

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CA – 0011 OF 2015

(Arising from FPT – 00 – CV- CS – 0044 of 2012)

ANGELIKA KAJUMBA.....APPELLANT

VERSUS

KIIZA GLADESI.....RESPONDENT

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

Judgment

This is an appeal against the decision of His Worship Oji Phillips, Magistrate Grade 1 at Fort Portal delivered on 4/2/2015.

Background

The Appellant instituted a Civil Suit against the Respondent for; a declaration that the Appellant was the rightful owner of the land in dispute situated at Nyankwanzi – Nyamusingire; eviction order and transfer of vacant possession; permanent injunction; general damages and costs of the suit.

The facts constituting the cause of action are that in 1977 the Plaintiff bought the suit land from Kabuleeta and had since been in occupation of the same until 2009 when the Respondent started claiming ownership over it. That the Respondent alleged that the suit land belonged to her father who had left it to Kabuleeta as a care taker. The matter came to the Chief Magistrate's Court on appeal and a retrial was ordered.

The Respondent on the other hand denied all the contents of the Plaint and contended that the suit land did belong to her late father who upon his death left Kabuleeta as the care taker. That in 2009 the Appellant then started trespassing on the suit land alleging that she had purchased the same from Kabuleeta.

Issues for determination were;

1. Who is the owner of the suit land?
2. What remedies are available to the parties?

The trial Magistrate after evaluating the evidence as adduced both in Court and at locus found the Respondent as the owner of the suit land and dismissed the Appellant's suit with costs.

The Appellant being dissatisfied with the above decision lodged the instant appeal whose grounds are that;

1. That the learned Trial Magistrate erred in law in failing to appreciate that the Respondents claim to the land was barred by the principles of limitation.
2. That the learned Trial Magistrate erred in law in refusing to recognise the Appellant's sale agreement on the basis that witnesses to the agreement died.
3. That the learned trial Magistrate failed to evaluate the evidence before him and reached a wrong conclusion.

Counsel Luleti Robert appeared for the Appellant and Counsel Babukiika Regina Tronera for the Respondent. By consent both parties agreed to file written submissions.

It is now trite law that a first Appellate Court is bound to subject the evidence on record to fresh scrutiny and come to its own conclusions as a way of retrial. (**J. Muluta versus S. Katama, Civil Appeal No.11 of 1999 (SC) and Section 80(2) of the Civil Procedure Act**).

It is trite law that the standard of proof in civil cases is on a balance of probabilities. In the case of **Nsubuga versus Kavuma [1978] HCB 307** it was held that in civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities.

In the instant Appeal this burden is on the Appellant.

Section 101 (1) of the Evidence Act, provides that 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.

Ground 1 is discussed separately and Grounds 2 & 3 jointly.

Resolution of the grounds:

Ground 1: That the learned Trial Magistrate erred in law in failing to appreciate that the Respondents claim to the land was barred by the principles of limitation.

Counsel for the Appellant noted that the Respondent was barred from instituting any suit against the Appellant after 12 years from the occurrence of the cause of action as per the provisions of **Section 5** of the Limitation Act.

In regard to limitation, Counsel for the Respondent submitted that the issue was not brought up in the lower Court therefore could not be brought up at this stage. And that beside trespass is a continuing tort and cited the case of **Abraham Kitumba versus Uganda Telecommunication Corporation, (1994) KALR 372**, where it was held that an action in trespass was not time barred because trespass was a continuing tort for which the injured party can sue from the date of the cessation of the wrong.

Counsel for the Respondent did submit that the trial Magistrate was right to hold that the suit land belonged to the Respondent and that Kabuleeta had no authority to sell since he had no title to the suit land and in the circumstances could not pass on any title.

In the instant appeal the main issue for determination during trial was ownership, and the issue of limitation was not brought up. In my opinion, I do concur with the submission of Counsel for the Respondent that indeed it is true that the issue was not brought up in the lower Court therefore cannot be brought up on appeal. Trespass is also a continuing tort in nature and thus the issue of limitation does not arise.

This ground therefore fails on the ground that limitation was never raised as an issue during trial in the lower Court.

Grounds 2&3:

2. That the learned Trial Magistrate erred in law in refusing to recognise the Appellant's sale agreement on the basis that witnesses to the agreement died.

3. That the learned trial Magistrate failed to evaluate the evidence before him and reached a wrong conclusion.

Counsel for the Appellant submitted that the trial Magistrate failed to evaluate the evidence on record on the basis that the trial Magistrate did not give reason for his decision as envisaged in **Section 136** of the Magistrates Courts Act.

Counsel for the Appellant also stated the Appellant's evidence did not bare any contradictions and it pointed to the fact that she acquired the suit land in 1977. That on the other hand the Respondent's evidence had glaring contradictions which went to the root of the case. For instance she stated that she had been on the suit land since 1969 and later contradicted herself by stating that in 1960 she had left the suit to go get married. Not to mention that she stated that her age was 50 and from the calculations it would show that she was born in 1964 therefore it was not possible for her to have gotten married in 1960 before she was even born.

Furthermore, that the Respondent departed from her pleadings by stating that the suit land was left in the custody of Venansio Kato their uncle and Kabuleeta. And also that the Respondent added her sister Eva as a beneficiary to the suit land yet this was not stated in her pleadings. The Respondent also in Written Statement of Defence stated that her father left the suit land with Kabuleeta and later stated that she is the one that left the suit land with Kabuleeta when she left to get married. That the departure from the pleadings was a contravention of **Order 6 Rule 6** of the Civil Procedure Rules was intended to mislead Court.

During the Locus visit the Respondent did not show Court where she had once lived with her grandmother for 16 years and neither did the Respondent in her testimony at any one time make reference to a structure that she and her relatives had lived in on the suit land.

Counsel for the Appellant went to submit that DW2 who is Venansio never at any one time mentioned in his testimony that he was left to look after the suit land but rather on cross-examination stated that it was Kabuleeta that was left as a care taker of the Respondent's children and not the suit land.

That the same witness DW2 stated that he saw the Appellant using the suit land in 1971 contradicting the Respondent's testimony and also added that by 1971 Kabuleeta had died.

Counsel for the Appellant also noted that there were inconsistencies between the ages of DW1 and DW3 Eva who are siblings. That DW3 who stated that she was 40 years told Court that at the time of her father's death she was one month and the Respondent stated that she was 5 years old. However, on proper analysis it would indicate that the Respondent's father died before DW3 was born. That this contradiction touches the root of the case.

Counsel also noted that the Respondent at the locus mentioned a one Birungi as the one that started tilling the suit land, yet in Court she stated that the land had been vacant in 1986-1989. That the Respondent was also aware of the Appellant's occupation of the suit land in 1990 according to her testimony where she stated that DW2 had tried to talk to the Appellant in 1990 as opposed her getting to know in 2009.

Counsel for the Respondent on the other hand submitted that the Appellant tendered in Court a sale agreement however, all the witnesses had died save for one John Mugenyi whom she did not call, the other neighbour Bafaaki also did not sign nor did any of the neighbours sign. That with all these lacunas, the trial Magistrate was right to hold that the suit land belonged to the Respondent. And the evidence as adduced was properly evaluated thus leading to the correct decision.

That if Kabuleeta did indeed sell the suit land then this was an illegality and this court cannot condone an illegality as per the case of **Makula International versus His Eminence Cardinal Wamala Nsubuga [1982] HCB 11**.

In my opinion I note that the Respondent did depart from her pleadings by introducing new parties to her case however, this was not prejudicial to either of the parties. DW2 told Court that he had seen the Appellant using the suit land in 1971 yet she alleged to have bought the suit land in 1977. The Respondent and DW2 did contradict themselves as to the year of death of Kabuleeta and the fact that DW2 stated that Kabuleeta was a caretaker of the Respondent and her sister and also never mentioned that he was also a care taker of the suit land as stated by the Respondent. The contradictions of Respondent's witnesses were so major and touched the root of the case.

In regard to the sale agreement and the death of all the witnesses, the suit land was allegedly bought in 1977 and it is possible for all the witnesses to have died by the time of the hearing of the case. If Court deemed John as the only surviving witness as vital in the determination of the suit, then it had a duty to summon him to attend Court and guide it on the issue at hand through his testimony. Otherwise a party is at liberty on who to call as a witness in a bid to prove their case.

During the locus visit, I did not see anywhere on record that the Respondent did show Court where she initially stayed with her relatives, nor was the same ever mentioned in her testimony. The former grave of her father was also not shown to Court during the visit.

In my opinion with the evidence on record as adduced by both parties, I find that the Appellant's evidence was more reliable than that of the Respondent. The Respondent's was more of a denial of facts, without evidential proof while the Appellant was reliable and more cogent. I am therefore in agreement with observations made by Counsel for Appellant regarding this evidence in his submissions. In regard to the inconsistencies and contradictions, these did touch the root of the matter at hand.

The Appellant stated that she bought the suit land from Kabuleeta and a sale agreement was tendered in Court to prove the same. Counsel for the Respondent however submitted that this was illegality owing to the fact that the alleged seller did sell without the consent of the owners since he was just a caretaker of the suit land. The Respondent also did mention that DW2 was left as a caretaker of the suit land, who however, did not state the same in his testimony in Court. On the contrary he stated that the late Kabuleeta was left as a caretaker of the Respondent and her sibling and not of the suit land. Nor, did DW2 in his testimony state that he too was left as a caretaker of the suit land as was alluded to by the Respondent.

I find that the contradictions in the evidence of the Respondent were major and did touch the root of this case. It is very hard to believe evidence that is full of major contradictions and different from that of the person giving the story and in the instant case, the Respondent.

This ground therefore succeeds.

And in a nutshell, this appeal succeeds on grounds 2 and 3 and fails on ground 1. Costs awarded to the Appellant in this Court and the lower Court. The lower Court's decision is therefore set aside.

Right of appeal is explained.

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OYUKO. ANTHONY OJOK
JUDGE
23/03/2017

Judgment delivered and read in open Court in the presence of;

1. Counsel Rwakatooke M. Holding Brief for Counsel Luleti Robert for the Appellant.
2. James – Court Clerk.

In the absence of;

1. Counsel for the Respondent
2. Both parties.

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OYUKO. ANTHONY OJOK
JUDGE
23/03/2017