THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MPIGI

Civil Appeal No. 03 of 2020

(Arising out of Civil Suit No. 010 of 2018)

1. ST. NOAH JUNIOR BOARDING PRIMARY SCHOOL LTD
2. WALUSIMBI HERBERT
3. MPANGA TONNY (As Administrator of the Estate of the late Kizza Blasio) ……APPLICANTS

VERSUS

KIVIRI JOHN MARK……...……..RESPONDENT

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

Judgment

This is an appeal against the decision of His Worship Kasakya Muhamadi Chief Magistrate of Mpigi at Mpigi delivered on the 07th July 2020.

The appellants being dissatisfied with the said decision lodged the instant appeal whose grounds are as follows;

1. That the trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence and as such reached a wrong decision.
2. That the trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence in holding that the respondent is the rightful owner of the suit kibanja.
3. That the trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence in holding that the appellants have no interest and are trespassers on the suit land.
4. That the trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence in holding that the appellants have no evidence to support that the appellant's/defendant's acquisition and Musisi's occupation of the suit Kibanja whereas not.

5. That the trial court erred in law and fact when it ignored contradictions and inconsistencies in the respondent's evidence thus reaching a wrong decision.

Brief facts:

The respondent sued the appellants and his claim in trespass was for an order and declaration that; the respondent was the rightful owner of the land/kibanja at Njaji (Mawokota) – Muduma measuring approximately 4 acres, vacant possession, a permanent injunction restraining the defendants and their agents, workers from trespassing on the suit land, general damages for trespass, interest on general damages from the date of judgment till payment, costs and any other relief that court may deem fit and just.

It was the respondent's case that the appellants had trespassed on his kibanja and demolished a building under construction thereon which actions constituted continuous trespass.

The appellants on the other hand contended that the respondent does not own land or interests in the area of controversy and that the kibanja they used to own belonged to the 1st appellant who owned the same with bonafide interest courtesy of the late Kizza Blasio formerly a director of the 1st appellant, who relinquished his interest therein to the 1st appellant and as such holds bonafide interests therein.

The 1st appellant further contended that at all material time, it had legally and lawfully utilized and used the suit land for farming and agricultural purposes to date and as such cannot in any way be a trespasser on the land and prayed that the suit be dismissed.

Representation:

Mr. Ndugwa Sekyanda Ivan represented the appellants while Mr. Lwanga Hassan represented the respondent. Mr. Nelson Nerima appeared for Mr. Godfrey Bamwine the registered proprietor of the suit land. Both parties filed written submissions and gave oral highlights of their submissions in open court.

Duty of the first appellate court:

In the case of **Kifamunte Henry v. Uganda, S.C.C.A no. 10 of 1997**, it was held that;

"The first appellate court has a duty to review the evidence of the case, to reconsider the material facts before the trial judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

It is therefore, the duty of the first appellate court to scrutinize and re-evaluate the evidence on record and come up with its own decision keeping in mind that it did not have the privilege of seeing the witnesses as they testified in open court. (See: **Dinkerrai Ramakrishan Pandya v. R. [1957] E.A 336** and **Section 80** of the Civil Procedure Act.).

Resolution:

Ground 4 is discussed separately, grounds 2 and 3 are discussed jointly while grounds 1 and 5 are also discussed jointly.

Ground 4: That the trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence in holding that the appellants have no evidence to support that the appellant's/defendant's acquisition and Musisi's occupation of the suit Kibanja whereas not.

Counsel for the appellants submitted that Musisi's occupation was not controverted by the respondent throughout his evidence. That from the evidence of PW1 the respondent purchased a kibanja from Kasule Musisi as per PEX3 without any evidence of consent from the then registered land lord. That in the circumstances the holding by the chief Magistrate that there was no proof that F. Kasule Musisi occupied the land was erroneous given that the same F. Kasule Musisi is the one who also sold a kibajna properly demarcated to both the appellant's late father as per DEX3. That the sketch map on which Musisi sold to the respondent is different from the demarcations of the agreement Musisi sold to the appellant's late father. That this was also observed at the locus in quo where the respondent surveyed more than what he purchased encroaching onto the appellant's kibanja.

Counsel concluded that the Chief Magistrate wrongly evaluated the evidence and ignored DEX3 and DEX4 which had properly indicated that they owned kibanja interest thereon. That he also ignored PEX2 and PEX3 which indicated that the respondent surveyed land beyond the kibanja he had purchased and included the appellants' kibanja.

Counsel for the respondent on the other hand submitted that the respondent's interest is registered while the appellants' interest is unregistered. That the appellants claim to have bibanja on the respondent's registered land. That respondent bought the suit land from Kabonge Chrisestom in 2009 measuring 4 acres part of land comprised in Mawokota Block 26 Plot 89. That the respondent does not own the entire Plot 89 which measures approximately 11 acres but upon sub division his land was removed and he was allocated Plot 91.

Counsel argued that this case revolves around PEX3 which was admitted in evidence even though it was not translated and relied on **Section 161(2)** of the Evidence Act and the case of **Lamusa Magidu v. Alamanzani Nsadhu, Civil Appeal No. 0020 of 2008** where it was held that;

> *"However, the document had already been admitted in evidence by the trial court. It also seemed to be one on which the case revolved. S.161(2) of the Evidence Act provides that the court, if it sees fit, may inspect the document (produced) in evidence, unless it refers to matters of state, or take other evidence to enable it to determine on its admissibility; and if such a purpose it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence. I believe this provision facilitates this court to order translation of any document before it since it is its duty to re-hear the case by re-evaluating the evidence. I thus ordered Mr. Kalera, a clerk in this court to translate the document into English and it appears on the record as Exh D1A."*

Counsel implored court to order that PEX3 be translated and supported his argument with the authority of **Musisi v. EDCO Ltd (Miscellaneous Application No. 386 of 2013** citing Bowen L.J in **Cropper v. Smith (1883) 26 CH D. 700 at page 711** where he noted that;

> *"It is a well-established principle that the object of the court is to decide the right of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with rights. I know of no kind of error or mistake which if not fraudulent or intended to over reach the court ought not to correct if it can be done without injustice to the other party, courts do not exist for the sake of discipline but for the sake of deciding matters in controversy…"*

Counsel for the respondent argued that the appellants claim that they are tenants on the respondent's land is disputed. That the agreement of acquisition of the suit kibanja from F.K. Musisi, has no deed of donation and there is neither a consent or option to purchase given to the land lord prior to the donation of the kibanja to the 1st appellant contrary to the Land Act and privity of contract. That that notwithstanding PEX3 and DEX3 are both agreements of sale of kibanja at Muduma both by Francis Kasule Musisi, PEX3 dated 12th December 2003 between F.K. Musisi and Kabonge while DEX3 is dated 27th January 2006, between F.K. Musisi & Kiiza Blasio three years after PEX3 was executed. That whereas PEX3 has a sketch map describing the Kibanja, DEX3 does not have but briefly describes the kibanja.

Analysis of court:

I have carefully considered the submissions of both parties while resolving this ground.

Counsel for the appellants argued that Musisi's occupation was not controverted by the respondent and noted that from PW1's evidence he stated that Kabonge purchased a kibanja from Kasule Musisi as per PEX3 without any evidence of consent from the then registered land lord. He also noted that the sketch map on which Musisi sold to Kanonge is different from the demarcations of the agreement Musisi sold to the appellant's late father. That this was also observed at the locus in quo where the respondent surveyed more than what he purchased encroaching onto the appellant's kibanja.

Counsel for the respondent on the other hand contended that the appellants claim to have bibanja on the respondent's registered land was unfounded.

The respondent's counsel argued that in the instant case the suit was hinged on PEX3 which is the sale agreement between Francis Kasule Musisi and Kabonge dated 12/12/2003 on which he was allowed to pay for the land from 1998 to 2003. He went ahead and implored court to have PEX3 translated into English much as it had already been admitted in evidence as per the provisions of **Section 161(2)** of the Evidence Act.

The respondent in his testimony before court averred that he bought from Kabonge as evidenced by PEX2 dated 27/7/2009. Kabonge testified as PW2 and told court that he bought the said land from Ismail Kikomeko and sold to the respondent in 2009. The respondent based his claim on a registered interest that

he obtained from Kabonge. There was no evidence adduced from Kabonge who sold to the respondent stating that he had sold to the respondent a kibanja he bought from Francis Kasule which in this case was also illegal because no evidence was adduced to show that consent was obtained by the then registered proprietor. Kabonge therefore, only sold to the respondent the legal interest subject to the interest of the bibanja holders who he was aware of at all material times as they also tried to sell to him their bibanja interest and he declined. Kabonge did not at any one time challenge the occupancy to the bibanja holders, nor did the previous registered owner.

The appellants on the other hand told court that they derived their interest from the purchase made by Kizza Blasiyo Walusimbi who bought from Francis Kasule Musisi a bonafide occupant as evidenced by DEX4.

It is very clear to me that the two parties have diverse interests in the suit land, one being legal and another being equitable. PEX3 therefore does not play a focal point in this case as far as the respondent's interest is concerned because his claim stems from Kabonge who bought from Ismail Kikomeko legal interest and sold the same to the respondent. The respondent himself who testified as PW1 confirmed this to court that he bought from Kabonge who bought from Ismail and that is how he obtained the certificate of title.

PEX3 is an agreement between Kabonge and Francis Kasule Musisi and has nothing to do with the respondent. I have however, gone ahead and ordered for the translation of PEX3 by Ms. Nakibogwe Phiona an Officer of Mpigi High Court and the same is on record marked as P1.

Kabonge was very particular on which interest he passed on to the respondent and that is not what he bought from Kasule Francis Musisi which in this case is a kibanja.

DW3 Flavia Musisi the widow to Francis Kasule Musisi confirmed to court that her late husband had ever sold to Kabonge a kibanja and that the suit land was sold to Kizza Blasiyo and they had been on the suit land from the 1970s. And that the suit land is different from the land that was sold to Kabonge.

It was also the evidence of Kakande Augustine DW2 that his late father Musisi sold to Kizza Blasiyo Walusimbi the suit land and he was present and signed as a witness on the sale agreement, which is indeed is true as his signature is appended on DEX3. That he is a neighbour to the suit land. He also stated that

his late father Musisi also in 2003 had sold to Kabonge a kibanja which is different from the suit land.

DW2 further stated in his testimony that he found the respondent opening boundaries of his land and he informed him that he had encroached on Kizza Blasiyo's land but he did not take hid.

PW1 told court during cross examination that he was never shown the boundaries of the kibanja (which would be different from the purchase under PEX2) and nor did he meet with Kakande to consult him before the survey.

The appellants through the evidence of their witnesses clearly told court how they obtained their interest from Francis Kasule Musisi which was confirmed by his widow and son. However, the purchase was illegal for lack of consent from the land lord according to **Section 34 (1), (3)** of the Land Act.

I therefore find and hold that even though the trial Chief Magistrate erred in law and fact in holding that the appellants had no evidence to support the acquisition of the suit land. The appellants have no valid claim over the suit land as this court cannot uphold an illegality. **(See: Makula International Ltd Vs. His Eminence Cardinal Nsubuga & Anor. (1982) HCB 11).** Kasule Musisi Francis was a bonafide occupant however, he could not sale to Kizza Blasiyo without the consent of the then land lord.

This ground therefore fails.

Grounds 2 & 3:

2.That the trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence in holding that the respondent is the rightful owner of the suit kibanja.

3. That the trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence in holding that the appellants have no interest and are trespassers on the suit land.

Counsel for the appellants submitted that the trial Magistrate relied on the documentary evidence presented by the respondent and allowed it as exhibits without due regard to the law on admissibility of the same while disregarding DXE3 and DW2 and DW3's testimony yet all the testimony ought to have been considered in determining issues of ownership. That had the magistrate

considered DXE3 he would have arrived at a completely different conclusion. That the appellants did not claim interest in the registrable interest but rather the kibanja interest out of land comprised in Block 26 which was the subject of the dispute. That the certificate of title as obtained by the respondent was in 2011 whereas the suit was filed in 2010.

That the respondent could not have purchased land comprised in Mawokota Block 26 Plot 89 on 27th July 2009 from PW2 when at that time the land was still registered in the name of Ismail Kikomeko, T. Namaganda and Sulaiman Ssesanga. That the respondent went ahead to amend the disputed land to Plot 89 however, there was no proof through a certificate of title of the same. That this was a complete departure from the pleadings by claiming land comprised in Block 26 plot 91 and pleading Plot 89.

Counsel further submitted that the court ignored the evidence of the appellants' witnesses and chose to capitalize on the absence of busulu or consent to sale by the land lord. That however, the previous registered proprietors of land comprised in Mawokota Block 26 Plot 89 from which Plot 91 was curved had never challenged the occupation of both the appellants and the late Musisi.

That the previous registered proprietors of Block 26 Plot 98 have also to date never challenged the sale transaction between the late Kiiza Blazio Walusimbi and the late Musisi. Therefore, the respondent who later purportedly acquired interest in Block 26 Plot 91 issued in 2011 which was not pleaded after the appellants were in occupation and the suit filed cannot now challenge the lawful ownership and occupation by the appellants or their predecessors in title.

Counsel added that during the locus visit it was observed that there were pine trees on the suit land, cultivation was on going by the appellants and this was not challenged by the respondent and that this detailed was not record by the court.

Counsel went on to submit that there was no evidence on record that the respondent had conducted due diligence or consulted the family of Musisi as to whether the kibanja was occupied by any one. That mere presentation of a certificate of title cannot suffice to find the appellants as trespassers.

Further, counsel argued that under the law if one has been on the land for more than 12 years uninterrupted, that person automatically gets lawful possession under the principle of adverse possession of the suit land. That in this case this falls squarely with the occupation and possession of the suit kibanja by DW2's

family before the sale in 2006 to the late Kizza Blasio. Thus, the issue of busulu was in applicable at this stage. That DW3's evidence was indicative of the fact that Musisi's family had been on the suit land for over 30 years uninterrupted by the then land lord. That the previous unchallenged occupation and utilization of the suit kibanja for over 30 years made them lawful/bonafide occupants protected under **Section 29(1), (2)** of the Land Act.

Counsel for the respondent on the other hand argued that Francis Kasule Musisi, the same person who purportedly sold Kibanja to Mr. Kizza Blasio (the 1st Appellant's director then in 2006), a kibanja holder (tenant) on Kabonge Chrisestom's land (land lord) had in 2003 sold the kibanja interest he had on Kabonge's land to him (Kabonge Chrisestom) as per PEX3. Thus, Kabonge merged the kibanja interest with his already existing Mailo interest. That when the respondent started developing his land, Mr. Kiiza Blasio the 1st appellant's director then trespassed on the land by demolishing the entire structure under construction as evidenced by PEX4 and PEX5 claiming he had a kibanja as per DEX3.

Counsel further submitted that had the appellant's director the late Kiiza Blazio conducted some due diligence and consulted the land lord then (Mr. Kabonge) before entering into DEX3. That PEX3 came prior to DEX3 and referred to the purchaser in PEX3 Mr. Kabonge the Land Lord then and the legal requirement required consent or to be offered an option of purchase of the kibanja interest. That this was corroborated by DW2 and DW3 who confirmed that Mr. Musisi had ever sold a kibanja to Mr. Kabonge. That PEX3 and DEX3 describe the same piece of land as going to the parish land and near the forest reserve. That the size of the kibanja is said to be an acre by DW1 yet during cross examination he stated that it was half an acre which is a grave contradiction.

Counsel further submitted that according to the testimonies of DW1, DW2 and DW3, DEX3 did not pass any legal interest to Mr. Kiiza Blasio, the 2nd appellant since he had sold the same to the appellant's predecessor, the mailo owner, Kabonge Chrisestomm and also because it offended the provisions of **Sections 34 & 35** of the Land Act. That the 1st appellant's director had a duty to ask Mr. Musisi who sold to him the land to take the essential step of obtaining the consent of the mailo interest owner Mr. Kabonge and there is no proof that due diligence was conducted. That it was the evidence of DW2 and DW3 that Kabonge was contacted but did not grant consent. And that in case consent is not granted there

are remedies that the aggrieved party can undertake which was not done in the instant case.

Counsel concluded that the claim of being in possession of the land more than 12 years is not sustainable as no title was passed on through DEX3 nor did he occupy the suit land for 12 years before the coming into place of the Constitution of the Republic of Uganda, 1995 to qualify to be a bonafide occupant or adverse possessor. **(See: Hope Rwaguma (The Administrator of the Estate of the Late Dr. Rwaguma B.E) v. Jingo Livingstone Mukasa (The Administrator of the Estate of the Late Yowana Mukasa, Civil Suit No. 508 of 2012).**

Analysis of court:

I have carefully considered both submissions under these grounds in resolving the same.

It is my observation that counsel for the respondent intends to confuse court. I have carefully looked at the record and PEX3 is an agreement between Kabonge Chrisestom and Kasule Francis Musisi under this agreement Kabonge was acquiring a kibanja and not legal interest. The Legal interest Kabonge acquired that he passed on to the respondent was from Ismail and not from Musisi. The respondent cannot therefore argue that Kabonge acquired a kibanja interest on the suit land in 2003 prior to the Appellants whose interest stems from Kizza Blasio who bought from Musisi in 2006. These two piece of land are different in my view following the testimonies of the late Musisi's widow and son. What however, the appellants claim is an equitable interest on the suit land while the respondent claims a legal interest over the same.

Kabonge during the locus visit contradicted himself by telling court that he sold to the respondent 6 acres as opposed to the 4 acres he mentioned in his witness statement. While PW1 told court that he was only given PEX3 by Kabonge yet in his claim he did not claim any kibanja interest initially departing from his pleadings.

The respondent in his evidence also stated that he was never shown the extent of his land physically, going by the submission that he bought off Kabonge's kibanja interest under PEX3. How then was he able to determine the same for purposes of opening boundaries? Yet the appellants knew their portion and had been using the same.

It is my observation that Kabonge's kibanja was neighbouring the suit land according to the locus proceedings.

The appellants in this case indeed bought from a bonafide occupant and the same applies to the transaction in PEX3 between Kasule Musisi and Kabonge. The time PEX3 was executed Kabonge Chrisestom was buying a kibanja. The respondent cannot therefore, claim to have kibanja interest in land purchased under PEX3. This transactions was conducted without the consent of the then Land lord in contravention of the provisions of **Section 34 (1), (3)** of the Land Act. Thus both purchases under DEX3 and PEX3 were null and void for failure to obtain consent from the land lord before sale.

Secondly, the respondent cannot challenge the contents of DEX3 while upholding PEX3 which adduced in evidence that were derived from the same vendor.

In the case of Stephen **Seruwagi Kavuma v. Barclays bank (U) Ltd miscellaneous application number 634 of 2010,** it was stated that one cannot approbate and reprobate at the same time.

This is based on the doctrine of election that nobody can accept and reject the same instrument and that a party cannot say at one time that a transaction is valid and thereby obtain some advantage from it to which it could only be entitled on the footing that it is valid and then turned round and said it is void for purposes of securing some other advantage. **(See: Ken Group of Companies Ltd v. Standard Chartered Bank (U) Ltd and 2 Others, Civil Suit No. 486 of 2007).**

It is my considered view that the respondent bought a different interest from that of the appellants as evidence by DEX3 and PEX2. If the respondent also bought a kibanja from Kabonge, the same was not made known to court since Kabonge stated in his witness statement that he sold to respondent what he bought from Ismail and this was legal interest for which he obtained a certificate of title.

I accordingly find that the appellants illegally bought the suit land for failure to obtain consent of the land lord in contravention of **Section 34 (1), (3)** of the Land Act.

These grounds of appeal hereby fail.

Grounds 1 & 5:

1. That the trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence and as such reached a wrong decision.

5. That the trial court erred in law and fact when it ignored contradictions and inconsistencies in the respondent's evidence thus reaching a wrong decision.

Counsel for the appellants submitted that the respondent admitted to not owning Block 26 Plot 89, however, he tendered in court PEX2 a sale agreement with PW2 reflecting Block 26 Plot 89. Thus, there was a contradiction on PEX3, the police report when the investigations were being conducted which court relied on.

I acknowledge submissions of the respondent under these issues however, I will not reproduce the same.

Analysis of court

I find the two grounds too general and taking this court for a fishing expedition in contravention of **Order 43 Rule 1 (2)** of the Civil Procedure Rules which provides that;

> *"The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively."*

In the case of **Attorney General versus Florence Baliraine, Civil Appeal No. 79 of 2003**, court held that;

> *"Am at loss as what the appellant's complaint is, in ground one. It seems to me that it is now a practice that every memorandum of appeal must begin with such a general ground. Am unable to ascertain from this ground the judge's alleged error in law or fact. Am unable to ascertain how the judge misdirected himself and how he failed to properly evaluate the evidence.*
>
> *Am still unable to ascertain how the error and the misdirection affected the judgment or led to a wrong conclusion…*
>
> *The grounds of appeal must therefore, concisely specify the points which are alleged to have been wrongly decided…"*

These two grounds are hereby struck out.

In a nut shell this appeal fails. It is hereby dismissed and the decision of the lower court upheld. I make no order as to costs.

Right of appeal explained.

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OYUKO ANTHONY OJOK

JUDGE

15/11/2022

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