

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MPIGI
CIVIL APPEAL NO. 51 OF 2016

(Arising from land matter Civil Suit No. 091 f 2013 in the chief Magistrate's court of Mpigi)

NAKAMYA FLORENCE:.....APPELLANT

VERSUS

NASSAZI ESTHER:.....RESPONDENT

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BEFORE: HON. JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Appellant, **Nakamya Florence**, being dissatisfied with the Judgment and orders of Her Worship Ninsiima Marion, Grade One Magistrate appealed to this Court on the following grounds:

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- 1) The Learned trial Magistrate failed to properly interpret the law so as to apply it to the facts before her when she ordered the plaintiff to refund the purchase price of the suit Kibanja to the family of the late Mayiga hence leading to a miscarriage of justice.
- 2) The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thus arriving at wrong conclusion declaring the plaintiff as the rightful owner of the suit Kibanja hence leading to miscarriage of justice.
- 3) The learned trial Magistrate erred in law and misdirected herself when she delved into speculations and extraneous matters not supported by evidence on record thus arriving at a wrong decision.

The appellant was represented by the Muslim Centre for justice and Law, while the Respondent, Nassazi Esther was represented by M/S Oasis Advocates, Kampala.

The background of this appeal is tat:

The Respondent herein instituted Civil Suit No. 091 of 2013 against the Appellant in the Chief Magistrate's Court at Mpigi at Mpigi for a declaration that the Plaintiff is the rightful owner, a declaration that a defendant is a trespasser on the suit land, an order for eviction, mesne profits, a permanent injunction against the defendant, general damages and costs.

10 The Respondent contended that in the year 2010, she sold part of her kibanja to the appellant's late husband at a consideration of UgX 2,000,000/= of which the Appellant's husband paid UgX 1,500,000/= leaving an outstanding balance of UgX 500,000/= to be repaid within two months. The Respondent contends that no written agreement was made and the late Mayega died before full payment. The respondent attempted to return the money to the appellant which was rejected by the Respondent hence the main suit.

The Appellant on the other hand contends that her late husband bought the suit Kibanja measuring approximately 4 acres at a consideration of UgX 2,000,000/=, the kibanja was inspected an agreement of sale was signed albeit the same got lost. The Appellant took immediate possession and was utilizing the entire land without any interference. The Appellant in fulfillment of the contract with the Respondent attempted to pay the balance of UgX 500,000/= but the same was rejected by the Respondent on ground that the sale had been cancelled.

20 The issues at the trial court were whether the Plaintiff has an interest in the suit land, whether the defendant is a trespasser on the suit land and what remedies are available to parties.

Judgment was entered in favour of Plaintiff (Respondent) hence this Appeal.

It is settled law that the duty of this Court, as a first Appellate Court is to re-evaluate the evidence in the lower court and subject it to a fresh and exhaustive scrutiny and draw its own

inferences and conclusions. However, it has to bear in mind that it neither saw or heard witnesses testify, and due allowance has to be given in that respect. The case in point in **Banco Arabe Espanel vs Bank of Uganda SCCA NO. 8 of 1998.**

10 As far as the first ground of appeal is concerned, notably that the trial Magistrate failed to interpret the law when she ordered Nassazi Esther to refund the purchase price of the suit kibanja to the family of late Mayiga. Counsel submitted that appellant's husband, late Mayega paid UgX 1,500,000/= to Nassazi Esther. Counsel quoted the law on part payment, **Semakula & another vs Sentiba , Civil Appeal No. 5 of 2013**, where my brother Bashaija J held that a purchaser who had concluded a sale agreement with the owner immediately becomes the owner of the land and the vendor becomes a trustee in title. It was also held that the purchaser is entitled to the equitable remedy of specific performance . Another case referred to was **Ismael Jaffer Allibhai and others vs Nandalar Harvijan Karia & another SCCA N. 53 of 1995**, where it was held that in a sale of immovable property. Upon payment of deposit, property passes to the purchaser who acquires equitable interest. It was also held that the purchaser becomes the lawful purchaser when he has paid the deposit. Counsel therefore maintained that upon payment of UgX 1,500,000/= the husband of Nakamya Florence acquired an equitable interest and Nassazi Esther was to claim the balance.

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Counsel for the Respondent, Nassazi Esther on the other hand submitted that there was no written Agreement between Nassazi Esther and the late Mayega Abasi, husband to Nakamya Florence. Counsel however, conceded that there was an oral Agreement (contract) between Nassazi Esther and Mayega which was not completed as the consideration was not fully paid. He added that the subject matter of 100 ft by 100ft was also not measured counsel or the Respondent also quoted Halsbury Laws of England, 3rd Edition, Vol 36 page 297 where it is stated that payment in whole or in part of the purchase price is not an act of part performance which entitles the purchaser to enforce a verbal contract. He concluded that since the alleged sale agreement of 2.5 acres or whatever

was not produced, then the trial Magistrate was correct in her decision that the appellant, Nakamya Florence was a trespasser.

I have carefully considered the summarized submission by both sides and the Judgment of the lower court. Under Sections **101, 102 and 103 of the evidence Act**, whoever asserts a fact must prove it. It is clearly stipulated that: **“whoever wants Court to believe in the existence of a given set of facts must have the burden to prove their existence.”**

And the standard of proof in all Civil cases is one that is on the balance of probability. The first issue that had to be resolved was the size of the land involved.

10 The Respondent, Nassazi Esther testified as PWI on the record of proceedings and according to her, the size of the land of sale was 100 by 100 at 2,000,000/=, whereby part payment of 1,500,000/= was made by late Mayega before he died.

Nakamya Florence, the appellant now testified as DWI and stated that the subject of sale was four acres of kibanja. She was supported by DW2, Bumbaklali Sendawula. And whereas the Appellant’s case was that a written sale agreement was made but it got lost, the case of the Respondent was that no agreements were concluded.

20 He testimony in the lower court was that she verbally agreed with the late Mayega that she would show the boundaries after the balance had been paid in the circumstances, it is clear that the contract of sale between Nassazi Esther and the late Mayega was never completed so as to give full rights to the purchaser. Secondly, whereas the appellant and her witnesses that a written sale agreement was made, no such Agreement was tendered in court.

In the absence of sale agreement as alleged by the appellant, this court is inclined to believe the respondent Nassazi Esther that an oral agreement to sell 100ft by 100ft to the deceased husband of the appellant was reached and part payment of UgX 1,500,000/= made. I therefore agree with the findings of the trial Magistrate in that regard.

The trial Magistrate, in her judgment on page five stated that she visited locus in quo to ascertain the truth. She stated that while there, one Kyeyune Wahab was asked by court about the transaction and that he informed Court that his father the late Mayiga toured the kibanja with him. The trial Magistrate added:- **“He maintained that it is about 2.5 acres and that a balance of shs 500.000/= was meant to be paid. He went on to testify that an agreement was made when asked who authored the same, he first said that it was written by the chairman, then later changed and said it was written by him. During cross examination, he again changed and said it was the late Mayiga that wrote it . This he maintained in re examination.”**

The trial Magistrate concluded on that issue that the appellant now Nakamya Florence, then Defendant had a duty to prove the existence of that agreement. I entirely agree with the holding of the trial Magistrate particularly since Kyeyune Wahab contradicted himself as to who exactly wrote the alleged agreement.

And even DW2, Bumbakali Sendawula, who was the chairman of the area, testified that Eseza wrote the agreement in respect of four acres. Since there is a dispute about the size of the plot sold, whether 100 ft by 100ft or four acres, then a written agreement or copy thereof would have resolved the issue.

In the absence of such alleged written sale agreement, this court finds and holds that the Appellant did not discharge the burden of proof incumbent upon her and so I am also inclined to believe the version of the Respondent, Nassazi Esther that the sale was oral and a written agreement was to be made after completion of balance. And that the subject matter of sale was 100ft by 100ft plot and not four acres as alleged by the Appellant. The trial Magistrate therefore rightly applied the law to the facts of the case and arrived at a correct conclusion partly. The part of the trial Magistrate's conclusion I don't agree with is that Nassazi Esther refunds the UgX 1,500,000/= to the family of late Mayiga. Since the

transaction took place in 2010, and a larger part of the purchase price in respect of the 100ft by 100 ft plot had been paid, the family of the late Mayiga acquired equitable interest and are entitled to the said plot upon payment of the balance of UgX 500,000/= it would be unfair and amount to miscarriage of justice if the appellant is ordered to receive the part payment of UgX 1,500,000/=.

Instead, I find and hold that since late Mayega's family had acquired an equitable interest, the Respondent, Nassazi Esther receives the balance of UgX 500,000/= and goes ahead to demarcate and hand over the plot of 100ft by 100ft to the appellant, Nakamya Florence. So ground No 1 of Appeal partly succeeds.

10 Ground No 2 of appeal was about the evaluation of evidence. This has more or less been covered under ground 1 of appeal. Counsel for the Appellant emphasized that the trial Magistrate erred when she held that the Appellant had no legal or equitable interest in the land plot in question. Counsel also attacked the findings of the trial Magistrate about the alleged written agreement which was never produced.

Counsel for the Respondent on the other hand reiterated that even if Appellant had been in occupation against the will of the Respondent and was therefore a trespasser. The other point raised was that the Appellant never entered in any form of contract, written or oral with the Respondent, and so she was a stranger. I shall not waste much more time on this
20 ground as it has been more or less resolved under ground One. I have already decided that the Appellant, who is part of the family of the late Mayiga, has an equitable interest in the disputed land since her deceased husband had paid UgX 1,500,000/= in 2010 in respect thereof. And whether or not Appellant had letters of Administration is not a problem as long as no one challenged her status as wife of late Mayiga. And the land was a plot of 100ft by 100ft. In view of the decisions taken under grounds one and two, then I find ground No three irrelevant and the same is not discussed.

The conclusion of this Court therefore is that being a Court of law as well as a Court of Justice, the following orders are made:-

- 1) The Appellant, Nakamya Florence is to complete the payment of balance of UgX 500,000/= to the Respondent, Nassazi Esther.
- 2) The Respondent, Nassazi Esther is to demarcate the plot of 100ft by 100ft to Nakamya Florence, wife of late Mayiga.
- 3) The balance of any land left after demarcating off 100ft by 100ft is for the Respondent, Nassazi Esther.
- 4) Each party to meet their own costs.

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W. Masalu Musene

Judge.

02/02/2018