

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL APPEAL NO. 0002 OF 2013
(Arising from Kamwenge Civil Suit No. 0002 of 2005)
(Original Kamwenge District Land Tribunal)

DOVINA KOMUSANAAPPELLANT

VERSUS

PADDY KAGURUSI.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Judgment

This is an appeal against the decision, judgment and orders of His Worship John Kategaya Senior Magistrate Grade 1 Fort Portal delivered on 7/1/2013.

Brief facts

The Respondent instituted a claim against the Appellant for a declaratory order, eviction order, general damages, exemplary damages, and costs arising out of trespass to land comprised in Kayanga Village, Kitagwenda, Kamwenge District. That in 1985, the Respondent purchased land from John Kurugumaho at UGX 50,000/= and took possession of the same in 1991 without any disturbance until 1997 when the Appellant trespassed on the suit land. That, the Appellant, has ignored the constant demands to vacate the land even after Court Orders were issued in that regard.

On the other hand the Appellant in her defence averred that the Respondent is the one that wants to grab her land which she has been occupying since 1968. That her husband died in 1991 and the Respondent in 1996 presented her with a sale agreement claiming that in 1985 he had bought the suit land from John Kurugumaho her late husband. That the sale agreement

does not even bare the signature of her late husband and is therefore a forgery. That the matter has been before the LC Courts who passed judgment in her favour.

At retrial as ordered by the High Court in its revision order, the Magistrate found in favour of the Respondent in an exparte judgment. The Appellant however, applied to set aside the exparte judgment which application was granted and suit heard afresh. In the fresh hearing judgment was passed still in favour of the Respondent with costs.

The Appellant being dissatisfied with the decision of the trial Magistrate lodged this appeal whose grounds are;

1. That the trial Magistrate Grade 1 did not properly evaluate the evidence on record otherwise he ought to have held for the Appellant.
2. That the trial Magistrate Grade 1 did not consider the evidence of the Appellant and her witnesses in holding in favour of the Respondent, otherwise he ought to have held for the Appellant.
3. That the trial Magistrate Grade 1 did not consider the evidence at locus when coming to his decision which caused a miscarriage of justice.
4. That the trial Magistrate Grade 1 erred in law and fact in admitting in evidence and basing his decision on a land purchase agreement of the Respondent whose origin and authenticity was not proved in Court and hence came to a wrong decision.

Counsel Peter Nyamutale Amooti (R.I.P) appeared for the Appellant and M/s Abaine – Buregyeya & Co. Advocates represented the Respondent. Both parties filed written submissions.

The grounds are discussed as follows; first is Grounds 4 and 3 separately, then Grounds 1 and 2 simultaneously.

Ground 4: That the trial Magistrate Grade 1 erred in law and fact in admitting in evidence and basing his decision on a land purchase agreement of the Respondent whose origin and authenticity was not proved in Court and hence came to a wrong decision.

The duty of the first Appellant Court is to evaluate the evidence on record afresh as a whole and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses at trial. The guiding principle was well stated by Law J. A. (as he then was) in the case of

Karanja Kago versus Karioki Njenga and Edward James Mungai, Civil Appeal No. 1 of 1979 (K-CA) where he held that;

“A first appeal is by way of re-trial and the Appellate Court is in as good a position as the Trial Judge to make findings of fact and to draw inferences from those facts but to bear in mind that it has neither seen nor heard the witnesses and should make due allowance of this fact.”

Counsel for the Appellant submitted that the Appellant during trial disputed the fact that her husband had sold land to the Respondent and the sale agreement Exhibit P1 is vague and was not proved to Court. Further, that the actual signature of the Appellant’s husband is different from that that is on the sale agreement.

Counsel for the Respondent on the other hand submitted that the sale agreement as executed on 12th/8/1985 was tendered by the Respondent and admitted as Exhibit P1. That not only was it admitted but it was also proved and corroborated by PW1, PW2 and PW3 who showed Court the precincts of the land that the Respondent had bought, when Court visited the locus-in-quo.

In my opinion the Appellant clearly stated in Court that she discovered that her husband had sold land to the Respondent and she could not accept his sale because she did not consent to it. The LC Court also found that the Appellant’s late husband had sold land to the Respondent and ordered the Appellant to pay back the 50,000/= being the purchase price which the Appellant declined to do. The Respondent also brought a witness to Court who was present during the sale and also signed on the sale agreement being PW2. I am therefore of the opinion that the Appellant does not want to accept the fact that her late husband sold off part of their land because she never consented to the sale however, the sale took place and an agreement was executed to that effect.

Counsel for the Appellant submitted that the signatures of the Appellant’s late husband differ on Annexure “A” that he apparently authored himself which has initials ‘J.R’ from that on Annexure “B” where the two initials are missing. That therefore, the sale agreement is a fabrication and the trial Magistrate erroneously relied on it to come to his conclusion.

Counsel for the Respondent however submitted that the evidence of DW2 Africano Mubangizi as to the handwriting and signature of his late father was inadmissible since he

was not a handwriting expert and no such ground was established upon which to give such evidence.

In my opinion, I concur with the submission of Counsel for the Respondent in that regard. Note should also be taken that the Appellant in her testimony while disputing the sale agreement told Court that her late husband did not sign the sale agreement which could explain why the initials were missing on Annexure “B” and that the document was authored by somebody else on behalf of Kurugumaho but in his presence since there are other witnesses who were present including PW2.

Further, that it is the evidence of the Respondent that he purchased the suit land in 1985 but never occupied it until 1991; however, the Appellant told Court that the Respondent trespassed on the suit land in 1996 after the death of her husband. That this piece of evidence was not disputed and in the case of **Akol Patrick & Others versus Uganda [2005] HCB Vol. 14 at Page 6**, it was held that;

“An omission or neglect to challenge evidence in-chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted...”

That the Respondent never challenged the evidence of the Appellant when she stated that the Respondent in 1996 trespassed on the suit land.

Counsel for the Respondent on the other submitted that it is not disputed that the Appellant’s husband died in 1991, however, the Appellant’s husband died intestate because the purported will produced as evidence by the Appellant is inadmissible for not being attested as required by law. It is true that the will as referred to by the Appellant was not attested to and lacks the qualifications of a valid will however, the document has the intentions of the Appellant’s late husband laid out.

Counsel for the Appellant further submitted that if it were true that the Respondent had purchased land, why did he wait for the Appellant’s husband to die for him to occupy the land? Further, that the Respondent also told Court during cross-examination that there was no need to tell the Appellant about the sale during husband’s burial. That the only conclusion is that the late husband never executed the sale agreement. That PW3 testified to the effect that he was present when the balance of the purchase price was being paid to Kurugumaho, however, he did not see the land that had been sold to the Respondent. Therefore, this witness was not present when the purported transaction took place.

Counsel for the Respondent submitted that the Respondent could not disclose to the Appellant about the sale of the land during her husband's burial because it was only logical and a reasonable conduct of a caring brother whose family was in mourning.

In my opinion the non-disclosure of the sale does not make it non-existent so, the time at which the Appellant got to know about the sale is immaterial and does not change the fact that her late husband had sold off the suit land.

Counsel for the Appellant in his submission also noted that the Respondent did not call the other 4 witnesses who signed on the sale agreement. That the sale agreement was hidden from the general public and the evidence before Court is insufficient to establish with any degree of certainty that the disputed sale agreement was signed by the late husband of the Appellant. That it is therefore safe in the circumstances to exclude the said purported sale agreement from affecting the land in dispute.

PW2 James Byankore 85 years is the only person who signed the sale agreement and testified in Court. He told Court that in 1985 the mother to the Appellant's husband died and there was need for money to cater for the burial. It was due to that need that the Appellant's father sold off the piece of land. That after the death of her husband Appellant chased the Respondent off the suit land. The Evidence as given by this witness is in support of that of the Respondent. That when the matter went to the LC Courts the Appellant was ordered to refund the 50,000/= that the Respondent had paid to purchase the suit land but she declined because the Respondent had asked for an additional 10,000/=.

In my opinion the sale agreement should not be totally disregarded because the Respondent at least brought one witness who was at the sale transaction and also signed the sale agreement. And his testimony supports that of the Respondent.

Ground 3: That, the trial Magistrate Grade 1 did not consider the evidence at the locus when coming to his decision which caused a miscarriage of justice.

Counsel for the Appellant submitted that there is no record of proceedings at the locus-in-quo but rather only a sketch map. In the case of **Yeseri Waiki versus Edisa Luni Byandala [1982] HCB 28**, it was held that;

“The usual practice of visiting locus-in-quo is to check on the evidence given by the witnesses and not to fill the gaps, for then the trial Magistrate may run the risk of making himself a

witness in the case and the trial Magistrate should make note of what takes place at the locus-in-quo and if a witness points out any place or demonstrates any movement to the Court, then this witness should be recalled by the Court and give evidence of what occurred.”

Counsel for the Appellant stated that PW3 could not show the land that was sold, since he was not present during the sale and also PW2’s evidence could not be relied upon because the land was not demarcated or inspected during the sale. That therefore, the Magistrate made himself a witness at the locus-in-quo and did not record the evidence of the parties and their witnesses at the locus and this caused a miscarriage of justice.

On the other hand Counsel for the Respondent submitted that at locus the trial Magistrate found the Respondent in possession of the suit land, with old sites of gardens belonging to him and that it is on that basis that the trial Magistrate did not award damages for trespass against the Appellant. That it is therefore his submission that the Respondent took possession of the subject land upon purchase.

Further that Court itself visited the locus-in-quo and found the Respondent had been in possession and with old sites of gardens, a fact which Court took judicial notice of and need not be proved. **(See: Section 55 Evidence Act)**

Counsel for the Respondent also submitted that PW1 and PW2 both testified that the sale took place and even identified the suit land. That failure by PW3 to identify the suit land is not evidence itself that the transaction did not take place. that if anything the evidence of PW1 and PW2 would suffice on balance of possibilities.

In my opinion the trial Magistrate visited that locus-in-quo though the proceedings are not on record, the findings are summarised in his judgment. It is upon the evidence as given in court and at locus that the trial Magistrate based his decision therefore there was no miscarriage of justice.

Grounds 1 and 2:

1. That the trial Magistrate Grade 1 did not properly evaluate the evidence on record otherwise he ought to have held for the Appellant.

2. That the trial Magistrate Grade 1 did not consider the evidence of the Appellant and her witnesses in holding in favour of the Respondent, otherwise he ought to have held for the Appellant.

Counsel for the Appellant submitted that in resolving these grounds he reiterates what he has already discussed under grounds 3 and 4 above.

Counsel for the Respondent on the other hand submitted that he reiterates the observation of the trial Magistrate; that when Court visited the locus-in-quo, there was no single garden belonging to the Appellant. That it appeared that the Appellant had vacated the suit land and the Respondent was found in possession. That therefore, it is the Respondent's humble submission that the usual practice of visiting locus-in-quo is to check on the evidence given by the witnesses and not to fill the gaps... as was held in the case of **Yeseri Waibi (Supra)**.

However, in my opinion these grounds lack merit, are too general and inconcise thereof offending the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules and should therefore be dismissed. (See: **Arajab Bossa Vs Bingi, HCT – 01 – LD – CA – 0015 of 2012 Pg. 2**)

In a nutshell, all the grounds have failed therefore; this appeal is dismissed with costs.

Right of appeal is explained

Dated this 6th Day of **September**, 2016.

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OYUKO. ANTHONY OJOK

JUDGE

Delivered in open Court in the presence of;

1. Both parties
2. Counsel for the Appellant

3. Counsel for the Respondent
4. Court clerk