

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL APPEAL NO. 115 OF 2019

(ARISING FROM ENTEBBE CM CIVIL SUIT NO.002 OF 2017)

BUKENYA RICHARD::::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

NABUKEERA IRENE::::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGEMENT

This is an appeal from the judgment of Her Worship Nantege Christine delivered on 12th September 2019.

The Appellant filed a memorandum of appeal highlighting seven grounds of appeal to wit;-

1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate and analyse the evidence on record, thereby reaching a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when she disregarded a criminal issue of first determining who the rightful owner of the land is.

3. The learned trial Magistrate erred in law and fact when she framed an issue that the parties did not agree upon and adduce evidence to.
4. The learned trial Magistrate erred in law and fact when she relied on a disputed last Will of the late Sebyala Stanley, leading to a miscarriage of justice.
5. The learned trial Magistrate erred in law and fact when she declared both parties lawful owners of the suitland.
6. The learned trial Magistrate erred in law and fact when she held that both parties share the suitland equally.
7. The learned trial Magistrate erred in law and fact when she disregarded the existence of the boundary marks which had been shown by the Plaintiff at the *locus* visit.

The Appellant prayed that the appeal be allowed with costs and the judgment and orders of the lower Court be set aside.

While parties were given schedules to file submissions and address Court on the grounds of appeal, the Respondents did not file any submissions or responses to the memorandum of appeal.

In the judgment of the lower Court, the learned trial Magistrate held that the Defendant is not a trespasser on the suitland, being a beneficiary to the estate of the late Sebyala Stanley.

That both parties share equally the entire piece of land and measurements be done by each party, and that the Plaintiff bear costs for the Defendant, whereupon the Plaintiff was dissatisfied, hence this appeal.

The duty of the first Appellate Court

The cases of **Banco Arab Espanol versus Bank of Uganda; SCCA No. 81 of 1998**, and **Sanyu Lwanga Musoke versus Sam Galiwango; SCCA No.4 of 1995**, discuss this duty as hereunder;

“The duty of the first appellate Court is to exhaustively scrutinise and re-evaluate and make its own conclusion while bearing in mind the fact that Court never observed the witnesses. The Court therefore has a duty to re-evaluate the evidence to avoid a miscarriage of justice while reaching its own conclusions”.

This Court has accordingly gone through the record and internalised both the evidence on the pleadings and reached the following conclusions.

Issue 1,2 and 5

As argued by counsel for the Plaintiff; the trial magistrate is alleged to have failed to evaluate and analyse the evidence on record, thereby reaching a wrong conclusion. According to the evidence; PW1 was Bukenya Richard who said that the Defendant is his young sister of 6 children of their father. He sued her over a kibanja left by their father Stanley Sebyala where his house and banana plantation is situated; measuring 25 decimals.

He claimed that their sister Naiga Joyce; the title holder signed mutation forms for him. Their father died in 1991 and the Plaintiff has lived on the kibanja for 25 years without interference until 2015 when the Defendant began having claim over the same. The mutation form and photographs were received in Court as PEX1 and PID1 respectively; the Plaintiff testified that the Defendant reported him to the Administrator General claiming that she had been given that portion of land by their late father, but the Administrator General dismissed the claim.

The Defendant however fenced off the land and destroyed the Plaintiff's crops like bananas and she also began construction thereon. Photographs were taken by police as per PID2

In cross examination; the witness stated that there were witnesses to the transaction like Mable who witnessed the father giving the Plaintiff's land. He also revealed that he got registered interest, but Naiga got registered interests in 1979. He also revealed that the Defendant's mother and Iga are using the Defendant to fight the Plaintiff.

In re-examination, the Plaintiff's evidence is that Nabukeera's mother, Iga Emmanuel and another sold off part of Nabukeera's land to be able to pay her fees and in the rest of the rentals were put up and she is in possession.

PW2: Tabula Matovu Rogers stated that the Defendant is a young sister to her uncle (Bukenyia Richard) PW1. She started living with Mr. Bukenyia in 1994 when about 5 – 6 years. He said the land in dispute is for Mr. Bukenyia. It's a kibanja, surveyed and transfer forms signed.

Yiga constructed part of Nabukeera's land and she is now claiming Bukenyia's portion (about 12 decimals). He saw the Defendant's fence off the land in 2017 and called Bukenyia who came with Naiga and they went to police. In cross-examination, he denied knowledge of Sebyala's Will.

PW3; Mable Nyanzi said that the Plaintiff is his young sister. He said the land belongs to Bukenyia. He said the father of the Plaintiff gave him the land in the presence of PW3. He saw Sebyala put '*empaanyi*' to demarcate the boundaries. He also said that part of Nabukeera's land was sold to Yiga and Nabukeela retained a part.

PW4; Enock Sematimba is a brother to PW1 – Bukenyia. He confirmed that Nabukeera went to Bukenyia's land and constructed thereon, claiming it's hers. He

said he knows Bukenya's land as he stayed on it in 1997 and Bukenya's father told him he had given Bukenya land.

In defence, DW1; Kasozi Stanley Tabula said that the Plaintiff himself and the Defendant are the siblings. He disputed that Nabukeela trespassed on Bukenya's land because she was given land that was neighbouring to Bukenya by the late Stanley Sebyala. She was given 25 decimals in writing.

That the late Sebyala made a will on 26/01/1989 and gave land to Nabukeela. He has the original will which he got from Kyeyune in 2003. That Nabukeera as a beneficiary has not got her share of 25 decimals. That Bukenya sold part of her land in order to pay her school fees. He said he has a copy of the will. The will was tendered as DEI.

DW2; Nabukeera Irene said that the Defendant got the land by way of a will which was made by her father, she got 25 decimals – but never got them. She therefore took 20 decimals as per the will. She said Bukenya was to get 25 decimals, but does not know if Bukenya got the 25 decimals. She claimed Bukenya sold her land to Yiga – she received with 20 decimals after the sale.

She, in cross-examination, revealed that she occupies 6 decimals; undisputed and 14 decimals are disputed.

D3; Emmanuel Yiga; said the Plaintiff and the Defendant are his cousins. He said Bukenya sold to him land 58ft x 47ft, 6 decimals and the agreement was tendered as DE2. He said on completing the house on the land, Bukenya had sold to him, the Defendant's mother Nyangole Specioza entered it. He said he can't tell if the land was for Nabukenya or Bukenya. He also said the property has not been yet distributed.

DW4; Steven Tamale Mutaga surveyed the land belonging to the Defendant and the Plaintiff; Pace 'A' for the Defendant and 'B' for the Plaintiff. The parcels were shown to him by the parties. Parcel A for the Defendant is 0.25 acres, B is 0.19 acres. In between is 0.111 acres facing part of parcel 'A' & 'B'. This survey report is admitted on record as Court exhibit.

From all the evidence assembled and cross examination, I do now take to answer whether the trial magistrate wrongly evaluated the evidence when she reached the conclusion she did.

Firstly, an ownership of the suit kibanja and magistrate's conclusion that both parties own the suit land as erroneous. The above evidence consistently shows that part of what was meant to be the share of the Defendant was earlier on sold off to raise fees for her. There is evidence that this land is part of a deceased's estate and no one has the authority to sale or alienate without letters of administration. The Defendants' claim is therefore unsustainable if no evidence of lawful distribution of the estate has occurred. There is evidence from PW1, PW2, PW3, PW4, DID1, DID2, DW1, DW2, DW3, DW4 and Court exhibit I which gives and leads to a different conclusion from that reached by the learned trial magistrate.

That evidence shows that the Appellant got the suitland from his late father and the surveyor's report shows that the disputed land appears to be part of the 25 decimals claimed by the Plaintiff. All this evidence counters the conclusions reached by the learned trial Magistrate. The judgment does not refer to the details of the evidence to explain why one is believed and the other rejected. This evidence must therefore be re-evaluated and reviewed. I agree with the Appellants on this issue and I find it in the affirmative.

The Appellant raised other concerns related to the law on gifts *intervivos*, *law as lawful/bonafide* occupant and the law on wills. All these legal issues were set forth

in the submissions and I will not repeat them here. However, on review of the evidence, I hold as follows:

The case of **Joy Mukasa versus Willy Waibuw; HCCA No. 55 of 2005**, Court held that;

“For a gift intervivos to take irrevocable torts, the donor must intend to give the gift, the donor must deliver the property and the donee must accept the gift”.

See also cases of **Cole (1964) 1 ch.175, Namugabe Balopera & Ors versus Fredrick Njuki & anor; HCCS; 34 OF 2013** which is o the effect that;

“Delay of the gift must be actual or constructive and made during the donor’s life time in a manner that the donor has stopped themselves of all dominion over the gift”

I found evidence from PW1, PW2, PW3, PW4 showing that the Appellant was gifted the land by his late father.

The said portion was actualised into signed mutation form and transfer form; PEX1 and PEX2.

I agreed with the quoted decision of **George William Kalule versus Norah Nassozi & Anor; CACA No. 29/2014** that;

“Although the Appellant had not registered the suit property in his names, the rights he acquired in equity are good against the whole world”

I also agree with the Appellant that even the ‘will’, if it is to be followed, shows that the Appellant was to be given 25 decimals. I do agree that the conclusions reached by the learned trial Magistrate that the kibanja which forms part of 25 decimals be shared is an erroneous conclusion.

Law as lawful/bonafide occupant

I agree that evidence shows that the Appellant has been in occupation of the 25 decimal from 1979 to 2015 which is a period of 36 years. This period exceeds the

12 years envisaged in Section 1(e) of the Land Act which provides for bonafide occupants and lawful occupants; read together with Section 29 of the Act.

The holding in **Bugembe Kagwa versus Steven Erukana & Anor; CS No.2020/2012**, is followed here for emphasis of the hold that;

‘A person who enters on land with the consent of the registered owner, qualifies to be deemed a lawful occupant; and this includes a purchaser’.

Therefore the Appellant in this case, having entered on land with permission of the registered owner; Sebyala Stanley and current proprietor; Naiga Joyce. This finding faults the findings of the learned trial Magistrate on this limb.

The law on Wills

I have followed counsel for the Appellant’s arguments on the law on Wills. I entirely agree that counsel for the Defendants in open Court, objected to the admission of the will as an exhibit. However, Court rejected the same and allowed it on record as DEX1. Counsel now referred to Section 101 of the Evidence Act on proof, to argue that the will was not proved to be authentic in Court. Counsel referred Court to; **M B Ramesh D BYLRS versus K M Varuge URS (D) & Ors; Civil Appeal No.1071 of 2006** which holds that;

“A will has to be proved like any other document except that the evidence should additionally satisfy the requirements of Section 63 of the Succession Act; (equivalent to Section 67 of the Evidence Act).

Section 50 of the Evidence Act provides for what amounts to a valid Will.

Section 67 of the Evidence Act provides that if a document is required by law to be attested, it shall not be used as evidence until the attesting witnesses(s), at least has been called for the purpose of proving its execution. If there is an attesting witness alive and subject to the process of the Court”.

The objections raised by the Appellant on the manner and mode used by the learned trial magistrate to admit this document on record as a ‘Will’ is sustained. The entire law above was violated because there was no attesting witness in Court. The will

was not proved in Court and cannot be granted, the evidential value which is timely attested will carries. This ground is as well proved.

Illegality

The will which Court admitted as record in violation of the law is an illegality. The case of **Makula International versus His Eminence Cardinal Wamala Nsubuga [1982] HCB 11**, Court held that;

‘Courts should not condone or enforce an illegality which once brought to its attention works to override all questions of pleadings including admissions made’

They are glaring illegalities on record which go to the root of the case. This makes it unnecessary for this Court to examine the rest of the grounds.

I find that the learned trial Magistrate based on an illegality to make conclusions in her Judgment. This cannot stand and it vitiates the entire trial finds.

I do therefore find that the appeal succeeds on all grounds above.

I do order that the Judgment and orders be set aside and be replaced with a finding for the Appellant.

Costs granted to the Appellants.

I so order.

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Henry I. Kawesa

JUDGE

11/02/2021

11/02/2021:

Babalanga B. for the Respondent present.

Respondents present.

Appellant present.

Court:

Judgment read in the presence of the parties above.

Sgd:

Kakooza Elias

Ag. Deputy Registrar

11/02/2021