THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

CIVIL APPEAL NO.0013 OF 2018

(Arising From Masindi Chief Magistrate Civil Suit No. 0069 Of 2011 At Masindi)

MUGUNGU STEVEN (Administrator of the Estate of the late David Musinguzi) :: APPELLANT

Versus

1.KABALEGYE SAM

2. GIDEON MATUWA :: RESPONDENTS

(Appeal from the judgment of His Worship Ochoka Egesa Freddy Magistrate Grade I delivered on the 23rd January, 2018).

BEFORE: Hon. Justice Isah Serunkuma

JUDGEMENT

Introduction

This is an appeal from the judgment of the Chief Magistrates court of Masindi arising from a land dispute regarding ownership of approximately 30 acres of land located at Bisembe village, Ntooma Parish, Bwijanga subcounty, Buyenje County in Masindi District.

The appellant sued the respondents in the LC. 1 court of Kitamba village where matter was resolved in favor of the plaintiffs but the 1st respondent continued to use the land thus the appellant sued in the chief Magistrates court of Masindi which declared the 1st respondent the lawful owner of the suit land having purchased the same from the 2nd respondent.

At the beginning of the trial an exparte Judgment was entered against the 2nd respondent having failed to file a written Statement of defence despite substituted service with an advert in the New Vision Newspaper.

The plaintiff's case was that he acquired 100 acres of land as vacant land in 1988. That later in 1988 he allocated and demarcated off 30 acres of the said land to his son a one Late captain Musinguzi David who was in the army at the time. That Captain Musinguzi died on 17th February, 2003 thus the appellant became the administrator of his estate. That in 2003 after the death of the late David Musinguzi the 1st respondent started trespassing on part of the land measuring 27 acres forming his estate thus the appellant filed a suit in the trial court.

In response at the trial, the respondent's case was that he bought the suit land from the 2nd respondent on 06/09/2003 and executed an agreement before the local council committee and neighbours. That he started using the suit land immediately without any resistance from the appellant until 2010 when the appellant started putting up claims.

At trial the following issues were raised;

1. Who owns the suit land?

2. Whether the sale between the 1st and 2nd defendant was valid.

3. What are the remedies available to the parties?

The trial court entered judgment against the plaintiff holding that the respondent was the rightful owner of the suit land having bought the same from the 2nd respondent and dismissed the plaintiff's suit with costs. Being dissatisfied with the decision the appellant brought this appeal on grounds that;

1. ***The learned trial magistrate erred in law and fact when he failed to properly evaluate evidence on record thereby arriving at a wrong decision in Civil Suit No. 0069 of 2011 that the suit land belongs to the 1st defendant.***

2. ***The learned trial magistrate erred in law and fact when he totally disregarded the appellant's evidence thereby arriving at a wrong decision in Civil Suit No. 0069 of 2011 that the suit land did not belong to the estate of the late David Musinguzi.***

3. ***The learned Trial magistrate erred in law and fact when he found that the 2nd defendant/respondent lawfully sold the suit land.***

4. ***The learned Trial magistrate erred in law and fact when he failed to address himself as to the correct procedure to be followed at locus and when he totally disregarded the evidence and made no observations on visiting locus in quo.***

Representation.

Mr. Lubega Willy appeared for the appellant while Mr. Tugume Moses appeared for the respondent. Court directed parties to proceed by way of written submissions and it is only the appellants who respected this order, the respondent did not comply with the court's directive.

Court's Analysis.

Duty of court

The duty of this court as an appellate court of first instance is to re-valuate the evidence, subjecting it to fresh scrutiny. The court has to be conscious of the fact that it did not have a chance to observe the witnesses, nor listen to them. The law is well stipulated in various cases. ***(*See*; Uganda Revenue Authority vs Rwakasaija Azarious & 2Ors; CACA 8/2007).***

I have dully examined the pleadings, the evidence on record, submissions by counsel both in the trial court and at appeal and the findings of the trial court. I now do find the following in resolution to the grounds raised at appeal;

It is convenient for this court to consider grounds one, two and three together.

The learned trial magistrate erred in law and fact when he failed to properly evaluate evidence on record thereby arriving at a wrong decision in Civil Suit No. 0069 of 2011 that the suit land belongs to the 1st defendant.

The learned trial magistrate erred in law and fact when he totally disregarded the appellant's evidence thereby arriving at a wrong decision in Civil Suit No. 0069 of 2011 that the suit land did not belong to the estate of the late David Musinguzi.

The learned Trial magistrate erred in law and fact when he found that the 2nd defendant/respondent lawfully sold the suit land.

In assessing evidence, the court has a duty to consider all evidence on record as a whole without isolation of even the smallest piece of evidence brought before it. The burden of proof is always on one who asserts a fact, though the plaintiff has an overall burden to proof the case on a balance of probability. (***Sections; 101,102 & 103 of the Evidence Act).***

The appellants are faulting the trial magistrate for having failed to properly scrutinize the evidence on record thus coming to a wrong decision that the 2nd respondent lawfully sold the suit land and that the 2nd respondent is the owner of the suit land.

At trial while resolving the first issue as to who owns the suit land the appellant's /plaintiff's counsel submitted that the suit land forms part of the 100 acres of land that were given to the plaintiff and that he earmarked off 30 acres of land for his son. That further the plaintiff planted bananas on part of the 3 acres that he had earmarked for his son however the same was destroyed while the road was being graded by the government. That the plaintiff brought cogent proof by which he acquired the land from which the suit land was earmarked.

In response to prove ownership of the suit land the respondent/defendant relied on a sale agreement made by the local counsel chairperson Nyakoojo Joseph who testified as DW1.

According to the record at page 16-17, DW1 states that the 1st respondent had been stopped from purchasing the land from the 2nd respondent since the same didn't belong to him by the chairperson at the time however when he did find out the chairperson had been changed, he used that opportunity to have an agreement made for him by the new chairperson.

In resolving this issue, the trial magistrate stated that the defendant had proved that he lawfully bought the land and that a sale agreement had been admitted in court. That an application for conversion of the suit land from customary tenure to free hold tenure was made in 2006 upon which the Inspection Committee found out that the suit land belonged to the 1st defendant. The trial magistrate concluded

by declaring the 1st defendant the legal owner having lawfully purchased the land and has been occupying the same since 2003 to date.

While determining the owner of disputed land keen attention must be paid on the ways through which either party acquired the land. According to the record the plaintiff testified in the trial court that he was given 100 acres of vacant land by the area committee from which he gave 30 acres of land to his late son Musinguzi David. On the contrary the 1st defendant testified that he bought the land from the 2nd defendant and executed an agreement before the local authorities and some residents. That however he did not get any documents showing that the 2nd respondent owned the land. The 2nd defendant despite substituted service refused to come and defend the suit.

What now comes to question is whether the 2nd defendant had a good tittle before he passed on the same to the 1st defendant. The law is very clear as regards passing on title of land; that one cannot pass on better title than they have.

Whereas the 1st defendant relies on an agreement for sale executed before the local authorities and some residents to prove that he bought the land from the 2nd defendant he does not bring any further evidence to show how the 2nd defendant obtained the suit land. So, this brings a question as to whether the 2nd defendant had a good title.

According to page 17of the record during cross examination DW1 stated that there were other people together with the 2nd defendant who had interest in purchasing the land however when they were notified by the then chairperson of the area Baguma about the disputes as regards ownership of the suit land, they gave up their interest. However, that after change in the area leadership the 1st defendant came back and bought the land. This character is not of an innocent man. The refusal to endorse the sale of the suit land by the first Chairperson Baguma would have been an eye opener for the 1st defendant to start thorough investigations as to how the 2nd defendant came to acquire the suit land. It is unfortunate that even after being added as the 2nd defendant the 1st defendant did not make any endeavors to bring him to court to defend his title to the suit land. I agree with counsel for the appellant's submission in citing the case of ***Mudiima Isa and Ors Vs Elly Kayanja and 2 Ors; Civil Suit No. 0232 of 2009*** wherein it was held that ***"if it is shown that a purchaser 's suspicion were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him".***

From the evidence on record the 2nd defendant continued with purchasing of the suit land without getting any document showing ownership of the land even after he had been warned about the transaction by the local council chairperson. In the case of ***Ojwang versus Wilson Bagonza CACA No. 25 of 2002, Byamugisha J*** *(as then was). observed that for one to claim an interest in land, he must show that he or she acquired an interest or title from someone who previously had an interest or title thereon.*

In the circumstances since the appellant was able to show how he acquired his 100 acres from which he earmarked 30 acres part of which is the suit land and yet the 1st respondent failed to show how the 2nd defendant had acquired the suit land, I agree with the appellant that the trial magistrate did not properly scrutinize the evidence on record thereby wrongly coming to a conclusion that the

respondent had legally purchased the suit land and therefore was the legal owner of the same. Grounds one, two and three succeed.

Ground four

The learned Trial magistrate erred in law and fact when he failed to address himself as to the correct procedure to be followed at locus and when he totally disregarded the evidence and make no observations on visiting locus in quo.

The law with regard to visiting of locus in quo is now settled and there are a lot of authorities on what happens at locus in quo.

All evidence and proceedings at the locus in quo must be recorded and form part of court record. It is also important to note that evidence at locus cannot be considered in isolation from the existing evidence recorded in court.

The purpose of locus in quo is to help both parties to clearly indicate to court what their claim is. In matters where the claim is based on boundaries and location parties are given the opportunity to show court the boundaries or location as claimed. In the case of ***John Siwa Bonin versus John Arap Kissa (HCCS No. 0058 of 2007*** where the decision in ***De- Souza versus Uganda (1967) E.A 78***, was re-echoed, court observed that the purpose of visiting locus in quo is to check on evidence given by the witnesses in court, not to fill in gaps to bolster the party's case.

In the case ***Okee & 2 Ors v Otim (Civil Appeal No. 0041 of 2015) [2019] UGHCLD2 (21February 2019) Mubiru J*** held that;

> ***"The purpose of visiting locus in quo is to clarify on evidence already given in court is intended for the parties and witnesses to clarify special features such as grave yards of departed ones on either side, to confirm boundaries and neighbours to the disputed land, to show whatever developments either party may have put up on the disputed land and any other matters relevant to the case. It is during locus in quo that witnesses who were unable to go to court either because of physical disability or advanced age may testify. However, if the trial court finds/or is satisfied that the evidence given in court is enough, then he or she may not visit the locus in quo. Evidence at the locus in quo cannot be a substitute for evidence already given in court. It can only supplement.***
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> ***It should therefore be noted that visiting locus in quo is not mandatory. It depends on circumstances of the case. However, once locus in quo is visited all the relevant procedures must be followed. Witnesses must testify or give evidence after taking oath or affirmation and they are liable to cross examination by the parties and or their advocates.***
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> ***All evidence and proceedings at locus in quo must be recorded and form part of the court record.it is also important to note that evidence at locus cannot be considered in isolation from the existing evidence in court".***

In essence therefore the purpose of locus visit is to check for any variance in evidence given in court and that at locus. Where the evidence in both instances is similar then I find no reason as why court should specifically highlight the same when making its decision.

In the instant case according to the record the trial magistrate did not depart from any procedures at locus. All steps and procedures were followed as per the law. In my view I am unable to fault the trial magistrate for failure to regard the evidence and observations made at the locus in quo visit. Ground, therefore collapses.

Having held grounds one to three in the affirmative, the appeal is allowed with the following orders;

1. The appellant is the rightful owner of the suit land.
2. The sale agreement made between the 1st and 2nd respondent was wrong and invalid.
3. The 1st respondent should immediately hand over vacant possession of the suit land to the appellant.
4. Cancellation of the application for freehold land title by the 1st respondent.
5. Costs of the case both here and in the lower court are granted to the appellant.

I so order.

Dated and delivered on this 31st day of August 2023.

Isah Serunkuma
JUDGE