence is that she went to South Africa in 1998 and used to send money contributing to the construction of their mother's house. This evidence is inconsistent with the evidence of PW4 and PW1 that the house was constructed around 1994-1996. I however find that such inconsistency is not major and could be attributed to the time and human error.

The Appellant further stated that in addition to contributing towards the construction, she contributed towards the busuulu payments although these were receipted in the name of the Respondent. It is not clear as to the location of the kibanja and the evidence taken at locus

did not clearly establish the boundaries and location, therefore, the busuulu tickets are not sufficient to prove that the receipts are for the kibanja in dispute.

The Appellant stated clearly in her evidence that she returned from South Africa after hearing that the Respondent was claiming the house as the sole owner in order to take the compensation for the electricity lines. The trial Magistrate in his judgment made reiterated and emphasized that this matter arose because of the anticipated compensation. Although this could be the case, the Parties have rights and whoever truly owns the suit kibanja should be protected.

The Appellant's evidence is that the suit kibanja belonged to the late Gladys and the Respondent on the other hand claims that the suit kibanja belongs to her. She states that she allowed her mother to live on the land and built a house for her thereon after her house had collapsed. The Appellant argues that the house was constructed by all the siblings.

The evidence on the record shows that the Parties' siblings one Cate and Tomusange also lived on the suit kibanja. The Respondent stated in her evidence that the siblings utilized the land with her permission. I find it hard to believe that the Respondent who never lived on the suit kibanja allowed her mother and two siblings to live thereon without any claim of right. She states that she did not need to establish ownership because it had already been resolved that the suit kibanja belonged to her.

The evidence adduced to prove that the Respondent owned the suit kibaja was a letter allegedly written by the late Gladys confirming that the Respondent bought the suit kibanja. Evidence on the record from PW2 and DW3 shows that Aidah was still alive when the said letter was authored. I find it suspicious that the said Aidah was not called to confirm that she sold the suit kibanja to the Respondent. The letter presumably authored by the late Gladys therefore does not prove that the Respondent bought the suit kibanja.

Section 101 of the Evidence Act requires anyone seeking to rely on a fact to prove the existence of that fact. In the instant case, both Parties had to prove their alleged ownership

of the suit kibanja. I have clearly observed that this wrangle has been going on for a long time despite the parties being siblings.

Both Parties have never resided on the suit kibanja and the evidence on record shows that Gladys lived on the kibanja along with the Parties' siblings. The Appellant's evidence is that the suit kibanja belongs to the late Gladys Nakagwa and forms part of her estate. The Respondent claims to have bought the suit kibanja from one Aidah, however, she did not adduce any sufficient evidence to support this claim.

Both Parties clearly state that the late Gladys Nakagwa lived on and utilized the suit kibanja and this evidence was supported by all the witnesses or both Parties. I am therefore convinced that in the absence of sufficient evidence to the contrary, the suit kibanja forms part of the estate of the late Gladys Nakagwa.

In the result, this appeal is hereby allowed on the following orders;

1. The suit kibanja belongs to and forms part of the estate of the late Gladys Nakaggwa;
2. No order is made as to costs since the Parties are siblings.

I so order.

Dated at Masaka this 19th day of January, 2022

Signed;



Victoria Nakintu Nkwanga Katamba

Judge