

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – LD – CA – 0015 OF 2016
(Arising from Civil Suit KAS – 00 – CV – CS – LD – 029 of 2011)

**KASESE DISTRICT LOCAL GOVERNEMENT
COUNCIL.....APPELLANT**

VERSUS

BALUKU LUCIANO BUHAKA

MASEREKA JULIUS

BAMWIITE DAVIDRESPONDENTS

EMMANUEL BUHAKA

MARAHU JULIUS

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

Judgment

This is an appeal against the decision of His Worship Katorogo Moses, Chief Magistrate at Kasese delivered on 4/3/2016.

Background

The Respondents instituted a Civil Suit against the Appellant for orders that the Respondents be declared as trespassers on the land and prayed for an eviction order, permanent injunction, general damages and costs of the suit.

The Respondents' claim was that they are the rightful owners of the suit land having inherited it from their deceased father in the year 2000 who inherited the same from his father (the Respondents' grandfather).

The Appellant on the other hand contended that she was the lawful owner of the suit land deriving title thereof from Ministry of Agriculture Animal Industry and Fisheries in the 1950s. The Appellant further contended that the Respondents had no cause of action against her and the suit was frivolous and vexatious and prayed that it be dismissed with costs.

Issues raised for determination were;

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

The trial Magistrate found that the suit land belonged to the Respondents and the Appellant was a trespasser. Awarded general damages of UGX 20,000,000/= and costs of the suit. The trial Magistrate forwarded the file to the High Court for cancellation of the Appellant's title to the suit land.

The Appellant being dissatisfied with the above decision lodged the instant appeal whose Grounds as per the Memorandum of appeal are;

1. That the learned Trial Magistrate erred in law and fact when he failed to evaluate the evidence on record that the Appellant is the owner of the suit property and had operated a mechanized Agricultural workshop on the suit land and therefore had been in occupation of the land as far back as the 1950s.
2. That the learned Trial Magistrate erred in law and fact when he held that the Respondents were bonafide occupants of the suit land.
3. That the learned Trial Magistrate erred in law and fact by holding that Respondents are customary owners of the suit land.
4. That the learned Trial Magistrate erred in law and fact when he held that the Appellant was falsely laying a claim and therefore trespassers on the suit land.
5. That the learned Trial Magistrate erred in law and fact when he held that the Appellant's Title to the land was obtained fraudulently and therefore should be cancelled.
6. That the learned Trial Magistrate erred in law and fact when he held that the suit land was not available for leasing to the Appellant.

Representation:

Counsel Tukahirwa Joyce appeared for the Appellant and Counsel Ahabwe James represented the Respondents. By consent both parties agreed to file written submissions.

Duty of the first Appellate Court:

The first Appellate Court has a duty to consider the evidence on record, evaluate it and draw conclusions and decide whether to uphold or set aside the judgment of the trial Court.

The case of **Selle versus Associated Motor Boat and Co. Ltd [1968] E.A 123**, set out the principle that the duty of the first Appellate Court is to rehear the case by considering the evidence on the record, evaluating it itself and drawing its own conclusion.

Section 80 (1) of the Civil Procedure Act also provides for these powers.

As a first Appellate Court, it is my duty to evaluate the evidence of the lower Court on record and decide whether the lower Court decision can be sustained or not. The Appellate Court has to come to its conclusion while bearing in mind that the Appellate Court did not have the

opportunity to see the witnesses (demeanour) as they testified in the lower Court. That was settled also in the case of **Fredrick Zaabwe versus Orient Bank & 5 Others, Supreme Court Civil Appeal No.4 of 2006**

Resolution of the Grounds:

Ground 1: That the learned Trial Magistrate erred in law and fact when he failed to evaluate the evidence on record that the Appellant is the owner of the suit property and had operated a mechanized Agricultural workshop on the suit land and therefore had been in occupation of the land as far back as the 1950s.

Counsel for the Appellants submitted that DW1 testified that the suit land was acquired by the Appellant through the decentralisation process from the Ministry of Agriculture Animal Industry and Fisheries in 2000 as per DE1. That there are correspondences dating as far back as 1962 in regard to the suit land. That the suit land was being used as an agricultural repair shop and had houses for staff and no cultivation was allowed on the same which was corroborated by DW2 and DW3. The Appellant also obtained a Certificate in regard to the same that commenced in 2001 and this did not involve any fraudulent acts.

Counsel for the Appellants cited **Section 59** of the Registration of Titles Act which provides that;

“No certificate of title issued upon an application to bring land under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application or in the proceedings previous to the registration of the certificate, and every certificate of title issued under this Act shall be received in all courts as evidence of the particulars set forth in the certificate and of the entry of the certificate in the Register Book, and shall be conclusive evidence that the person named in the certificate as the proprietor of or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.”

Further that the Respondents did not adduce any evidence to the effect that the Appellant acquired the title in bad faith or fraudulently or that the due process of the law was not followed as they stated in Court so as to render it impeachable.

Furthermore, that the Respondents only gave oral evidence to the effect that they got the suit land from their father in 2000 and no other evidence on proof of ownership. That the trial Magistrate did not properly evaluate the evidence and failed to put into consideration the evidence of the Appellant’s witnesses and only restricted himself to that of DW1 as opposed to the Respondent’s witnesses from PW1 to PW4.

Counsel for the Appellant quoted the case of **Kiraza Paul versus Musa Ssekeba, Civil Appeal No. 58 of 2012**, where it was stated that;

“...there is no fast and hard rule as to how evidence is supposed to be evaluated. It is sufficient if the trial Magistrate gives consideration to the evidence of both sides, weighs the

evidence and gives reasons for relying on one part of the evidence and why he/she did not believe some evidence and preferred the other that formed basis of the decision.”

Counsel for the Appellant went on to submit that in the circumstances if the trial Magistrate had properly evaluated the evidence he would have come to the conclusion that the Appellant was the rightful owner of the suit land.

Counsel for the Respondents on the other hand submitted that the Respondents testified to the fact that their grandfather is the one that gave a group of whites called PIDA land on which to do their and they promised that they would leave the suit land after their activities. That the father of the Respondents also let the whites construct a hall to keep their things since his father had permitted them to use the same.

Further that PW3 in his testimony told Court that the agricultural department of the Appellant came to him requesting for a place for repairing their tractors and they were given the structures that were being used by PIDA. That after the agricultural department left the suit land.

Furthermore, that the PW2 told Court that the Appellant grabbed the suit land in 2010 and comparing with the Appellant's witnesses, DW1 told Court that the Appellant acquired the suit land by virtue of circular dated 6/4/2001 Ref SDD/127/312/2 from the Ministry of Agriculture.

Furthermore, that the testimonies of DW2 and DW3 did not explain how the Ministry of Agriculture or the Appellant acquired the suit land. That all the Appellant's witness never told Court how the Appellant acquired the suit land.

That the suit land has trees that were planted by the Respondents parents in 1966 and by then the Appellant was not in existence because she was not a District by then. That the Appellant's entry onto the suit land was unauthorized, the Appellant interfered with the lawful possession of the Respondent's land and is a trespasser.

In my opinion and from the evidence as adduced by both parties in the lower Court, I find that the Appellant produced evidence to the effect that the suit land belonged to Government and was merely being used by a different department being that of Veterinary and the same gave the portion it was not using to the Ministry of Agriculture.

The Respondents on the other told Court that they obtained the suit land from their grandfather who also allowed a group of whites to use the same for their activities and had promised to leave. The suit land was eventually given to the Government to use for tractor repairs. The grandfather of the Respondents was said to have been working with the Ministry of Agriculture as per the testimony of PW2.

PW2 further told Court that their grandfather was given the suit land in 1952 by the elders and they grew up and stayed on the same.

However, from the documentary evidence adduced by the Appellant, I am inclined to find that they are the lawful owners of the suit land having used the same at all material times while operating a tractor repair workshop.

Thus, the learned Trial Magistrate erred in law and fact when he failed to evaluate the evidence on record that the Appellant is the owner of the suit property and had operated a mechanized Agricultural workshop on the suit land and therefore had been in occupation of the land as far back as the 1950s.

This ground therefore succeeds.

Ground 2: That the learned Trial Magistrate erred in law and fact when he held that the Respondents were bonafide occupants of the suit land.

Section 29(2) of land Act provides that:

“Bonafide Occupant means a person who before the coming in force of the Constitution –

Had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more.”

Furthermore, Section 29 (5);

“Any person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant under this Section shall be taken to be a bonafide occupant for purposes of this Act.”

Counsel for the Appellant submitted that it was the evidence of the Respondents that they acquired the suit land in 2000 from their father whereas the Appellant averred that the suit land was being used by the Government as far back as the 1960s.

Further, that the Respondents are not bonafide occupants within the meaning in the Land Act given the fact that they told Court that they occupied the suit land in 2000. That PW4 also told Court that their father left the suit land at some point to live in Kiteso because of the Appellant. That Government having been in occupation at all material times shows that utilization of the land was not left unchallenged as is required for one to be a bonafide occupant under **Section 29 (2)** of the Land Act.

Counsel for the Respondent submitted that the trial Magistrate was right to hold the Respondents as Bona fide occupants of the suit land because they had stayed on the suit land for over 12 years before the Appellant acquired title to the same.

In my opinion and as per **Section 29(5)** of the Land Act, the Respondents do qualify as bonafide occupants of the suit land since this land was acquired from their father who acquired the same from his father. The Respondents also in their testimony told Court that before their father’s demise he had been fighting over the suit land with the help of the area LCV Chair person. I therefore find from the evidence as adduced by the Respondents indeed they do qualify as bonafide occupants of the suit land.

This ground therefore fails.

Grounds 3 and 6:

3. That the learned Trial Magistrate erred in law and fact by holding that Respondents are customary owners of the suit land.

6. That the learned Trial Magistrate erred in law and fact when he held that the suit land was not available for leasing to the Appellant.

Counsel for the Appellant submitted that the Respondents testified to the effect that they were customary owners of the suit land where as the Appellant's witnesses testified to the effect that the suit land was being used by Government for agricultural activities.

Customary ownership of land is recognised under **Section 3** of the land act as one of the land tenures in Uganda and the Respondents were not customary tenants as the Government was the occupant at all material times.

Counsel for the Appellants submitted that the case as cited by the trial Magistrate in regard to the suit land not being available for lease that is the case of **National Housing and Construction Operation versus Kampala District Land Board and Another, 2005 UCLR 361**, was in applicable since the Respondents were neither customary tenants nor bonafide occupants. That the evidence in the lower Court indicated that Government even had permanent structures on the suit land.

Counsel for the Respondents on the other hand submitted that the Respondents are the rightful owners of the suit land and no person could create a lease on the land other than the Respondents. That the Respondents' father even grew crops like maize and cotton on the suit land. And the Respondents' father upon making a complaint to the LCV Kasese District, the Appellant started removing the uniports which it was using on the Respondents' land as per PW1's testimony. DW3 also testified to the fact that the uniports were removed by the District engineer to the District headquarters.

In my opinion having resolved that indeed the Respondents were bonafide occupants of the suit land, I find that the suit land was not available in the circumstances for a lease and the case of **Kampala District Land Board and George Mitala versus Venansio Babweyaka, Johnson Mwijuke, Sempala Sengendo and Apollo Nabeeta Supreme Court Civil Appeal No. 2 of 2007** was very applicable. The Honourable Odoki, C.J, while agreeing with the conclusions reached by the Justices of Appeal held on page 22 as follows:-

"It was admitted fact that the Respondents were in occupation of the suit land at the time the lease was granted to the second Appellant. The predecessors in occupation to the Respondents had been in possession of the land since 1970. Although it is my view they were not customary tenants, they were described variously in the lower Courts as squatters, tenants of a tentative nature, licences with possessory interest, or bonafide occupiers protected from Administrative injustice.I agree with the lower Courts that the Respondents were bonafide occupants as defined in Section 29 (2) of the Land Act. The

Respondents purchased the suit land in 1998 from persons who had occupied and utilised the same since 1970, and were therefore deemed to be bonafide occupants in accordance with Sub-section 5 of Section 29 of the Act.....”

These grounds fail.

Ground 4: That the learned Trial Magistrate erred in law and fact when he held that the Appellant was falsely laying a claim and therefore trespassers on the suit land.

In the case of **Justine E.M Lutaaya versus Sterling Civil Engineering Ltd, Civil Appeal No.11 of 2002**, it was stated that;

“Trespass occurs when a person makes unauthorized entry upon land, and thereby interferes, or pretends to interfere, with another person’s lawful possession of that land.”

Counsel for the Appellant submitted that the essential elements of trespass were lacking in the instant case. That the Appellants are the owners of the suit land and do have a Certificate of Title. That a Certificate of Title is conclusive evidence of ownership as proprietor as per **Section 59** of the Registration of Tittles Act.

In my opinion whereas it is true that Certificate of Title is conclusive evidence of ownership, the Respondents in the instant case are bonafide owners of the suit making the Appellant a trespasser thereon. The Respondents’ through their lineage had interest in the suit land before the Appellant acquired title to the same.

This ground therefore fails.

Ground 5: That learned Trial Magistrate erred in law and fact when he held that the Appellant’s Title to the land was obtained fraudulently and therefore should be cancelled.

Counsel for the Appellant submitted that the Appellant submitted documentation to prove how they acquired title to the suit land and there was nothing in their evidence or that of the Respondents that proved any fraud by the Appellants.

In the case of **Kampala Bottlers Ltd versus Damanico (U) Ltd, Supreme Court Civil Appeal No. 22 of 1992**, fraud was defined as an act of dishonesty. It was also held that it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters. In addition, it is also a mandatory requirement under **Order 6 Rule 3** of the Civil Procedure Rules that in all cases in which the party pleading relies on fraud, the particulars with dates are stated in the pleadings.

Counsel for the Respondents submitted that the Respondents and their witnesses submitted evidence to the effect that the Appellant obtained the Certificate of Title in 2013 and it is not true that the process was started in 2001.

In regard to fraud, Counsel for the Respondent submitted that by the time the case was being heard there was no time for the Respondents to plead fraud. The Certificate of title was

obtained when the suit was ongoing and it was tendered in Court when the Respondents had already testified.

In my opinion having found that the Respondents are bonafide occupants on the suit land, the Appellant cannot still have title to the same as this would over ride the Respondents' unregistered interest in the suit land. One interest in the suit land supersedes the other and in the instant case that of the Respondents supersedes that of the Appellant.

In a nut shell, the decision of the lower Court is upheld, the appeal dismissed with costs for lack of merit. I also order the Registrar of Title to cancel the Certificate of Title in regard to the suit land as held by the Appellant. I so order.

Right of appeal explained.

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OYUKO ANTHONY OJOK
JUDGE
1/06/2017

Judgment delivered in open Court in the presence of;

1. Ms. Anna Magembe for the Appellant.
2. Mr. Ahabwe James for the Respondents.
3. Representative of the Appellant.
4. Both Respondents.
5. James – Court Clerk.

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OYUKO ANTHONY OJOK
JUDGE
1/06/2017