THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORTPORTAL

HCT – 01 – LD – CA – 0078 OF 2016

(Arising from KAS – 00 – CV – CS – 069 of 2008)

YAYERI MUSAIJA .....APPELLANT

VERSUS

1. MUSAIJA GIDEON

2. MUKALI MOSES

3. MANKUBELE ENOSI

4. HUMBA MUHINDO **.....RESPONDENTS**

5. LEOSI KAHANGIRWE MASEREKA

6. AUGUSTINE BWAMBALE

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

Judgment

This is an appeal against the decision of His Worship Mfitundinda George Magistrate Grade one of Kasese at Kasese.

Background:

The Appellant instituted a Civil Suit against the Respondents for the following orders and declarations;

1. General damages for trespass and inconveniences with interest thereon at Court rate of 40% p.a from date of judgment till full payment.
2. Permanent injunction restraining the Defendants, their servants, and workmen from further trespass, on the suit plot.
3. Vacant possession.
4. Costs.

The Appellant alleged that she bought the suit land from Eriya Mbunda Baluku on 25/06/1995 before she got married using her own money and was therefore the lawful owner of the same. That the 1st Respondent sold it to the rest of the Defendants without her consent.

The 1st Respondent on the other hand averred that the suit land was bought jointly with the appellant having both contributed to the purchase of the same. That subsequently he sold it to

the 2nd – 5th Respondents without her knowledge. That the 2nd – 5th Respondents knew that the suit land was jointly owned therefore were not bonafide purchasers for value without notice.

The 2nd – 6th Respondents also averred that they were lawful occupants/bonafide purchasers for value.

The case proceeded exparte against the 1st Respondent. The trial Magistrate found that the suit land was not family land and thus there was no need for spousal consent. The sale between the 1st Respondent and the other Respondents was therefore valid. That the 2nd, 3rd, 4th, 5th and 6th Respondents were found not to be trespassers and the suit was dismissed with costs to the Respondents.

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 failed to properly evaluate the evidence on record *vis a vis* the law set out in **Section 39** of the Land Act and the Regulations there under which wholly invalidated and vitiated the entire transactions from which the second to sixth Respondents purport to claim their interest in the suit land.
2. That the learned trial Magistrate Grade 1 erred in law and in fact in finding that the second to sixth Respondents were not trespassers on the suit land without the Appellant's authority or consent thereby making the whole transaction void *ab initio.*

Representation:

Counsel Kateeba Cosma appeared for the Appellant and Counsel Masereka Chan for the Respondent. By consent both parties agreed to file written submissions.

The law:

Appeals are a creature of statute. Therefore they are provided for by law.

Section 220 (1) of the Magistrates Courts Act states that subject to any written law and except as provided in this section, an appeal shall lie;

"a) From the decrees or any part of the decrees and from the orders of Magistrate's Court presided over by a Chief Magistrate or Magistrate Grade 1 in the exercise of its original civil jurisdiction to the High Court.

b) From the decision, Judgment and orders of a Magistrate's Court, whether interlocutory or final presided over by a Magistrate Grade II and III to a Court presided over by a Chief Magistrate.

c) From decrees and orders passed or made in appeal by a Chief Magistrate, with the leave of the Chief Magistrate or of the High court, to the High Court."

In the case of ***Attorney General versus Shah No. 4 of [1971] EA P.50,*** Spry Ag. President stated that;

"Appellate jurisdiction springs only from statute. There is no such thing as inherent appellate jurisdiction."

The same was also observed in the Judgment of Tsekooko JSC (as he then was) in the case of ***Baku Raphael Obudra and Obiga Kania versus the Attorney General, Supreme Court Constitution Appeal No.1 of 2005.***

In that same case B.J Odoki, CJ (as he then was), also noted as follows;-

"It is trite law that there is no such a thing as an inherent appellate jurisdiction. Appellate jurisdiction must be specifically created by law. It cannot be inferred or implied."

The Appellate Court such as in the instant case therefore derives its Appellate jurisdiction from the law as elucidated above.

Sections 101, 102, 103 and **106** of the Evidence Act, place the burden of proof on the party who asserts the affirmative of the questions or the issue in dispute. The Sections impose the burden of proof upon a person who alleges the facts to exist.

In the instant case it was therefore the duty of the Appellant to prove her case and the Respondents to defend themselves.

Duty of the first Appellate Court:

It is now trite law that a first appeal like this one is in the nature of a retrial and the first Appellate Court such as the instant Court, is bound to subject the evidence on record as a whole to fresh scrutiny and come to its own conclusions. In reviewing the evidence, the Appellate Court has to reconsider the evidence on record and make up its own mind but without disregarding the judgment appealed from but carefully weighing and considering it. **(See: Bagumisa & Others versus Tibebaga [2004] 2 E.A 17).**

Resolution of the Grounds

I will discuss the grounds separately. Submissions were filed in favour of the Appellant and the 2nd – 5th Respondents. That is what I will put into consideration.

Ground 1: That the learned trial Magistrate failed to properly evaluate the evidence on record *vis a vis* the law set out in Section 39 of the Land Act and the Regulations there under which wholly invalidated and vitiated the entire transactions from which the second to sixth Respondents purport to claim their interest in the suit land.

Counsel for the Appellant submitted that family land is defined in **Section 38A** of the land Act to include, *inter alia*, land from which the family derives sustenance. That the same Section defines land from which a family derives sustenance to mean *inter alia*, under (a) land which the family farms or alternatively land which the family freely and voluntarily agrees that it should be treated as where they derive sustenance.

The Appellant in her evidence stated that the suit land was purchased by her and the 1st Respondent and they had planted moringa, bananas, coffee, mangoes and had built on the same. That this piece of testimony was supported by PW2, DW1, DW3, DW4and DW5 who all confirmed that the Appellant and the 1st Respondent used to cultivate on the suit land. That in the circumstances the suit land qualified as family land because the Appellant and her family derived sustenance from the suit land and there was no evidence adduced to the effect that she gave spousal consent before the sale. Thus the sale was void as per **Section 39** of the Land Act given the fact that the land was jointly purchased and the Appellant with the 1st Respondent used to cultivate it.

Counsel for the Appellant cited the case of **Enid Tumwebaze versus Mpereirwe Stephen & Another, HCCA No. 039 of 2010** where it was stated that; the provisions of **Section 39** of the Land Act on spousal consent are mandatory and cannot be circumvented.

Thus, the sale should be set aside for lack of spousal consent.

Counsel for the 2nd – 5th Respondent on the other hand submitted that DW5 told Court that the 1st Respondent was not staying on the suit land at the time of the sale and the suit land had been divided into plots for sale. The same was supported by DW1 and DW2 to the effect that by the time they bought the suit land it had nothing on it. Thus, the family was no longer deriving sustenance from the suit land and the authorities as cited by Counsel for the Appellant were inapplicable in the instant case.

Counsel for the Appellant submitted in rejoinder that the suit land was family land and the Respondents burnt her grass thatched house and also destroyed her crops.

Analysis of Court:

I have addressed my mind to both submissions of Counsel and the evidence on record. The Appellant in the instant case alleged that the 1st Respondent being her husband sold the suit land to the 2nd – 5th Respondent without her consent. The 1st Respondent in his defence did not deny having sold the suit land without the Appellants and the sale was done without the consent of the Appellant however, the suit land was jointly owned and not solely owned by the Appellant.

Counsel for the Appellant in his submissions stated that the suit land was family land where the Appellant and her family derived sustenance. The Appellant told Court the suit land was developed with a plantation and other crops contrary to what the 2nd – 5th Respondents alleged. The sale agreement PE1 also indicated that the land as purchased by the Appellant and the 1st Respondent had a banana plantation at the time they bought it.

In the case of **Muwanga versus Kintu High Court Divorce Appeal No. 135 of 1997** (unreported) where Bbosa J observed;

"Matrimonial property is understood differently by different people. There is always property which the couple chose to call home. There may be property which may be acquired separately by each spouse before or after marriage. Then there is property which a husband

may hold in trust for the clan. Each of these should in my view be considered differently. The property to which each spouse should be entitled is that property which the parties chose to call home and which they jointly contribute to"

I find that the suit land was family land as well as matrimonial property that was jointly owned by the Appellant and the 1st Respondent thus could not be sold without the consent of the Appellant as provided for in **Section 39** of the Land Act.

This ground therefore succeeds.

Ground 2: That the learned trial Magistrate Grade 1 erred in law and in fact in finding that the second to sixth Respondents were not trespassers on the suit land without the Appellant's authority or consent thereby making the whole transaction void *ab initio.*

Counsel for the Appellant submitted that the suit land was jointly purchased and thus the Appellant and the 1st Respondent were joint tenants. They did not have distinct shares as the suit property was held jointly as a whole and the 1st Respondent could not sell without the consent of the Appellant.

The Appellant never attested to any of the sale agreements of the 2nd - 6th Respondents. That the evidence of the Respondents was full of contradictions and inconsistencies and the Respondents were not able to prove that indeed the alleged signature of the Appellant was actually hers. **(See: Sections 66 and 101 of the Evidence Act).** Thus the sale of the suit land was illegal, null and void. **(See: Makula International Ltd versus Emmanuel Cardinal Wamala & Another [1982] HCB 11.**

Counsel for the Respondent on the other hand submitted that from PE1 it clearly shows that the 1st Respondent bought the suit land individually and signed as the buyer whereas the Appellant signed as a witness. Thus, the Appellant had no interest in the suit land. That Counsel could not rely on paragraphs 6 and 7 of the Plaint and 6&7 of the 1st Respondent's WSD as admissions to contributions to buy the suit land. That the Plaintiff did not even testify to that effect and that the 1st Respondent though a spouse is not a compellable witness and did not attend trial therefore his defence cannot be relied on as proof of a joint tenancy. The suit land is not jointly owned as it was only bought by the 1st Respondent alone.

That DW5 confirmed to Court that the Appellant was present during the sale of the suit land and did not contest. That the issue of proof of the signature being that of the Appellant was declined by Court as per the record of appeal. The 2nd – 5th Respondent therefore bought the suit land lawfully.

Counsel for the Appellant in rejoinder submitted that the sale agreement states that the suit land was bought by Mr and Mrs and it is clear that the Appellant and the 1st Respondent are legally married. Therefore the purchase was joint.

Secondly, that the 1st Respondent's defence cannot be ignored as it indicates that the Appellant contributed a bigger portion of the consideration. Thus, the 1st Respondent could not sell the suit land without obtaining spousal consent.

Analysis of Court:

The Appellant and 1st Respondent are husband and wife who as per PE1 purchased the suit land jointly and the agreement categorically indicates that the purchase was made by Mr and Mrs though only the 1st Respondent signed as the buyer and the Appellant as a witness. The 1st Respondent does not deny having brought the suit land jointly with the Appellant.

Much as the 1st Respondent did not attend Court he filed his defence which this Court cannot pay a blind eye to.

The 1st Respondent in his defence Paragraph 4 admitted that he sold the suit land to the 2nd – 5th Respondents because he had used it as collateral when obtaining a loan from them and therefore sold off the suit land to cover the loan.

The 1st Respondent also stated in Paragraph 6 and 7 that he and the Appellant bought the suit land with her contributing a larger share for the consideration and the suit land was sold without her consent.

Further in paragraphs 8 and 11 the 1st Respondent submitted that he resettled the Appellant on another piece of land without her knowing the reasons why and the she was not party to the sale of the suit land.

The 2nd – 5th Respondents alleged that the Appellant had signed their sale agreements however, from my observation the signature of the Appellant on the plaint differs from that of the sale agreements of the 2nd – 5th Respondents. The Appellant herself denied signing on the sale agreements and the 1st Respondent stated so too.

I therefore find that indeed the suit land was jointly owned by the Appellant and the 1st Respondent. Therefore the 1st Respondent could not sell without the Appellant's consent which he did not deny. The sale to the 2nd – 5th Respondents by the 1st Respondent was therefore void *ab initio*. The 2nd – 6th Respondents are therefore trespassers and the trial Magistrate was wrong to find otherwise.

This ground therefore succeeds.

In a nutshell the appeal succeeds on all grounds. The decision of the lower Court is set aside. Costs are awarded to the Appellant in the instant appeal and in the lower Court. The 2nd – 6th Respondents are ordered to vacate the suit land and the 1st Respondent should refund the purchase price of the suit land to the 2nd – 5th Respondents since the sale transaction was illegal. I so order.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

14/12/2017

Judgment read and delivered in open Court in the presence of;

1. Counsel Kateeba Cosma for the Appellant
2. appellant present
3. 3rd and 4th Respondents present.
4. Julius Tembo on watching brief for the Respondents.
5. Beatrice Katusabe Court Clerk.

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OYUKO. ANTHONY OJOK

JUDGE

14/12/2017