

I did not see a copy of the WSD but the record indicates the defendants denied the suit and a scheduling was done where the WSD is referred to issues were agreed on the hearing commenced on 18/3/2009.

The plaintiff called 4 witnesses while defendant called 4 witnesses. Court visited locus. At the close of the trial the learned trial Magistrate found in favour of the defendant, hence this appeal.

In determining this appeal I will follow the grounds of appeal as listed, as appellant seems to have argued all of them together. His submissions do not categorically address the grounds of appeal as listed. Respondent followed the order of grounds as listed in the memorandum of appeal, which is the correct practice to follow. I will follow the same practice.

Ground 1: Learned trial Magistrate erred when he failed to guide court in the formulation of issues

I find this ground idle. The record of the lower court indicates that a scheduling was conducted in open court. This was done as provided for under Order 12 & order 15 of CPR.

This order is intended to enable the parties, counsel and court to narrow down the issues for determination.

The court is an active participant and on the record it clearly shows that this case was done on 18. 03. 2009. At page 5-6 of typed proceedings two issues were agreed on in full participation of both counsel.

Counsel for appellant did not address this ground. Respondent in submission found no problem with the issues as framed. This ground is not proved and fails.

Ground 2, 3, 4 and 5: These grounds all fault the learned trial Magistrate's failure to properly evaluate the evidence.

The arguments by appellant counsel in submissions attempts to show that the learned trial Magistrate failed to correctly evaluate all evidence on record. He particularly points at the following flaws in the assessments.

- i) That plaintiff showed that he had a right to the land since 1964 , and all evidence supports so (page 21 of the proceedings).
- ii) DW2- **Wilberforce Oluku** told lies and did not know when the agreement was done (page 22 of typed proceedings).
- iii) **DW3 Jane Nagamba Sempa** at page 28 of proceedings though claims she sold the land , failed to recognize annexure A” She stated she sold land at 100, 000/= then said Shs 50,000/= then said “ I can’t remember the price” showing she was an unreliable witness.
- iv) It was wrong to refer to section 5 of the Limitation Act.

In reply the respondent’s counsel in submission referred to the learned trial Magistrate’s Judgment and argued that it is well reasoned and reached the right conclusions on the evidence .

The respondent also invited court to ignore appellant’s annexures to his submissions as being strange to the case.

I will begin with the attempt to smuggle in evidence on appeal which was never before the lower court. This is unacceptable unless done with leave of court. The procedure so to do was not followed and all annexed documents to the appellant’s submissions are hereby struck off and expunged for being “strange” to the case on appeal.

Regarding evaluation of evidence I have found that the case of plaintiff was for “trespass” and permanent injunction. The law of evidence requires facts to be proved by the one who asserts” (Section 101, 102, 103 of Evidence Act)

Plaintiff had a burden to show that he had a cause of action against defendant in trespass.

The evidence on record from plaintiff was through PW1-PW2, PW3, and PW4, evidence of defence was by DW1-DW2, DW3 and agreement annexed to WSD as DExh1.

The evidence on record shows that (PW1) while plaintiff attempted to show that he bought the land in 1964 from **Langa Reuben**. His agreement was lost. PW2- **Okware Boniface** only said he knew defendant as a person who had constructed on plaintiff’s land and plaintiff (**Otwani**) was one of the people who began constructions in 1965.

In cross-examination he mentioned that **Obwal had sold the disputed land to Langa who sold to Osuna Otwani.**

He also confirmed that **Sempa** stayed there for about 6 years constructing for plaintiff houses, then left his wife **Jane** – stayed on the land for about 7 years then left 4 years ago but he did not know the circumstances under which she left.

PW3- **Sylvester Olimidi**, said it was him and his father who sold land to **Langa** who sold the land to **Osuna** . Later he saw **Ochieng** building on the land, and yet this witness was the one keeping the land (page 17). That Osuna came in 2009 and asked him why **Ochieng** was trespassing.

In cross-examination he said Obwal never sold any land.

Also confirmed **Sempa** and **Jane**'s presence on the land

PW4- **Odoi** said the land is owned by both parties. The plaintiff applied not to rely on his evidence.

In defence **DW1 David Ochieng** said he bought the land in 1993 from **Jane Sempa** at 60,000/= which $\frac{1}{4}$ an acre. He handed in the purchase agreement as exhibit (annex A). He took possession; and constructed thereon and plaintiff used to see him construct, but did nothing.

DW2- **Wilberforce Oluku** said the land belongs to the defendant, because DW2's father the late **Obwany** sold it to **John Sempa**. When **Sempa** went back to Buganda he left it to his wife **Jane Sempa**, who in turn sold it to defendant. Defendant bought and constructed thereon. He confirmed the land is $\frac{1}{4}$ an acre

DW3- **Negamba Jane** said the land was bought by her husband **John Sempa** from a one **Obwali**. The witness also sold the land to the defendant following her husband's death in 1990. She sold the land in 1993 in presence of late **Owor, James, Butuwu and Salongo**.

DW4- **Livingstone Salongo** said he witnessed the agreement of sale to defendant Ochieng by **Jane Sempa** at a cost of 60,000/= and he signed on it. He confirmed the agreement in court as the one on which he signed.

Court then visited the locus and noted each party claims.

From evidence on record, it was the duty of the plaintiff to prove on the balance of probability that the defendant was in trespass.

The law of trespass is that to succeed, the one alleging trespass must prove that he has title to the subject of contention. The law further protects the person in adverse possession. To prove trespass against a person in adverse possession you have to prove better title see **KINTU V KIRUMIRA [1975] HCB 221.**

The evidence on record shows on the balance of probability that the defendant claims possession by purchase. He is a banafide purchaser of land from DW3- **Jane Sempa**.
Meanwhile plaintiff failed to establish by evidence that the land **Sempa** sold was his land.

Secondly he claimed that he entrusted the land allegedly to PW3 **Silver Olimidi** who claimed he was “keeping it” (see page 17). The plaintiff and his witnesses were all vague on how **Sempa** gained the right to build and leave, come back and again let his wife therein, then the wife sells when all are just watching!

That be as it may, the defendant is protected by the law of banafide purchaser for value without notice.

The plaintiff cannot on evidence on record impeach defendant’s Title without showing that defendant’s title is fraudulent.

(See **MUSOKE . B V JOGGA (1975) HCB 26**).

From evidence on record therefore and the reasoning of the learned trial Magistrate, I do not agree with the appellant that the learned trial Magistrate did not evaluate the evidence properly. The plaintiff in the lower court failed to prove his case on the balance of probabilities. The defence case was more weighty and

hence the learned trial Magistrate reached the right conclusions both on the facts and the law.

I do not find any merit in all grounds raised on appeal. This appeal fails and is dismissed with costs to the respondents.

I so order.

Henry I. Kawesa

JUDGE

15.02.2017

