

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL APPEAL No. 0028 OF 2014

(Arising from the Adjumani Grade One Magistrates Court Civil Suit No. 0023 of 2013)

MADRAWI ALBERT **APPELLANT**

VERSUS

WEST NILE DISTILLERY COMPANY LIMITED **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

In the court below, the respondent sued the appellant for a declaration that the land in dispute belongs to the respondent, a permanent injunction, general damages for trespass, interest and costs. Its claim was briefly that it was at all material time the proprietor of land located at Lajopi village, Cesia Parish in Adjumani Town Council, measuring approximately 90.86 x 99.9 metres (approximately 2.2 acres) when the appellant during the year 2007 trespassed onto it by constructing a pit latrine and grass-thatched huts thereon within an area constituting 20 x 20 metres of that land. The respondent claimed to have acquired the land by way of a lease offer to it granted by Adjumani Town Council during 1997 whereupon the respondent took possession, constructed a house thereon for a security guard and planted trees all around its perimeter. The respondent initially filed the suit on 29th June 2007, obtained an ex-parte judgment against the appellant which was set aside on appeal and a retrial ordered.

In his defence, the appellant denied the respondent's claim and instead stated that he owned the land in dispute under customary tenure, the same having belonged to his forefathers. Its proprietorship had descended through a chain of inheritances over generations in his family ancestry until he acquired it by inheritance from his father, Mario Draga. He stated that he had

been born on this land, lived and cultivated it for the previous 47 years. He challenged the respondent's acquisition of the land in 1997 as having been unlawful.

During the trial P.W.1 Dr. Adriko Erik Tiyo Sebeya, the Executive Chairman of the respondent testified that during 1997, Adjumani Town Council allocated the land to the respondent of industrial development. He tendered in court for identification, a photocopy of an allocation letter dated 28th May 1997, on the Town Council headed paper. The respondent proceeded to prepare site plans but the witness could not submit the original drawing in evidence but rather a photocopy for identification because the original had been destroyed in a fire which had engulfed the respondent's factory and Head Office in Arua. Subsequently by a lease offer dated 15th October 1997, the Town Council fixed the premium at shs 1,500,000/= which was paid but the respondent had lost the original receipt in the aforementioned fire. Payment of the premium was to be made in two instalments; shs.500,000/= was paid by a cheque which was received by the Town Clerk who directed that the second instalment was to be paid to The Chief Government Valuer. The respondent was unable to pay the second instalment of the premium as directed due to financial constraints. The respondent was nevertheless allowed to take possession of the land, which was vacant at the time, upon which it constructed a house thereon for a security guard and planted teak trees all around its perimeter. The witness was later notified by the security guard, of the appellant's trespass on 20 x 20 meters of the land by constructing a pit latrine and grass-thatched huts, hence the suit.

P.W. 2, Mr. Lagu Samuel the then Adjumani Principal Town Clerk, testified that Adjumani Town Council had in 1997, before he assumed office, allocated land at Lajopi village, Cesia Parish in Adjumani Town Council to the respondent. He had found records to that effect. The respondent later had fenced the land with wires and teak trees. He saw the appellant's pit latrine and grass-thatched huts on the disputed area of the land during a routine inspection of the industrial area of the Town Council, within which area the disputed land lies. The witness tendered in evidence, the application form dated 15th January 1997, an acknowledgement receipt dated 28th May 1997 and a lease offer form dated 15th October 1997.

P.W. 3, Mr. Asiku Benard the respondent's security guard, testified that he had been working for the respondent as a security guard from 17th May 1995, deployed to guard the respondent's land at Lajopi village, Cesia Parish in Adjumani Town Council to the respondent fenced with wires and teak trees. During March 2007, the appellant had together with a group of around ten other people had unlawfully entered onto the land with construction material and had proceeded to construct huts thereon. He reported the incident to P.W.1, who attempted to stop them in vain, hence the suit.

In his defence, the appellant testified that he came to know the respondent company during 2005 when they trespassed on his land now in dispute. He stated that he owned the land under customary tenure, having inherited it in 1984 from his father, the late Mario Draga who in turn had inherited it from his father Paulino Elo. The appellant had obtained letters of administration to the estate of his late father which he tendered in court as an exhibit. During the year 2006, a women's group had attempted to install a grinding mill on the land. He reported to the L.C.1 who issued him with a forwarding letter and advised him to file a suit in court. He tendered in evidence the letter dated 7th February 2006. During the year 2007, the respondent had entered onto the land and destroyed his potato and maize gardens and proceeded to fence it off. He once again complained to the L.C.1 and he tendered in evidence a copy of the letter of complaint dated 7th June 2007. He engaged an advocate who wrote two correspondences to the respondent and copies of these too were tendered in evidence. He testified further that Adjumani Town Council had not offered him any compensation before allocating the land to the respondent.

D.W.2. Mr. Ngoli Peter a cousin of the appellant testified that the land in dispute originally belonged to Mario Draga and that upon his death the appellant had inherited it. Before Mario Draga the land had belonged to the late Elo, Mario Draga's father and before him, to their forefathers. He asserted that the appellant was the rightful owner of the disputed land. The respondent had trespassed on the land against the will of the appellant and destroyed his crops thereon.

D.W.3. Mr. Tolu Emmanuel cousin of the appellant and member of the Area Land Committee testified that the land in dispute originally belonged to Mario Draga and that upon his death the

appellant had inherited it. Before Mario Draga the land had belonged to the late Elo. The appellant had obtained letters of administration to the estate of his late father Mario Draga. He knew the appellant as the owner of the land in dispute. Adjumani Town Council was established in 1994 and the disputed land lies within the Town Council.

D.W.4 Mr. Eberu Matiliano another cousin of the appellant, testified that at the time Mario Draga died on 1984, the appellant was in exile. Before his death, Mario Draga told the witness that upon his death the appellant should take over the land. Indeed following his death, the appellant had obtained letters of administration to his estate. The appellant had later begun to cultivate the land until the respondent came onto the land and destroyed all his crops. The respondent then took over the land.

After close of the hearing, the court visited the locus in quo, later received written final submissions from both counsel and thereafter delivered its judgment. In his judgment delivered on 23rd June 2014, the trial magistrate held that by virtue of *The Public Lands Act* and *The Land Reform decree, 1975* which were in force at the time of the allocation of the disputed land to the respondent, customary tenants on former public land were only tenants at sufferance, and controlling authorities had power to lease such land to any person. Adjumani Town Council had therefore by its minute No. ATC/LAC/006/97, rightly allocated the land to the respondent. The appellant had no *locus standi* to question the procedure or non-compliance by the respondent with the conditions of the offer. The appellant could not question the respondent's possession in 2007 when the allocation had occurred in 1997. The court therefore entered judgment in favour of the respondent giving it vacant possession, a permanent injunction against the appellant, general damages of shs. 20,000,000/= and costs.

Being dissatisfied with the decision, the appellant appeals on five grounds, which for purposes of coherence in the delivery of this judgment, are paraphrased as follows;

1. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record.
2. The learned trial magistrate erred in law and fact when he failed to find that the respondent had acquired the land through an unlawful process.

3. The learned trial magistrate erred in law and fact when he allowed the respondent to introduce documents during the re-trial that it had not relied on during the initial trial.
4. The learned trial magistrate erred in law and fact when he failed to find that the respondent's case was based on forged and unreliable documents.
5. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record when he considered the respondent's evidence in isolation of that of the appellant.

Submitting in support of the appeal, counsel for the appellant Mr. Twontoo Oba argued that the trial magistrate's admission of the respondent's lease offer a copy of which had not been attached to the respondent's pleadings and was never submitted during the initial trial was a misdirection. Being a document that was issued after the suit was filed, it should not have been admitted during the trial. He argued further that the procedure leading to that lease offer was irregular and the respondent's failure to pay the premium in full invalidated the transaction. The land offered to the respondent was not specifically described in any of the documents issued by Adjumani Town Council. The standard forms used in transactions of this nature were never used at all. Apart from the premium, no other conditions such as the duration of the lease, were prescribed. He prayed the court to allow the appeal with costs.

In reply, counsel for the respondent Mr. Samuel Ondoma argued that the transaction took place before the coming in force of *The Land Act, 1998*. The law in force at the time had abolished customary tenure in urban areas and holders of such interest remained on the land as tenants at sufferance. In any event, there was evidence adduced by the respondent indicating that at the time of the offer by the Town Council, the land was vacant. Attacking the validity of the documentation used during the transaction is a challenge as to form rather than substance since the content of the documents meets the purpose and content of the standard forms. At the time of filing the suit, the respondent had indicated that it would rely on "other documents with the leave of court." The trial court therefore properly exercised its discretion when it allowed the respondent to rely on the lease offer. The appellant had no *locus standi* to challenge the respondent's part payment of the premium since the appellant was not privy to the transaction

between the respondent and the Town Council. He therefore prayed that the appeal be dismissed with costs.

The duty of a first appellate court was appropriately stated in *Selle v Associated Motor Boat Co.* [1968] EA 123, thus:

An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

This appeal can be disposed of by consideration of a point of law that was not directly raised by the appellant in the memorandum of appeal but was brought to the attention of both counsel by court during the course of their submission at the hearing of the appeal, i.e. whether Adjumani Town Council at the time it granted the respondent the contested offer of a lease over the land in dispute, had the legal capacity to do so.

The respondent's case at trial was that Adjumani Town Council had exercised its power as a controlling authority, to grant it a lease over what was otherwise public land. The genesis of controlling authorities; power with regard to "public land" can be traced back to section 1 of *The*

Land Reform Decree of 1975 which declared all land in Uganda public land to be administered by the Uganda Land Commission in accordance with *The Public Lands Act* of 1969, subject to such modification as were necessary to bring the Act into conformity with the Decree. Section 23 (2) of *The Public Lands Act, 1969* provided that the Uganda Land Commission would grant to the Urban Authorities of designated areas, such lease and on such terms and conditions as the Minister would direct and any lease so granted would be deemed to be a statutory lease. A controlling authority then had the capacity to lease out the land entrusted to it under the statutory lease, to individuals.

Under that legal regime, for an Urban Authority to be constituted into a controlling authority, and hence acquire capacity to lease land, there had to be proof of prior grant of a statutory lease by the Uganda Land Commission. For example in *Nyumba ya Chuma Ltd v Uganda Land Commission and another, Const. Petition No. 13 of 2010*, where the Constitutional Court found no evidence whatsoever to show that the then Kampala City Council, now Kampala Capital City Authority, had ever had a statutory lease over the suit property from which it could have legally granted a lease to the petitioner or its alleged predecessor in title, it decided that Kampala Capital City Authority did not have any authority to grant a lease over the land. In the instant case, it was not proved that Adjumani Town Council was at any time before the purported grant of a lease to the respondent granted a statutory lease by the Uganda Land Commission.

On the other hand, upon the promulgation of *The Constitution of the Republic of Uganda, 1995*, the Uganda Land Commission's power to grant statutory leases to Urban Authorities ceased. The role of the Uganda Land Commission was redefined and restricted by article 239 of the constitution and section 53 of *The Land Act Cap 227*, to holding and managing land in Uganda "vested in or acquired by the Government of Uganda" in accordance with the provisions of the Constitution. In the instant case, Adjumani was pronounced as a district on 17th July 1997. It was originally one of the three counties in Moyo District known as East Moyo. Before that, by item 4 of the first schedule to *The Town and Town Council (Declaration) order, S.I 10 of 1995*, which came into force on 17th February 1995, Adjumani Town Board, had come into existence. No evidence was adduced during the trial to show the point in time at which Adjumani Town Board was elevated to a Town Council and whether it had, at any time before the purported grant of a

lease to the respondent, been granted a statutory lease by the Uganda Land Commission. In any event, six months after it was declared a Town Board, article 286 of *The Constitution of the Republic of Uganda, 1995* came into force and it abolished statutory leases with effect from 8th of October 1995. The article provides as follows;

Upon the coming into force of this Constitution and subject to the provisions of article 237 (2) (a) of this Constitution, statutory leases to urban authorities shall cease to exist.

The constitution came into force upon its promulgation on the 8th of October 1995. In *Kampala District Land Board and another v National Housing and Construction Corporation S.C. Civil Appeal No.2 of 2004*, the Supreme Court held that the effect of this provision was that the statutory lease granted to the City Council by the Uganda Land Commission in 1970 was extinguished on the coming into force of the Constitution. Kampala City Council ceased to be the registered owner of the suit land on the coming into force of the Constitution.

Similarly in the instant case, even if before the 8th of October 1995 Adjumani Town Council had been designated a controlling authority, evidence of which was not furnished to the trial court, its power to grant leases ended with the coming into force of the constitution by virtue of which any statutory lease it may have had hitherto, was abolished. According to the decision in *Kampala District Land Board and another v National Housing and Construction Corporation S.C. Civil Appeal No.2 of 2004*, even in case of a controlling authority to which a statutory lease had been granted and a corresponding title deed created, upon the promulgation of the Constitution the District Land Boards by operation of law became successors in title to controlling authorities or urban authorities in respect of public land which had not been granted or alienated to any person or authority. The District Land Boards became successors by operation of law because land was vested in them by law under Section 59 (8) of *The Land Act* not by grant, transfer or registration.

Therefore, when by its minute No. ATC/LAC/006/97, Adjumani Town Council purported to grant a lease over the disputed land to the respondent, it had no legal basis for doing so. According to article 241 (1) (a) of the Constitution and section 59 (1) of *The Land Act*, upon the promulgation of the Constitution, the power to hold and allocate land in the district “which is not

owned by any person or authority,” was vested in the District Land Boards, in this case, Adjumani District Land Board. Since grant of the lease in this case was on the assumption that the land in question did not belong to anyone, which the appellant contests, such power lay with the District Land Board and not the Town Council. In *Bruton v London and Quadrant Housing Trust* [1999] 3 All ER 481, court commented that a lease may, and usually does, create a proprietary interest called a leasehold estate or, technically, a “term of years absolute.” This will depend upon whether the landlord had an interest out of which he could grant it, based on *Nemo dat quod non habet*. In absence of a legal estate in the land vested in it by contract or law or rather the legal estate in the land having been divested of it, Adjumani Town Council had by 1997 either lost the capacity or lacked capacity from the very beginning, to conduct any dealings in the land now in dispute.

On the other hand, assuming that Adjumani Town Council had an estate vested in it out of which it had the capacity to create a lease, the nature of the offer made to the respondent, even if accepted by the respondent, was incapable of creating a valid lease over the disputed land. In *Street v Mountford* [1985] AC 809, the key elements constituting a tenancy were stated to as; first, there must be exclusive possession. Secondly, there must be consideration in the form of a premium or periodical payments. Thirdly, there must be a grant of the land for a fixed or periodic term. Section 3 (5) (d) of *The Land Act* though defines a lease to involve grant of land “usually but not necessarily in return for a rent.”

In the instant case, although the offer to the respondent did not specify any rent, it is silent as regards the duration. The application is dated 15th January 1997 (exhibit P.E.1). The offer was initially made on 28th May 1997 (exhibit P.E.2) and subsequently on 15th October 1997 (exhibit P.E.3). None of the offers specified the duration of the lease offered or the location and demarcations of the land offered. The period of time within which the lease period was to run ought to have been fixed by or determinable from the contract, which was constituted by the offer and subsequent acceptance by payment of the first instalment of the premium. Dates for the commencement and ending of the lease term must be specified or determinable, otherwise there is no valid lease granted. There ought to be a description of the demised premises. All these features are missing from this transaction of a purported lease.

These aspects of the case dispose of the appeal and I find it unnecessary to consider the rest of the grounds which essentially deal with the manner in which the trial court went about evaluation of the rest of the evidence that was produced before it. Having found that Adjumani Town Council had no basis in law and lacked the legal capacity to offer the respondent a lease as it purported to do, the processes that followed thereafter were an exercise in futility. No amount of careful evaluation of the evidence by the trial court, or the lack of it, could validate that process.

For those reasons, the appeal succeeds and the judgment and decree of the court below are hereby set aside with orders that the respondent shall meet the costs of this appeal and the costs of the court below. I so order.

Dated at Arua this 1st day of December 2016.

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Stephen Mubiru

Judge