

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HCT – 01 – LD – CA – 0021 OF 2016
(Arising from KAS – 00 – CV – CS – LD – 001 of 2015)
MUGISA YEREMIYA KACHAMUAPPELLANT
VERSUS
ANIFA BURUNGULERESPONDENT

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

Judgment

This is an appeal against the decision of His Worship Mfitundida George Magistrate Grade one at Kasese delivered on the 19/04/16.

Background

The Appellant instituted a Civil Suit against the Respondent for; a declaration that the suit land belongs to the Appellant; a declaration that the Respondent was a trespasser; general damages; eviction order; interest on general damages; and costs.

The Appellant's case was that he bought the suit plot from Biira Eve Ngene on 8/4/2014. That he constructed there a house in which he allowed Kabugho Naome, the Respondent's daughter to live in. In 2009, the Respondent started laying claim over the suit property.

The Respondent on the other hand averred that she bought the suit plot from Biira Eve Ngene in April 2003. That she paid UGX 750,000/=. However, the sale agreement was stolen by the Appellant who was the boyfriend of the Respondent's daughter.

Issues for determination were;

1. Whether the suit land belongs to the Plaintiff?
2. Whether the Defendant is a trespasser?
3. What remedies are available to the parties?

The trial Magistrate found that the suit plot belonged to the Respondent, and the Appellant's suit was dismissed with costs.

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 in holding that the suit land belongs to the Respondent thereby departing from the documentary evidence in Exhibit PE1 which clearly stated that the Appellant was the purchaser of the suit land.
2. That the learned trial Magistrate erred in law and fact when he used the oral evidence given by DW1, DW2, and DW3 to the effect that the Respondent was the purchaser of the suit land to vary the documentary evidence contained in Exhibit PE1 to the effect that the Appellant was the purchaser of the suit land thereby arriving at a wrong conclusion that the suit land belongs to the Defendant.
3. That the learned trial Magistrate erred in law and fact when he held that the Appellant never took possession of the suit land after purchase contrary to the unchallenged evidence of PW1, PW2 and PW3 who clearly stated that the Appellant took possession of the suit land where he lived with the Respondent's daughter Kabughho Naome.

Representation:

Counsel Augustine Bafaaki Kayonga appeared for the Appellant and Counsel Emiru Dominic represented the Respondent. By consent both parties agreed to file written submissions.

Duty of the Appellate Court:

This Court has a duty to re-evaluate the evidence to avoid a miscarriage of Justice as it mindfully arrives at its own conclusion as per the case of **Banco Arab Espanol versus Bank of Uganda, Supreme Court Civil Appeal No.8 of 1998**.

The powers of the High Court as an appellate Court are stipulated in **Section 80** of the Civil Procedure Act Cap 71. The High Court accordingly has power to determine the case finally, to remand the case, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial.

According to **Section 80 (2)** of the Civil Procedure Act, the High Court has the same powers and nearly the same duties as are conferred on courts of original jurisdiction in respect of suits instituted in it.

Thus, the duty of this court as a first appellate court is to re-evaluate the evidence, give it a fresh scrutiny and reach its own conclusions. (**See: Pandya versus R. (1957) EA 336**).

Resolution of Grounds:

Ground 1 and 3 are discussed jointly and Ground 2 separately.

Grounds 1 and 3:

1. That the learned trial Magistrate erred in law and fact in holding that the suit land belongs to the Respondent thereby departing from the documentary evidence in Exhibit PE1 which clearly stated that the Appellant was the purchaser of the suit land.

3. That the learned trial Magistrate erred in law and fact when he held that the Appellant never took possession of the suit land after purchase contrary to the unchallenged evidence of PW1, PW2 and PW3 who clearly stated that the Appellant took possession of the suit land where he lived with the Respondent's daughter Kabugho Naume.

Counsel for the Appellant submitted that the Appellant's evidence was supported by the sale agreement that was executed between the Appellant and the seller Biira Eva dated 8th April 2004 and was tendered in Court and admitted as exhibit PE1. This piece of evidence was corroborated by PW2 and PW3 and the same was not challenged by the Respondent but rather she stated that the purchaser was made the Appellant because he was her son in law.

Further that the Respondent signed on the sale agreement as a witness which could only mean that she confirmed that the Appellant was the purchaser and there was no evidence adduced to prove that the Appellant had stolen the agreement.

Counsel for the Appellant quoted **Section 58** of the Evidence Act which is to the effect that;

"All facts, except the contents of a document may be proved by oral evidence."

Section 91 of the Evidence Act which provides that;

"When the terms of a contract, grant and other disposition of property have been reduced to a form of document, no evidence shall be given in proof of the terms of that contract except the document itself."

That in the circumstances oral evidence cannot be relied upon when there is a document to prove the facts in issue and oral evidence can only be admitted in exceptional circumstances.

Counsel for the Respondent on the other hand submitted that from the evidence on record it is clear that there was a dispute in the interpretation of the intention of the parties to the said agreement. The confusion was highlighted by DW2 the seller of the suit land and DW3 the broker who brought the buyer. That none of the neighbours as mentioned by PW2 the Chairperson was called to witness the sale agreement.

Further, that the Appellant apart from arguing that the evidence was not properly evaluated he did not explain how he acquired the suit land. On the other hand the Respondent explained in detail how she acquired the suit land and most importantly DW3 was not even cross examined.

In regard to the best evidence rule counsel for the Respondent submitted that the Respondent is an illiterate and was unrepresented in the lower Court, she was disputing the sale agreement and this in the circumstances would warrant oral evidence. That the Respondent in the instant case was able to prove to Court how she purchase the suit land in the name of the third party thus the decision of the trial Magistrate was correct in finding the Respondent as the rightful owner.

In the instant case the Appellant alleged that he was the owner of the suit land and brought two witnesses to prove his case who all told Court that the suit land belonged to him and PW2 is the one that even wrote the agreement.

The Respondent also brought two witnesses who included the seller of the suit land DW2 and DW3 who was the broker that brought the Respondent as the buyer. The Respondent's witnesses confirmed to Court that she was the one that bought the suit land and she is the one that paid consideration for the same. However, the agreement was made in the name of the Appellant who was her son in law at the time after a mutual agreement.

From the submissions made, Counsel for the Appellant stated that it is clear from the sale agreement that the Appellant was the buyer which Counsel for the Respondent contends that allegedly that was not the intention of the Respondent.

In my opinion in law once a party relies on documentary evidence, that document can be proved in any of the ways provided for under **Sections 60-64** of the Evidence Act. Exhibit PE1 was proved and tendered. Witnesses testified as to its authenticity. Respondent did not deny the transaction but claimed that though she bought the suit land it was agreed that the agreement be made in the name of the Appellant.

Section 103 of the Evidence Act:

“Places the burden of proof in a suit or proceeding as to any particular fact on that person who wishes the court to believe in its existence...”

This means that whereas the burden of proving the fact of the sale transaction was upon the Appellant under **Section 101** of the Evidence Act, that burden was discharged when he tendered Exhibit PE1 and called witnesses who confirmed the same.

However the Respondent who wanted court to believe that the document though referring to the Appellant as the purchaser, it was her that was actually the purchaser then assumed the burden to prove those facts under **Section 103** of the Evidence Act. The Respondent brought witnesses who corroborated her testimony that indeed she was the purchaser though the Appellant was indicated as the buyer.

Thus, there is a document indicating that the Appellant is the purchaser of the suit land and the same is not challenged by the Respondent, the Respondent brought oral evidence which to prove the contrary that the actual buyer was the Respondent and not the Appellant in whose name the agreement was made. The Respondent even thumb printed on the agreement as a witness where as the Appellant was indicated as the buyer.

I find that the documentary evidence as adduced by the Appellant is conclusive proof that the Appellant was the purchaser of the suit land. The document speaks for itself and the Respondent does not challenge it. The Respondent was unable to prove to Court indeed that the Appellant stole the sale agreement and again why would she put the agreement in the Appellant's name when he was not even officially married to her daughter. I find this hard to believe.

I also concur with Counsel for the Appellant's submission in rejoinder that the exceptions to the general best evidence Rule were not proved in the instant case that the trial Magistrate ought to have relied on in reaching his decision. The intention of the party cannot be said to have been brought out by the sale agreement because the agreement has the purchaser as the Appellant and not the Respondent, oral evidence was not sufficient to prove otherwise.

I therefore, set aside the decision of the trial Magistrate and these two grounds succeed.

Ground 2: That the learned trial Magistrate erred in law and fact when he used the oral evidence given by DW1, DW2, and DW3 to the effect that the Respondent was the purchaser of the suit land to vary the documentary evidence contained in Exhibit PE1 to the effect that the Appellant was the purchaser of the suit land thereby arriving at a wrong conclusion that the suit land belongs to the Defendant.

Counsel for the Appellant submitted that it was the evidence of PW2 that after the Appellant bought the suit land, he constructed a temporary house on the land where he stayed with the Respondent's daughter who later brought the Respondent.

Further, that considering the fact that the Respondent's daughter was in a relationship with the Appellant, it is upon this fact that she occupied the suit land and is currently occupying the same and the trial Magistrate should have considered this piece of evidence in making his decision.

Counsel for the Respondent in this regard submitted that the Respondent is currently in occupation of the suit land, however, the Appellant did not explain to Court how he was evicted off the same. That failure of the Appellant to explain how he acquired the suit land and was displaced creates a gap in the Appellant's case. That DW2 denied knowing the Appellant but confirmed knowing the Respondent as the purchaser of the suit land.

In my opinion, the Appellant did tell Court how he was evicted off the suit and that he was fought off by the Respondent's daughter and son called Muhammad and this happened when he told them that he wanted to develop the suit land after separating with the Respondent's daughter.

On cross examination the Appellant also told Court that the Respondent was staying on the adjacent uniport to the suit land. The Respondent occupied the house upon being brought by her daughter whom the Appellant had been staying with after the purchase of the suit land where he bought a temporary house of iron sheets.

The Appellant also told Court that he paid cash for the suit land.

The Respondent on the other hand through her witnesses told Court that she is the one that bought the suit land and even paid for the same though it was agreed that the name of the Appellant be put on the agreement. The Respondent is also the one currently occupying the suit land.

DW2 told Court how it was the Respondent that was brought to her as the buyer and also paid for the suit land. That upon execution of the agreement it is the Respondent that told the person drafting the agreement that it be put in the names of the Appellant. The same was confirmed by DW3 who was the broker that brought the buyer to DW2.

The Respondent also confirmed to Court that she had been in occupation of the suit land since the purchase of the suit land and the agreement was merely stolen by the Appellant.

In my opinion I find that the evidence of the Respondent is impractical and full of falsehoods and connivance. The Appellant was able to prove that he actually bought the suit land and was able to adduce documentary evidence to prove his claim.

This ground therefore succeeds.

Counsel for the Respondent addressed a new ground without leave of Court or lodging a cross-appeal and also brought fresh evidence on appeal without leave of Court.

In the Case of **Tanganyika Farmers versus Unyamwezi [1960] EA 620**, Goudl Ag. V.P. said that;

“The objection to this submission is that it raised a question which was never in the contemplation of the parties in the Court below it was not argued there nor was it ever mentioned in the correspondences between the parties. An appeal Court has discretion to allow a new point to be taken on appeal but it will permit such course only when it is assured that full justice can be done to the parties”.

Be as it may the instant case is not one that warranted a locus visit as it was in regard to ownership and not a dispute as to boundaries that would have necessitated Court to go on ground to confirm the same and prove the truthfulness of the witnesses and the evidence adduced. Not visiting locus in the instant case did not occasion any miscarriage of justice to either of the parties.

The cases of **Sempala versus Ndagire Godfrey, HCCA No. 45 of 2011** and **Osire Moses versus Syaluka Florence Mbale, HCCA No. 79 of 2009** were misapplied in the instant case as they are distinguishable from the subject of the instant appeal. The decision in the above authorities was based on determination and clarification of ambiguities on size, the dispute in the instant case is about ownership of the suit land and not its size.

As to the new piece of evidence I see no formal application made by the Respondent to adduce this evidence nor was the same brought to the attention of this Court save for notifying Counsel for the Appellant of the intention to make the application. However, I still do not see the essence of this fresh evidence with all due respect even if Counsel for the Respondent has alluded to it in his submissions.

In a nut shell this appeal is allowed with costs and the decision of the lower Court is set aside and costs awarded to the Appellant. I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

31/5/2017

Judgment delivered in open Court in the presence of;

1. Counsel Kateebwa Cosma holding brief for Augustine Bafaaki Kayonga for the Appellant.
2. The Appellant.
3. In the absence of the Respondent and his Counsel.
4. James – Court Clerk

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OYUKO. ANTHONY OJOK

JUDGE

31/5/2017