

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-LD-CV-CS-0052/2014

(Arising from CIVIL SUIT NO. 025/2003)

MUSYAKULU CHARLES.....APPELLANT

VS

MUWONGE PATRICK.....RESPONDENT

BEFORE: HON. MR. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

JUDGMENT

This is an appeal against the decision and orders of his Worship Kwizera Vian Magistrate Grade I Fort Portal delivered on the 3rd December 2014

Background

The Respondent brought a suit against the defendant seeking for an order for declaration of ownership of the suit land, Vacant Possession, Permanent Injunction, Mesne profits, compensation, General Damages, interest in (a) above at Court rate from the date of Judgment till full payments and costs.

The appellant on the other hand denied all the allegations and prayed that the suit be dismissed with costs.

It is alleged that the plaintiff bought the suit land from Baguma Ali and Christopher Byakunaga measuring about 8 acres. The plaintiff through his agent sold part of the suit land measuring 25 X 50 Ft to the 1st Defendant Mbusa Isaac at a Purchase price of Ug Shs 400,000/=. The 1st Defendant paid 180,000/= and the balance of Ugx 220,000/= remained unpaid.

During the hearing of this case, the 1st defendant agreed with the plaintiff to rescind the sale agreement. The plaintiff refunded to the 1st Defendant his money Ugx 180,000/= which the 1st defendant accepted and agreed to hand over the piece of land he had bought.

A consent Judgment was signed by both plaintiff and the 1st defendant and it was entered on court record and Court proceeded with the hearing of the defendant No. 2 who claims to be the owner of the Suitland.

Issues raised for determination were;

1. Whether the plaintiff is the owner of the suit land.
2. Whether the defendant is a trespasser on the suit land.
3. What are the remedies available?

The trial magistrate found the Appellant to be a trespasser on the suit land and that the suit land belonged to the Respondent and awarded costs to him. The appellant being dissatisfied with this decision, lodged the instant appeal whose grounds are;

1. The learned trial Magistrate failed to evaluate the whole evidence including documentary evidence especially the Judgment in Criminal Case No. 221/12 passed on 31/07/2013 in which the appellant was acquitted of criminal trespass and the sale agreement.
2. The Learned trial Magistrate erred in law, fact and procedure when he objected the request to call a hand writing expert to confirm whether the signature on the sale agreement was that of the Respondent or not.
3. The learned trial Magistrate failed to consider that the Appellant had quietly lived on the suit land for 9 years with the consent of the Respondent/plaintiff which was evidence that the Appellant had a better title to the land causing a miscarriage of justice.

4. The learned trial Magistrate failed to properly compare the signature on the sale agreement with that on proof of customary land ownership, which document was produced by the respondent in evidence coming to a wrong conclusion.

Ms Ngaruye Ruhindi Spencer & Co. Advocates appeared for the Appellant and Ms Ahabwe James & Co. Advocates for the Respondent. By consent both parties agreed to file written submissions.

Duty of the 1st Appellant Court is to appreciate the evidence adduced in the trial Court and the power to do so is as wide as that of the trial Court. Where the trial Court had resorted to perverse application of the principles of evidence or show lack of appreciation of the principles of evidence, the Appellate Court may re-appreciate the evidence and reach its own conclusion. (See: **Pandya Versus Republic [1957] EA 336, Kifamunte Henry Versus Uganda Criminal Appeal No. 10 of 1997 page 5 (Supreme Court).**)

Ground 1: The learned trial Magistrate failed to evaluate the whole evidence including documentary evidence especially the Judgment in Criminal Case No. 221/12 passed on 31/07/2013 in which the appellant was acquitted of criminal trespass and the sale agreement.

Counsel submitted that the sale agreement was tendered in Court as the Appellant's evidence. The Appellant clearly testified in Court together with his witnesses that they were in possession of the suit land for 9 years. Surprisingly the same Magistrate who entertained the Criminal matter where he held that the now Appellant had a claim of right and believed the L.C I chairperson who wrote the sale agreement and the witnesses on the sale agreement is the same Magistrate who later turns and disbelieves the same evidence.

He further submitted that court confer to the Judgment and proceedings of Criminal case No. FPT-00-CR-CO-022/2012 of Bundibugyo. This is unbelievable and occasioned the miscarriage of justice. That Appellant implored to refer to the proceedings of the Criminal case but Court refused reason nobody can understand.

He submitted that the Respondent disowned the sale Agreement by disowning his signature on the Sale Agreement. The Appellant implored Court to refer the signature to a Handwriting expert, however Court refused and turned itself into a Handwriting expert.

In response Counsel of the Respondent submitted that the evidence of criminal case No. 221 of 2012 was never adduced in court and therefore the Appellant cannot base on it to found an appeal. It is also not true as per what is on record that the appellant ever made a prayer to the trial Court to refer to the proceedings of the above criminal case. What is on record at page 5 is that after the Respondent reported the Appellant to police for an alleged trespass, the police referred the matter to court and the Respondent was advised by police to file civil suit No. 025/2013 which finally gave birth to this appeal.

In my view ground I is too general, vague and inconcise. In fact it offends O.43 r (1) and (2) of the Civil Procedure Rules and the case of **Arab Bossa Vs Bingi HCT-0015/2012 pp 2** it therefore fails. Be it as it may the trial Magistrate evaluated the whole documentary evidence in respect to this case. Civil case No. 221/2012 was not brought and tendered in court as per the entire proceedings. In fact PW1 states that he sold his land at Ushs 400,000/= to DW1, land measuring 25Ft X 50Ft and DW1 paid 180,000/= leaving a balance of 220,000/= and left DW2 to care take, no agreement was made and indeed a consent Judgment was entered between PW1 and DW1 and PW II to the very fact together with PW III.

DWI stated that he bought the land at Ushs 400,000/=, on the 29/7/2003 paid 230,000/= and was left with a balance of 270,000/=. He again states that he paid on the 12th August 2003 55000/= plus 70,000/= plus 45000/=. The original agreement was however not tendered in Court for reasons unknown to me and size of the land was 25Ft X 96Ft.

DW II claims that the plaintiff sold land to DW1 but he was not around even the L.C I was not around together with the owner.

DW III admits that the land belonged to the plaintiff in the second last paragraph PP 18 and that the plaintiff sold it to DW2. The first agreement was made on the 29/7/2003 and the second agreement on the 12/8/2013.

In my view according to the statements of all Defence witnesses, it seems there was two agreements dated 29/07/2013 and 12/8/2003 and yet according to the records, its only 1 agreement containing everything. In the agreement it mentions the size of the land being 35X96Ft and yet according to the testimony of DW1 the size of the land is 25Ft X 96 Ft, secondly the agreement states that DW1 paid 230,000/= leaving a balance of 270,000/= which totals to 500,000/= not 400,000/=. Thirdly DW1 states that he bought the land from the plaintiff but he contradicts himself and says he bought it from the agent. DW2 clearly states that DW1 bought the land from an agent and DW3 says DW2 bought the land from the plaintiff and he even witnessed it, he even contradicts himself on the record of proceeding PP 19, first paragraph during cross-examination where he states that he only witnessed the 2nd agreement dated 12/8/2003. Fourthly DW1 says the plaintiff never signed the agreement at the time of buying which was attended to by DW II and yet DW III says that the plaintiff signed the agreement. One wonders as to how somebody sells land without authorization of the owner either expressly or impliedly leave alone not signing on the document. These inconsistencies are grave and goes to the root of the case and cannot be ignored unless satisfactory explained. This was so in the case of *Uganda Vs Abdullah Nassur (1982) HCB*. It is also not true as per what is on record that the appellant ever made a prayer to the trial Court to refer to the proceedings of the above criminal case. What is on record at page 5 is that after the Respondent reported the Appellant to police for an alleged trespass, the police referred the matter to court and the Respondent was advised by police to file civil suit No. 025/2013 which finally gave birth to this appeal. This ground fails.

Ground 2: The Learned trial Magistrate erred in law, fact and procedure when he objected the request to call a hand writing expert to confirm whether the signature on the sale agreement was that of the Respondent or not.

Counsel for the Appellant submitted that it is a cardinal principle of practice that where the issue is on handwriting and a party or parties request for the services of a hand writing expert, Court is enjoined into granting such a prayer so that is determined once and for all.

That the Appellant was never given this chance or an opportunity to prove from the Experts that the Sale Agreement bears the signature of the Respondent who was then the seller of the suit land.

However counsel of the Respondent stated that it is not true that the Appellant made a prayer to call a hand writing expert and was turned down by the Magistrate. The evidence of the appellant who testified as DW1 is at PP 12-16 of the record of proceedings and there is no prayer a handwriting expert that was made by the Appellant at the trial. He further submitted that the expert was not necessary because the error in the agreement could be easily seen by the Magistrate.

In my view I do agree upon perusal of the entire proceedings that DW1 now the Appellant never made any request that an handwriting expert be called during trial probably because he felt there was no need and in any case it is not upon court but the parties to prove their case by calling witnesses that are beneficial to them. In this case I really do not know why the original agreement was not tendered in Court. Be it as it may failure to call a handwriting expert during trial does not make it an illegality as stated by the Appellant's Counsel. The Standard of prove was on the Appellant to prove his case on a balance of probability which he miserably failed. This ground fails.

Ground 3: The learned trial Magistrate failed to consider that the Appellant had quietly lived on the suit land for 9 years with the consent of the Respondent/plaintiff which was evidence that the Appellant had a better title to the land causing a miscarriage of justice.

Both Counsel did not submit on this ground and I take it that it was abandoned without any valid explanation. All the same the ground lacked merit and it does not matter whether the appellant stayed on the land for 9 years because according to the Respondent, the Appellant was caretaking the land on behalf of DW1 who later signed a consent Judgment with PW1 withdrawing from the case.

Ground 4: The learned trial Magistrate failed to properly compare the signature on the sale agreement with that on proof of customary land ownership, which document was produced by the respondent in evidence coming to a wrong conclusion.

In my view upon perusal of the entire proceedings, no document for proof of ownership was ever tendered in Court to enable the trial Magistrate compare the signatures on the sale agreement.

In fact parties are bound by their own pleadings. You cannot manufacture new evidence/facts during appeal unless otherwise it is in conformity with the law.

In a nutshell from the re-evaluation of the evidence on record, I find that the Appellant is indeed a trespasser. This appeal therefore lacks merit, is a waste of Court's time and is intended to deprive the Respondent the fruits of his Judgment. It is dismissed with costs and all orders of the lower Court are upheld.

Right of Appeal explained.

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Oyuko Anthony Ojok

Judge

23/3/2017

Delivered in open Court in the presence of

1. Mr. Ahabwe James Counsel for the Respondent
2. Mr. Victor Businge for the Appellant
3. The Respondent.
4. In the absence of the Appellant

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Oyuko Anthony Ojok

Judge

23/3/2017