

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA**

**HOLDEN AT JINJA**

**CIVIL APPEAL NO. 54 OF 2014**

**(Arising out of Iganga Chief Magistrate Court, Civil Suit No. 017 of 2004)**

**MALINGU MWATO GEORGE:..... APPELLANT**

**VERSUS**

**OUMA KASSIM :..... RESPONDENT**

**RULING**

**BEFORE: HON. LADY JUSTICE EVA K. LUSWATA**

**1. Introduction**

**1.1** The appellant through his lawyers M/s Were Associated Advocates brought this appeal against the judgment and decision of Her Worship Alum Agnes delivered on 16<sup>th</sup> April, 2012 on the following grounds;

- (a) That the trial Court erred in law and fact when she failed to properly evaluate the evidence on record hence causing a miscarriage of justice.**
- (b) That the trial Court erred in law and fact when she held that there was a sale of land between the plaintiff and the defendant thereby arriving at a wrong decision.**
- (C) That the trial Court erred in law and fact when she held that the defendant / respondent was not a trespasser on the suit land.**

**1.2** The respondent being unrepresented was permitted to instruct an advocate and file his submissions by 15/3/2017. He did not do so and it is taken that he did not contest the appeal. That notwithstanding, this being a first appellate court, it remains my duty to

subject the entire evidence on record to fresh and exhaustive scrutiny, so as to determine whether the decision of the lower court is supported by the evidence. **See Kifamunte Henry Vrs Uganda (SC. Criminal Appeal No 10/1997)**

### **1.3 Facts of appeal**

The facts of appeal as gathered from the judgment of the trial court can be briefly stated as follows;

The plaintiff(now appellant) sued the defendant (now respondent) in trespass and sought a declaratory order that he is the rightful owner of the suit land measuring about six acres situate at Buhemba Village, Buyinja Sub-County now Namayingo District. The appellant inherited the suit land from a one Peter Mwato, his late father. That during 1999, upon request, the appellant authorized the Respondent to occupy about ½ an acre of the suit land for a period of only one year. When the Respondent declined to vacate and even cultivated beyond the agreed portion, the appellant sued him in trespass vide Civil Suit No. 017 of 2004.

In his defence, the respondent contended that he acquired the suit land from the appellant in 1999 through an outright purchase but with no formal agreement of purchase between the two parties. That payments were made in installments with the final payment being made after police intervention and detention of the respondent.

The trial Court gave judgment in favour of the respondent (defendant) thus this appeal on the above grounds.

## **2. Preliminary observations on this appeal by Court**

**2.1** According to Section 220(1) (a) of the Magistrates Court, (as amended) an appeal from the Magistrate's Court to the High Court of Uganda shall lie;

**“From the decrees or any part of the decrees or from orders of a Magistrate's court presided over by a Chief Magistrate or a Magistrate Grade 1 in the exercise of its original civil jurisdiction, to the High Court.”**

In the instant appeal, and according to the record of appeal, the decree from which the appellant would be appealing from was not extracted nor filed in Court. This would mean there is a technical contravention of the above law.

- 2.2 There appears to be no consensus in this Court on whether extracting a decree by one lodging an appeal to the High Court is mandatory.

Some have taken the strict interpretation of the law (**See for example Katweki Eriasafu Vs. Ingrid Turinawe C/A Appeal No. 035/2010- Kabale**).

- 2.3 On the other hand, the court in **Alosuis Bamugahare Vs. Kenyi Milla Moses & Another HCA N0 67/16 (Fort portal)** following **Standard Chartered Bank (U) Ltd Vs. Grand Hotel (U) Ltd C/A N0 13/1999** took a more liberal view, Citing Section 16 (1) Judicature Act, the Judge opined that an appeal to the High lies from decisions of Magistrates and other subordinate courts. That therefore, extraction of a decree is no longer a requirement in the institution of an appeal or at least, leaving out a decree is a mere technicality that can be remedied by Article 126 (2) of the Constitution.

- 2.4 The more strict decisions seem to be prominent before the enactment of the Constitution with its emphasis on substantive justice as opposed to legal technicalities. I agree with the reasoning in **Standard Chartered Bank (U) Ltd (Supra)** that institution of an appeal is by its nature against the judgment of a reasoned order and not a decree extracted from it.

- 2.5 It should therefore not be fatal to an appeal to the High Court, not to extract a decree and make it part of the record. I would therefore treat the absence of a decree in this appeal as a mere technicality and proceed to consider its merits.

### 3. **Resolution of the grounds of appeal by Court**

- 3.1 The appellant's advocates in their submissions, argued grounds 1 and 2, of the appeal concurrently, then ground 3, of the appeal separately. I will follow suit in resolving the issues.

**Ground 1: whether the trial magistrate failed to properly evaluate the evidence on record hence causing a miscarriage of justice.**

**Ground 2: whether the trial magistrate erred in law and fact when she held that there was a sale of land between the plaintiff and the defendant thereby arriving at a wrong decision.**

3.2 In his submissions, appellant's counsel argued that the Learned Chief Magistrate erred in law and fact in confirming the respondent's occupation on the suit land as lawful, inspite of evidence led for the appellant that the Respondent was only a an occupant on only ½ acres for one year on expiry of which he was to vacate. He continued that that evidence was not shaken or discredited in cross-examination and in addition, there was corroboration by PW2's testimony that the respondent had been chased by his father from Buhemba and it was PW2 who took the respondent to the appellant and pleaded for him to allow him stay on the suit land, which the appellant agreed on the above terms.

#### **The Evidence**

3.3 The gist of the appellant's testimony is that the agreement between him and the Respondent was not for sale but temporary occupation of ½ acres out of the suit land. That during 1999, his brother Mwato Ouma (PW5) and his uncle Mahande Pataleo ( PW2) persuaded him to allow the respondent occupy part of the land after disagreements had developed between PW2 and the respondent. He reluctantly agreed, with specific instructions that the respondent would occupy and cultivate a portion measuring ½ acre only and vacate after one year. The appellant requested and the respondent declined to vacate the land in 2002 and instead took up and cultivated more land to the extent of seven acres.

3.4 PW2 supported that evidence by stating that after the respondent was chased by his father out of Bagayi he moved to Buhemba. PW2 requested and the appellant agreed to allow the respondent temporary stay on his land, of which no measurements were taken.

**3.5** PW3, 4 and 5 substantively supported that evidence claiming to have been witness to the transaction. That the boundaries of the suit land were neither ascertained nor marked since it was not a sale. PW5 added that the respondent was first permitted to burn charcoal on the land and he thereafter requested for the suit land to build a hut to keep the charcoal. That upon the instructions of the appellant, PW5 measured the ½ acre which the defendant was to leave once he finished his work.

**3.6** On his part, the respondent admitted he met the appellant in 1999 and bought from him land measuring 54 by 40 stricks (a 12 foot yard stick) for a sum of Shs.960,000/=. He paid Shs. 800,000/= but no written agreement was made for the appellant explained that being the land lord, Chairman LCI and a Councilor, he could not cheat him. That the appellant allowed him to clear and use the land on which he settled in with his family. In 2002, the appellant caused his arrest at Dokwe police post for failing to pay the balance. Upon his release from custody, he managed to raise the balance of Shs. 160,000/= which he paid in the presence of one Ngero Constant after which, the appellant laid for him boundary mark stones. That exercise was witnessed by his father Mohamed Wabwire and other people including local Council authorities.

**3.7** DW2 and DW3 attested to the fact that they were all present when the respondent purchased the suit land but that no written agreement was given. DW2 was able to cite the date the boundary marks were planted and still exist on the suit land. DW3 confirmed that the land was measured to the specifications given by the respondent.

**3.8** DW4 testified that he too had purchased land from the appellant but received no written agreement, which he considered a “trick” by the appellant. That he was imprisoned together with the respondent for three days by the appellant in 2002 in order to receive balances for land he had sold to them. Prior to his arrest, he did not know the size of the land but insisted it was land the appellant had sold to the respondent.

#### **4.0 My decision**

**4.1** In his decision, the trial Magistrate noted that the plaintiffs testimony differed from his pleadings. This was a correct observation and therefore it is wrong to have allowed the plaintiff to carry on with his line of arguments in clear contravention of rule on

departure. None the less, the Magistrates decision generally was a proper evaluation of the evidence.

- 4.2 Beyond his testimony supported by other oral evidence, the appellant led no other proof that the respondent's occupation was only temporary and meant to last for only one year. His reasoning that no boundary marks were made because there was no sale, was negated by the respondent and his witnesses, and the discoveries made at the locus in quo. No contest was raised by the appellant at the locus when the respondent pointed out being in possession of a boundary spanning 6 ½ acres which appears in the sketch map drawn by the Magistrate. Not only did the respondent know his boundaries and those in adjacent plots, he was able to identify other boundary marks that were subsequently erected between 2002 and 2007 whenever the appellant sold to a new party.
- 4.3 The Learned Magistrate found that the evidence of a sale to the defendant was not challenged, and I agree. Indeed, the defendant and his witnesses were consistent that no agreement of sale was given, and the reasons given.
- 4.4 Ordinarily, every sale of land should as a matter of law be proved by a written agreement. However, the appellant was in a position of power of the respondent and as the Learned Magistrate concluded, may have used that position to his advantage to decline making a written agreement to represent the sale to the Respondent.
- 4.5 The above notwithstanding, the evidence that the respondent has been in possession of the suit land since 1999 is strong and supported on both sides. I have previously found in my decision in **John Lwalanda Vrs Israel Mayengo HCCS No 271/2009** following **Stanley Beinatabo Vs. Abaho Tumushabe CACA N0 11/1997** that a parole agreement can be enforced where the purchaser is in possession of the land with the vendor's authority. The evidence led is that the appellant authorized the Respondent's entry onto the suit land and the latter remained in possession since 1999.
- 4.6 There was other evidence which appeared to support the fact that there was a land purchase agreement between the parties.

All the defence witnesses were consistent on the purchase price, the fact that two were present when it was paid, and the outstanding balance. As noted by the trial Magistrate, the evidence of the respondent's arrest for not paying the balance was virtually not contested. It is conceivable that his release was secured only after he undertook to pay the balance which he did. Thereafter, his boundary marks were planted and he has continued in occupation since. Going by the High Court decision in **H.M Kadingidi Vs. Essence Alphonel HCCS No 289/86**, in equity, the Respondent became the owner, on the date the oral contract was made.

**4.7** Appellant's counsel pointed to inconsistencies between the respondents and his witness with regard to those who witnessed the payment being made to the appellant. That may be so, but the common testimony was that Yusuf Baraza and Mohammed and others witnessed the transaction. This in my view did not amount to a contradiction or inconsistency but rather corroborated the respondent's case that indeed the respondent paid the appellant 800,000/= as the first installment for the suit land.

**4.8** Again the inconsistencies on the size of the land and when the respondent purchased the same could be over looked as minor. Both parties could not have known the formal acreage since no surveyor was ever used in the transaction. However the defendant and his witnesses were consistent on the size measured when the mark stones were planted. There was no contest from the appellant at the locus on the size of the suit land, and it would be wrong to raise it on appeal.

**4.9** The evidence that the appellant was in the habit of selling land without issuing receipts cannot be ignored. The respondent stated that he raised it during a Land Tribunal hearing and even produced letters written by different authorities in response to a general complaint by leaders of Buhemba and other areas about landlords grabbing land after declining to acknowledge receipt of purchase monies. Some of that correspondence was admitted in evidence as P. exhibit 1,2 and 3.

**4.10** It was mentioned by the respondent in cross-examination that the appellant was a member of Mahapi's family which was mentioned in P. Exh. 3 (written in 2004) as

some of the people harassing and threatening to evict residents after collecting but not receipting their payments. An earlier communication by the RDC Bugiri District to the LCIII Chairperson, Buyinja Sub- County did mention Buhemba Parish, as one of the areas experiencing illegal evictions by Poteya-Pata, a group that the defendant was stated to belong. He never contested his involvement in that group.

**4.11** In conclusion, I would find no fault with the trial Magistrate’s evaluation of the evidence which strongly indicated that there was an unwritten agreement of the sale of the suit land by the appellant to the Respondent. The evidence that the Respondent was a mere occupant was readily outweighed with the evidence of a sale, leading to a correct decision.

**4.12** Therefore, ground one and two would fail.

### **5.0 Ground 3**

**5.1** The Supreme Court in **EMN Lutaya V Sterling Civil Engineering Co. Ltd. SCCA 11/2002** held that *“Trespass to land occurs where a person makes an authorized entry upon land and thereby interferes or portends to interfere with another person’s lawful possession of that land.”*

By his evidence, the appellant conceded that the respondent’s entry on the suit land was authorized, only objecting to his pro longed stay beyond one year. I have been convinced that the respondent owns the suit land following a purchase that he made from the appellant in 1999. As decided by the Learned Magistrate, his occupation is lawful and he cannot be deemed to be in trespass.

**5.2** Ground three would also fail.

### **6.0 Conclusion**

**6.1** In the result, and for the reasons given herein above, in this judgment, I find no merit in the appeal which is therefore, dismissed with costs to the respondent.



**EVA K.LUSWATA**

**JUDGE**

**24/05/2018**