THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0024-2016
(ARISING FROM SIRONKO CIVIL SUIT NO. 20 OF 2008 AND ORIGINAL DISTRICT LAND TRIBUNAL CLAIM NO. 39 OF 2006)

1. **WADIKA NANAYI**
2. **MAGUTI NANAYI** **::::::::::::::::** **APPELLANTS**

VERSUS

1. **ABDULLAH WALUSIMBI**
2. **MUHAMMAD ALI KIGOZI** **::::::::::::::::** **RESPONDENTS**

BEFORE: <u>HON. MR. JUSTICE HENRY I. KAWESA</u>

JUDGMENT

This is an appeal arising from the Judgments and orders of **Her Worship Awidi Susan** Magistrate Grade I Sironko of 23rd March 2016. The background was that the plaintiffs by plaint sued defendants for ownership of customary land situate at Bukigalabo village. Plaintiffs claimed that they acquired the suit land from its owners after he mortgaged the said land and later failed to pay and sold the same land to plaintiffs. Defendants also claimed they purchased the land. Each party held the other liable for trespass. The learned trial Magistrate found in favour of the plaintiffs, hence this appeal.

At scheduling three issues were framed for determination.

1. Whether plaintiffs are the lawful owners of the suit land.
2. Whether defendants have trespassed on the suit land.
3. What remedies are available to the parties?

As a first appellate court, this court has the duty to re-evaluate the evidence in order to make my own conclusions bearing in mind the fact that I did not observe and listen to the witnesses.

I have gone through the entire record, and noted the evidence, facts and submissions before court. The appellants have raised six grounds of appeal.
I will resolve the grounds in the order of presentation by the appellants.

Grounds 1, 2 and 3: Failure to evaluate and scrutinize evidence.
While arguing these grounds the appellant's counsel, pointed at issues related with;

a) Acreage.
b) Mortgage or sale?
c) Contradictions.

Counsel's arguments were in effect that on strength of evidence on record the learned trial Magistrate failed to note that the plaintiffs did not know the exact size (acreage) of the land in dispute hence court failed in its duty of assessing evidence.

Secondly that the learned trial Magistrate failed to find that this transaction was a mortgage and not a sale.

Thirdly that there were major contradictions in plaintiff's evidence as pointed out in his submissions which showed that there were forgeries, lies and inconclusive evidence which learned trial Magistrate ignored.

In their reply the Respondents through their counsel reviewed the evidence on record and argued that plaintiff satisfied the evidential burden of proof. The defence addressed itself to the issue of trespass, and argued that since plaintiff was in possession after the land was mortgaged to him then the maxim "*qui prior set tempore polier est fire*" applied in that the interest of the adverse claimant will rank in the order of their creation that "*first in time- better in law*." They argued that the learned trial magistrate was right.

I have carefully noted the above arguments. It is very important to remind all parties that the courts are courts of law but also enforce equity. The facts of this case needed to be placed in the perspective of the legal obligations of the parties.

First, the parties herein came to court to seek remedies. What was the cause of action?
According to the plaintiff in their plaint they claimed for vacant possession and an injunction to prohibit further trespass. From paragraph 3 of their claim the claimants stated that at the trial they would adduce evidence to establish that they are customary owners of the portion of land situate at Nampanga village, Sironko.

The defendants by written statement of defence denied the claim and averred that they bought the said land.

It however transpired from evidence that the transaction upon which the plaintiff based his acquisition of the land began as a mortgage later transformed into a sale (as claimed by plaintiffs in evidence). The defendants however based their claim from an outright sale of land to them, as per evidence adduced by them on record.

The evidence as adduced through **PW.1- Abdalla Walusimbi** stated that he had loaned shs. 150,000/= to **Abdullaham Parapande** who mortgaged to him his land. The arrangement was that if he failed to pay within a year then he pays shs. 250,000/= then takes the land in his own names.
The plaintiff says he paid the 250,000/= through **Mohamed Kigozi** in Nairobi. That no formal agreement was made, no transfer, and no formal introduction to neighbours was done.

PW.2 Mohamed Kigozi confirmed the evidence as per PW.1 only that he provided details showing that 150,000/= was payable within one year. The one year lapsed without payment and after 3 years, **Parapande** went to him and he paid him 250,000/= in Kenya. An agreement was made dated 20.08.94 (Ex.P.1).
PW.3 Haji Abdu Kigozi testified regarding the agreement of 10.12.1990 which he wrote as secretary between the parties mortgaging the land in question.

DW.1 Nelson Wedina testified that land was sold to them by **Parapande** in 1999.

DW.2 Wetewa John said he was contacted by **Isagalimana** and **Mutubo** that **Parapande** was selling land in 1999. They agreed to buy at 2 million on 5.09.1999 and it was paid in installments, the last on 11.11.1999 and agreements made. They were in possession until 25th December 2006, when the plaintiffs lay claim on the land.

DW.3 Muhamudu Kambire was a witness. That **Parapande** had a problem. He went to his brother **Walusimbi** to give him 150,000/= in one year, failure to pay back **Walusimbi** pays 250,000/= takes the land. He allowed **Walusimbi** to use the land. After three years he met **Parapande** and his two wives digging and he told him he had paid off **Walusimbi**. He eventually sold the land in 1991. He took back his land in 1992. He witnessed the mortgage.
DW.4 Mabui Fred witnessed the sale to defendant.

The facts above show that the plaintiffs and **Parapande** entered into a mortgage.
The law that governs mortgages is to the effect that "once a mortgage always a mortgage." The facts show that the transaction was an equitable mortgage which was "clogged" by the requirement to pay "250,000/= and take the land."
Mortgages have a branch of the law which govern its legal application.

In the case of ***Kyagalanyi Coffee Ltd v. Francis Senabulya (CA 41/2006) (2010) UGLA 36***, the Court of Appeal held that:

> "*the transfer and registration of the mortgaged property in issue in the appellant's names was illegal for lack of a foreclosure order from the Minister*."

The court found that the nature of transaction between appellant and respondent over the property in issue was that of an equitable mortgage and to realize its security it was necessary for it to obtain a foreclosure order from court which it did not. Simply taking over and registering the mortgaged property into its names, was therefore an illegality and no court could sunction that.

The court further referred to ***Stanley v. Wide (1899) 2 CH 474***; which held that:

> "*The principle is that a mortgage is a conveyance of land or an assignment of chattels as security for the payment of debt or discharge of some other obligation for which it is given. This is the idea of a mortgage. The security is redeemable on the payment of or discharge of such debt or obligation, any provision to the contrary notwithstanding. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by clog or fetter on the equity of redemption and therefore void. A "clog or fetter" is something inconsistent with the idea of security*."

Applying the law to the facts, the mortgage was given as security for the loan. It could not confer property rights of 'foreclosure' to the plaintiff without a legal court order so obtained. The transaction itself could not pass for a sale since "once a mortgage always a mortgage." This legal matter was not addressed by the learned trial Magistrate, or by the defence/Respondents. It stands in the way of any purported acquisition by sale, giving rights to possession by plaintiff. it therefore extinguishes all other arguments based on trespass, first in time etc on which the learned trial Magistrate dwelt at length in finding for the plaintiffs. I agree with the appellants that this transaction was a mortgage and the plaintiff did not acquire the land lawfully as stated. The law is not on their side.

This coupled with the inconsistencies and contradictions in the evidence of the plaintiffs as highlighted by counsel for appellants, I do agree that the learned trial Magistrate did not address his mind to the following crucial issues;

(i) Failure of the plaintiffs to prove the sale. The agreement to prove that shs. 250,000/= was ever received by the defendants is missing.

(ii) It is not clear what land is in issue and of what size. Acreage was important in view of defence evidence showing various portions of land involved. This was not proved by plaintiffs' evidence.

(iii) No evidence of actual possession is on record and hence it is not right to say plaintiffs were in possession.

For all those reasons, I find grounds 1, 2 and 3 proved.

Ground 5: On locus standi

I have found that the nexus which brings Plaintiff No.2 to this claim is the alleged payment of shs. 250,000/= from Kenya in final purchase of the land. However this evidence is inconclusive. The locus to bring the suit according to the plaint was based on his claim to the land customarily. He could therefore bring this suit. But upon trial in court, and on evidence by law and facts it was not proved that he owns the land as claimed. The grounds therefore fails only as far as stating that he had no locus to bring the suit, but succeeds in proving that he had no right to the land. He was a stranger to the mortgage transaction and also failed to prove ownership.

Ground 6:

From the findings above and authority of ***Matayo Okumu Fransisiko Amudhe & Others (1979) HCB 229***, the decision by the learned trial magistrate was based on a wrong principle of law and hence occasioned a miscarriage of justice. This ground succeeds.

All in all, the appeal succeeds.

The lower court judgment is set aside and it is entered for appellants with costs here and below.

Henry I. Kawesa

JUDGE

10.03.2017