

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO. 58 OF 2012

(From Nabweru Civil Suit No. 43 of 2009)

KIRAZA PAUL ::: APPELLANT

VERSUS

MUSA SSEKEBA ::: RESPONDENT

Before: Hon. Mr. Justice J. W. Kwesiga

JUDGMENT

This appeal arises from the Judgment of Her Worship JESSICA CHEMERI, Grade One Magistrate (as she then was) at Kasangati Court in Nabweru Chief Magisterial area under Civil Suit No. 43 of 2009 delivered on the 23rd day of May, 2012.

In the trial suit, the Plaintiff/Appellant sued the Defendant/Respondent alleging that the Respondent without any colour of right trespassed on the suit land, destroyed the developments thereon and constructed a commercial structure. The Appellant sought reliefs that included orders for vacant possession, General damages and costs of the suit.

The Defence filed by Katongole and Company Advocates generally denied the allegation.

At the trial the following issues were set down for determination:-

1. Whether the Defendant is a trespasser on the land in dispute.
2. Whether the Plaintiff is a bona fide purchaser for value without notice of fraud.
3. What are the available remedies?

The trial Magistrate dismissed the whole suit with costs to the Respondent leading to this Appeal. The following grounds of Appeal were filed:-

1. The trial Magistrate failed to properly evaluate the evidence adduced thereby arriving at a wrong conclusion that one of the Appellant wrongly purchased the Kibanja/land in dispute.
2. The learned trial magistrate erred in Law and fact when she failed to rely on the documents tendered for identification.

3. The trial Magistrate erred in Law and fact when she ruled that the will that the Appellant relied on was questionable.
4. The learned trial magistrate erred in Law and fact when she held that PW2 ought to have acquired Letters of Administration before disposing off her Kibanja.

This being the first appeal in this case, this Court shall discharge its duty by considering the evidence on record, evaluate this evidence and draw conclusions and decide whether to uphold or set aside the Judgment of the trial Court. In my view by subjecting the evidence on record to re-evaluation it may be possible to arrive at the same conclusion as the trial Court but for different reasons. Sometimes there are situations where the trial Court may not evaluate the evidence as a whole but give a conclusion or Judgment that correctly disposes of the case. I will keep this observation in mind together with the fact that as an appellate Judge, unlike the trial Judge I have not had the opportunity to see or hear the witnesses testifying and therefore I will not be influenced by or assisted by the demeanour of the witnesses.

I have made reference to superior Courts' decisions on this point and I found guidance in the following cases:

- (1) Kifamunte Henry Vs Uganda, Criminal Appeal No. 10 of 1997 (SCU).
- (2) Pandya Vs R. [1957] EA.
- (3) Kairu Vs Uganda [1978] HCB 123.
- (4) Selle Vs Associated Motor Boat & Co. Ltd. [1968] E.A. 123.

In Selle Vs Associated Motor Boat & Co. Ltd. [1968] E. A. 123. The principle was set out in these words:- **“... the duty of the first appellate Court is to rehear the case by considering the evidence on record, evaluate it itself and draw its own conclusion, in deciding whether the Judgment of the trial Court should be upheld, as well of course, deal with any question of Law raised on appeal.”**

Before I deal with the grounds of appeal I wish to record the manner in which this appeal was conducted.

The Memorandum of Appeal was filed on 25th July, 2012 by M/S Wameli & Co. Advocates for the Appellant. There was change of Advocates and M/S Sewankambo, Mubiru & Co. Advocates filed Written Submissions for the Appellant on Appeal. On 8th January 2015 following the directions of this Court that the record of appeal was ready

and the parties' Advocates should file written submissions to expedite disposal of this appeal. On 22nd January, 2015 M/S Katongole & Co. Advocates wrote to this Court reporting that the Respondent had since died and that **“There is no substantive Administrator yet to file the submissions.”** Katongole & Co. Advocates had handled the Appellant's/Plaintiff's case throughout the trial before the Magistrate Court. All the records were available and I am unable to understand what the deceased or administrators of the estate of the deceased were supposed to do in writing and filing the submissions.

It is possible that the Advocates had no instruction fees or filing fees. As far as this Court is concerned, for as long as the trial record is complete and there are grounds of appeal filed an appeal of this nature can be disposed of by reevaluating the evidence on record, guided by the issues that the trial Court was resolving. Advocates' submissions where available and correct, no doubt, are helpful to the Court but they are not the determinant factor in decision making. The paramount factors are the evidence and the Law. Therefore without the Respondent's submissions in this case, I have found no impediments in disposing of this appeal.

It is unfortunate that the Respondent died before the missing submissions but given the above position no miscarriage of justice is caused.

Ground one of Appeal: That the trial Magistrate failed to evaluate the evidence adduced thereby arriving at a wrong conclusion that the Appellant wrongly purchased the Kibanja/land in dispute.

First and foremost there is no fast and hard rule as to how evidence is supposed to be evaluated. It is sufficient if the trial Magistrate gives consideration to the evidence of both sides, weighs the evidence and gives reasons for relying on one part of the evidence and why he/she did not believe some evidence and preferred the other that formed the basis of the decision.

I have examined the evidence recorded by the trial Magistrate summarised below:-

PW1 Paul Kiraza told Court that that he purchased a Plot measuring 150 by 150 feet from ALICE NAGINGO in May 1997. The Plot included a house that was built by Alice Nagingo. The Defendant constructed on part of this Plot, about 50 ft by 40 ft which he seeks order of vacant possession. Under cross-examination he stated that he had lived in the

neighbourhood of the Plot for 30 years. He inquired from the LCs of the area about the genuine of ownership of the Plot, and that it took him (2) two months negotiating the price. The LCs did not witness the Agreement.

PW2 Magingo Alice, 65 years old woman she said she does not know the measurements of the suit Plot. That she was given the Plot by Late Ezeza Nabunya in 1986. That SSEKEBA MOSES built on part of this Plot in 1994 and the dispute started when the Defendant realized that PW2 wanted to sell it to the Plaintiff.

Under cross-examination she stated:- On the Plot there was a house left by ESEZA. That she grew up with her Aunt Ezeza from childhood but left when she got married up to 1978 and lived with her father 200 metres away from the suit Plot. The negotiation took two weeks and she sold it to the Plaintiff at Shs.1,000,000/=. There was a written Agreement. The Agreement was not witnessed by LCs. That her Aunt died in 1986 when she was working and living in Bugolobi.

PW3 Ssalongo John Lubwama, 75 years old testified that he knew the suit land belonged to ALICE NAGINGO the Defendant's grandmother. That ESEZA who was Nagingo's aunt gave her this land in a WILL. That Nagingo decided to sell it to the Plaintiff in 1997.

PW4 Hajji Kaya 65 years old. The Defendant is a son of his Aunt and Alice Nagingo is his cousin, a daughter of his uncle. Alice Nagingo inherited a share of land part of ESEZA's land in Wampewo, near the Road where ESEZA had been residing. Another part was given to JUMA the son of ESEZA. This witness firmly stated that ALICE inherited ESEZA's land and therefore had the right to sell her land.

In Defence, DW1 MUSA SSEKEBA told Court that the suit Plot belongs to him. He stated he has lived on the Plot for over 10 years and that some other people live on it and one of these people is PW2 Alice Nagingo. That in 1997 PW2 resisted his construction on the Plot. That the dispute was considered by LC I Court to LC III Court and he was declared the owner of the Plot. His building is 20 feet from the Plaintiff's house. They are separated by a foot path. The land belonged to his father Late JUMA MUSOKE who died in 1986. JUMA MUSOKE had been given this Kibanja by his mother ESEZA NABUNYA in 1960.

DW2 DUMBA EDWARD SEREMBA 57 years old stated that in 1982 ESEZA NABUNYA gave the Defendant a portion of her land. That the Plaintiff bought the disputed land without inquiring into ownership of the Plot. The Defendant was living with his wife and children in the house on the land.

DW4 Nabayaza Fatuma, 40 years old. This witness confirmed that her father JUMA MUSOKE and a father of the Defendant. That the Kibanja belonged to Eseza Nabunya who gave it to JUMA MUSOKE who also gave it to MUSA SSEKEBA. Before Eseza died she had handed over the Kibanja and house to the Defendant.

DW3 Mariam Nakuya, 80 years old wife of Late Juma Musoke and mother of Juma Ssekeba confirmed that the land belonged to her mother-in-law ESEZA who gave it to her husband Juma Musoke and they lived on the land before she died.

The trial Magistrate properly set out the above evidence and I have found sharp contradictions in the Plaintiff's evidence.

- (a) PW1 testified that he purchased 150 x 150 feet at Shs.800,000/= and that Ssalongo John and Kibuka were witnesses. On the other hand PW2 the Vendor states that she sold her Plot at Shs.1,000,000/=.
- (b) PW1 stated that at the time of purchase, Nagingo was staying on the land. Nagingo (PW2) testified that at the time of purchase she was living with her father 200 metres away from the suit land.

- (c) PW1 stated that negotiations took two months and the agreed price was Shs.800,000/=. On the other hand, PW2 stated negotiations took only two weeks and the buyer PW1 brought Shs.1,000,000/= and paid her.
- (d) There was further inconsistencies on why the alleged Agreement was not witnessed by Local Council authorities (LCs). Nagingo stated that they did not go to LCs because the LCs were not allowed to witness the Agreements by then. The purchaser on the other hand stated that he inquired from LCs who confirmed that land belonged to Nagingo.

This evidence has been evaluated with the unchallenged Defence evidence that this dispute between Nagingo and Ssekeba had been adjudicated by LC I up to LC III and Juma Ssekeba was declared the owner in Judgments that were never challenged beyond the LC III Court.

This Court is not concerned with the merits of the decision of the LC III Court but to take and consider the fact that the LCs were aware that this land was a subject of trial proceedings and therefore if the Plaintiff/Appellant had done due diligence in search of genuineness of the ownership of the Kibanja the LC I or LC III authorities would have

told him that Nagingo who had lost suits in LC Courts regarding the ownership had no powers to sell this land or at least that there was the Defendant's claim over the land. Therefore, having failed to do the necessary search the Plaintiff/Defendant cannot claim to be a bona fide purchaser of a Kibanja for value without notice of the Defendant's claim of ownership. PW1 and PW2 lied in their testimony on why they did not involve the LCs of the area in their transaction; my view is that they had something to hide.

These two further contradicted themselves on the venue of signing the Agreement. PW1 stated it was at the suit land while PW2 stated it was at her father's home where she lived after failed marriage.

PW2 testified that by the time she sold the Kibanja it was empty but PW1 and PW3 stated it was occupied by people.

All the above are material contradictions which the trial Magistrate considered. She evaluated the evidence properly when she observed that the alleged Agreement between PW1 and PW2 for sale or purchase of the Kibanja was not tendered and was produced in Court as an identification document.

I agree with the trial Magistrate that once a document is marked an identification document it does not become an exhibit or part of the evidence until it is formally tendered and admitted as an exhibit and so marked by the Court. The failure to produce the original Agreement and without offering any explanation for its absence left the sale not proved. The trial Magistrate was correct in holding that the purchase of the suit Kibanja by the Plaintiff/Appellant was not proved.

Nagingo claimed that she derived her authority to sell the Kibanja from a Will left by the Late ESEZA. There was no original Will produced or tendered in the whole trial. None of the witnesses to the Will were ever called to testify.

The trial Magistrate stated:

“I find it very difficult to rely on such a document and I find the entire estate of the Late ESEZA needed to be organised before any transaction could be done on the same.”

The trial Magistrate made a correct conclusion. If there was a Will made by Late ESEZA this Will ought to have been proved before a Court of competent jurisdiction and this would have been through

application for probate/Letters of Administration. The other remedy for purposes of this suit would have been production of the original or offering acceptable explanation on why it was not available and above all the witnesses to the Will should have been called to support it. The Defendant and his witnesses were consistent on the fact that ESEZA gave the suit land to her son JUMA MUSOKE and it was handed over to JUMA SSEKEBA the Defendant when ESEZA was still alive. The trial Magistrate was correct to hold that the Defendant was not a trespasser. The Defendant inherited the suit Kibanja from his grandmother. The trial Magistrate was correct to dismiss the suit as a whole.

Considering the evidence as a whole I find that the transaction between Paul Kiraza PW1 and Alice Nagingo PW2 was illegal. The house that was on the suit land belonged to Eseza Nabunya and not built by Alice Nagingo as alleged by PW1 because under cross-examination PW2 stated the Plot had a house left by Eseza Nabunya. This evidence has been weighed with the Defence evidence that Eseza had given her land before her death to the Defendant and this is more credible than the Appellant's version of distribution by a Will that was not proved.

The Law on how Courts should treat illegal contracts was well settled LINDLEY J. (as he then was in SCOTT Vs BROWN (1892) 2 QBD 724 at P.728 where he held that **“no Court ought to enforce an illegal**

contract or allow itself to be made the instrument of enforcing obligations alleged to rise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence by the plaintiff proves illegality, the Court ought not assist him.”

In the same case A. L. Smith L. J. said: **“If a plaintiff cannot maintain his cause of action without showing as part of such cause of action, that he has been guilty of illegality, then Court will not assist him.”**

The Appellant in the instant case acted illegally when he transacted over the suit land with a person that had no legal capacity to contract. He knew the Plot belonged to Eseza, even if there is a possibility that he did not know that Eseza had given to the Defendant/Respondent. He deliberately avoided involvement of the local authorities who were in possession of information about the actual ownership and previous contests over the Plot. He acted both illegally and irregularly and his appeal ought to fail. This appeal is hereby dismissed.

As observed in this Judgment above the Respondent’s Advocate opted not to file submissions as had been directed by the Court. This

Judgment has been made purely by re-evaluating the trial Court's recorded evidence and the grounds of Appeal. There is no justification for granting costs to the Respondent in this Appeal. The above notwithstanding this Court orders that:-

- (a) The Appeal is hereby dismissed without orders for costs.
- (b) The Appellant/Plaintiff shall pay the Respondent/Defendant costs in the Lower Court.

Dated at Kampala this 22nd day of June, 2015.

J. W. KWESIGA
JUDGE

In the presence of:

Mr. Kakeeto Denis for Appellant.

The Appellant in Court.

Respondent not present

Ms. Miria Naluwende – Court Clerk.

