

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL APPEAL No.031 OF 2023
(Appeal from Wakiso Chief Magistrate Civil Suit No.137
of 2017)

JAMES WANI WOLE ::: APPELLANT

VERSUS

NOWERINA NAMUSOKE ::: RESPONDENT

BEFORE; HON. LADY JUSTICE NALUZZE AISHA BATALA

JUDGEMENT

Introduction;

1. **James Wani Wole** herein after referred to as the Appellant brought this appeal against **Nowerina Namusoke** herein after referred to as the respondent appealing against the decision of His Worship Ssajjabbi Noah Norobert, magistrate grade one Wakiso Chief Magistrate’s Court in civil suit no.137 of 2017 delivered on the 30th day of May 2022 and judgment was entered in favour of the Respondent (defendant in the lower court) against the appellant (plaintiff in the lower court) for; orders that the respondent /defendant was found not to be a trespasser on the

suit land and costs of the suit be provided to the respondent/defendant.

Background;

2. In the lower court, the appellant sued the respondent for trespass on the suit land; land comprised in Busiro block 277 plot 280 at Kawoko, Wakiso district, an order evicting the defendant from the suit land, a permanent injunction restraining the defendant and his agents or servants from further trespassing on the suit land, mesne profits, general damages and costs of the suit.
3. Briefly, the appellant's case was that he purchased part of the suit land and the other part was owned by kavuya ben which land had squatters including Nowerian Musoke the respondent who was occupying part of the suit land that was believed to belong to Ben Kavuya and other squatters included Esero Mukasa.
4. That the appellant agreed with Kavuya Ben after the purchase of part of suit land to first compensate all the squatters on their respective parts of the suit land before sub dividing the same. The respondent was compensated Ug shs 9,000,000 by Kavuya Ben in two installments as per the agreements adduced in court marked PEX3 and PEX4 respectively.



5. The other squatters were compensated by the appellant and after they all vacated the land. The appellant together with Ben Kavuya had to subdivide the land where the appellant took plot 280 measuring 6.3 acres and Kavuya Ben got the remaining part.
6. After the subdivision, Ben kavuya found out that part of the land that belonged to the respondent which he compensated her for formed part of plot 280 which now belonged to the appellant.
7. Kavuya Ben asked the appellant to refund part of the money he had paid to the respondent where the two agreed and a sum of Ugshs 2,000,000 was paid by the appellant to Mr. Kavuya Ben as per the agreement adduced in court marked as exhibit PEX1
8. Later the respondent found out how part of the land she occupied which she was compensated for by Mr Kavuya Ben now formed part of plot 280 owned by the appellant, the respondent forced her way back on the land claiming further compensation for the same.
9. The respondent's case at the lower court in her written statement of defense contended that she received a compensation of Ugshs 9,000,000 from Kavuya Ben for her kibanja interest on plot 279 which belonged to kavuya ben and that her kibanja interest on plot 280 was never compensated, she has been cultivating on the

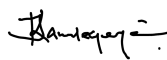
same land and she even constructed a house thereon. Further the respondent stated that she never vacated her kibanja over plot 280 since she had never been compensated for the same but rather, she vacated her kibanja on plot 279 upon being compensated by Kavuya Ben.

10. The trial court entered judgment in favor of the respondent and awarded the reliefs mentioned earlier.

11. Being dissatisfied with that decision, the appellants appealed on the following grounds; -

i) The learned trial Magistrate erred in law and facts when he failed to appreciate the evidence on record that the Respondent herein was fully paid for the whole of her kibanja by Kavuya Ben thus arriving at a wrong decision occasioning a miscarriage of justice.

ii) The Learned Trial Magistrate erred in law and fact when he failed to properly evaluate the over whelming evidence on record that Kavuya Ben paid the Respondent for her whole Kibanja inclusive of the part that was later discovered to be falling on the part owned by the Appellant


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thus arriving at a wrong decision occasioning miscarriage of justice.

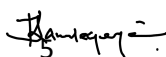
iii) The learned trial Magistrate erred in law and facts in holding that the Appellant failed to do due diligence against the overwhelming evidence that such due diligence was carried out thus occasioning a miscarriage of Justice.

iv) The Trial learned Magistrate erred in law and facts when he misdirected himself that compensation was only for Plot 279 and not plot 280 thus arriving at a wrong decision occasioning a miscarriage of justice.

Representation;

12. At the hearing of the appeal, the appellants were represented by Mr. Kenneth Situma of M/S Emiru Advocates & Solicitors while the respondent was represented by Mrs. Nakiranda Mary of the Legal Aid Project, Uganda Law Society. In arguing the appeal, counsel for the appellant addressed grounds 1 & 2 together then addressed grounds 3 & 4 separately.

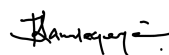
13. The appellant seeks orders setting aside the judgment and prays for orders of the court below;



14. A declaration that the respondent was fully compensated and is a trespasser on the appellant's land, an award of costs both for the appeal and for the trial.
15. The respondent did not file submissions opposing the appeal despite being present in court when directions were issued on when to file submissions by both parties.

Duty of the appellate court;

16. This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the court below to a fresh scrutiny and re-appraisal before coming to its own conclusion. **(See; Nanensio Begumisa and three Others vs Eric Tiberaga SCCA 17 of 2000)**
17. It is a well-settled principle of law that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions, the nature of this duty was put more



appropriately in **Selle vs Associated Motor Boat Co. [1968] EA 123.**

18. An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled, briefly put they are; ***that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.***

19. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. ***(See; Abdul Hameed Saif Vs Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)***

Power of the appellate court;

20. Section 80(i) of the Civil Procedure Act Cap.71 grants the high court appellate powers to determine a case to its finality, providing that subject to such conditions and limitations as may be prescribed in the appellate court shall have the power to determine

a case finally. The appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the act on courts of original jurisdiction in respect of suits instituted in it.

Analysis and determination of the grounds of appeal;

21. In his submissions in support of the appeal while arguing grounds 1 and 2, counsel for the appellant argued that the Appellant purchased 4 acres of the suit land from Augustine Tumusiime as per his witness statement as PW2 upon survey it was discovered that the purchased land was 6.3 acres not 4 acres and part of the respondent's kibanja formed part of the appellant's land.

22. He further states that the defendant was compensated by Ben Kavuya for her whole kibanja that was on plot 279 which belonged to Ben Kavuya. On the 15th April 2011, he paid Kavuya Ben Ug shs. 2,000,000 as compensation for the defendants kibanja which formed part of the appellant's land in the disguise that it belonged to Ben Kavuya not the defendant.

23. The appellant in his submissions in support of the appeal referred to his witness statement as PW2, however upon perusal

of the record of appeal on page 6, court directed that the hearing of the suit was to proceed by oral evidence not by witness statements and the witness statements were expunged off record. This is a fact that is supported by the judgement of the trial magistrate on page 37 of the record, therefore in determining this appeal I will consider what was recorded during examination of the witnesses not the witness statements.

24. The gist of grounds 1 & 2 rotate around the respondent's kibanja which formed part of the appellant's plot 280 upon subdivision and whether the respondent was compensated for the same kibanja by Ben kavuya.

25. The respondent is in occupation of the suit kibanja and she started putting up structures on the same in 2009 with the knowledge of the appellant as per page 42 of the record of proceedings.

26. The appellant was later informed by Mr.kavuya Ben that the respondent was occupying the suit kibanja illegally and in 2011 the appellant paid Mr. Kavuya Ben a sum of Ugshs. 2,000,000 for the suit kibanja which was occupied by the respondent in the absence of the respondent.



27. From the evidence of the plaintiff, it is clear that at the time the appellant paid Mr. Kavuya Ben a sum of Ughs.2,000,000 for the suit kibanja, the respondent was in occupation of the same kibanja with the knowledge of the appellant. Mr Kavuya Ben informed the appellant that he will evict the respondent from the said kibanja.

28. During cross examination of DW1 at page 19 of the record, it is well stated that the respondent has always been in possession and occupation of the suit kibanja even after the appellant had purchased the same before the subdivision had occurred.

29. The appellant at one time expressed his intention to compensate the respondent for the said kibanja but the parties failed to agree on the exact sum for compensation.

30. The trial court conducted a locus visit on the suit kibanja and established that the respondent was in occupation of the suit kibanja and she had structures on the same kibanja, this is evidenced at page 42 of the record of appeal.

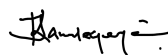
31. All the above evidence takes me to the fact that the appellant paid a sum of Ugshs. 2,000,000 to Ben Kavuya as consideration for the respondent's kibanja without the knowledge of the

respondent then the same appellant later brought an action for trespass against the respondent.

32. This is one of the mischiefs that ought to be cured by due diligence in regards to the purchase of land by parties in land transactions.

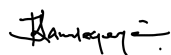
33. The principles of law in regards to due diligence have been well explored by courts and decided upon, I will draw reference to the celebrated decision of **Hajji Nasser Katende vs Vithalidas & Co ltd CACA No.84 of 2003** where court emphasized the value of land property and the need for thorough investigations before the purchase of land, court further noted that land is not vegetables that are bought from unknown sellers. Land is valuable property and buyers are expected to make thorough investigations not only on the land itself but of the sellers before making any purchase.

34. When it comes to the purchase of unregistered land the test is different compared to the registered land, a purchaser of unregistered land who does not undertake lengthy investigations and inquiries of title is bound by equities relating to that land of which he had actual or constructive notice of. **(See; Miza s/o Beki**



Beki (Miza Bhaki) Vs Bruna Ososo Civil Appeal No.026 of 2016)

35. The standard of due diligence imposed on a purchaser of unregistered land is much higher than that expected of a purchaser of registered land.
36. In his testimony during trial, the appellant told court that he paid Mr. Kavuya Ben a sum of Ugshs. 2,000,000 for the suit kibanja occupied by the respondent and Mr. Kavuya Ben told the appellant that he will help him evict the respondent. He further testified that he knew the respondent was in occupation of the suit kibanja where he even had structures and developments thereon.
37. The compensation of Ugshs. 9,000,000 the appellant refers to in his submissions was for the respondent's kibanja that formed part of Mr. Kavuya Ben's plot 279 not the appellant's plot 280, This collaborates with the evidence adduced in court which included the agreement executed between Mr. Kavuya Ben and the appellant (PEX3).
38. The findings of the trial court after the locus visit were that yes it is true the respondent vacated the kibanja on plot 279 that



belonged to Ben Kavuya after being compensated for the same kibanja.

39. Coming back to the findings of the trial magistrate, it is my considered opinion that he rightly held that the respondent had never been compensated for his kibanja that formed part of the appellant's plot 280. Further, the appellant wouldn't have paid Mr. Ben Kavuya for the suit kibanja without considering the interest of the respondent who was in possession and occupation of the said kibanja yet the appellant had knowledge that it is the respondent who had developments and structures on the said kibanja.

40. In the circumstances, having examined grounds 1 and 2 in detail I resolve them in the negative. Grounds 1 and 2 thus fail.

Determination of ground 3.

41. That the learned trial Magistrate erred in law and facts in holding that the Appellant failed to do due diligence against overwhelming evidence that such due diligence was carried out thus occasioning miscarriage of Justice.

42. Counsel for the appellant argued that the appellant purchased the suit land from Augustine Tumusime on the 5/4/2005 and that

it is clear evidence that the appellant conducted due diligence before purchasing the suit land.

43. On perusal of the record of appeal at page 43, the due diligence referred to by the trial magistrate was in respect of the respondent's kibanja that formed part of the appellant's plot 280 not the entire suit land before subdivision and opening up of boundaries.
44. The appellant states in his testimony that he paid a sum of Ugshs. 2,000,000 to Mr. Kavuya Ben as consideration for the kibanja that formed part of the appellant's land which kibanja was occupied by the respondent.
45. The spirit of the trial magistrate decision was that, if the appellant had carried out due diligence to establish who was the owner of the kibanja and how the respondent had structures on the said kibanja he would not have proceeded to pay the consideration of the suit kibanja to Mr. Kavuya Ben.
46. The appellant paid for the suit kibanja subject to the existing equities on the same kibanja which he had constructive notice of as per the law on purchase of unregistered land.



47. Parties should take note that land is a valuable asset that cannot be purchased the same way a person walks to a public market area to pay for a tomato where he will not have to establish how the same tomato got to the market and how the vendor acquired the same tomatoes. In land transactions, purchasers should always carry out thorough due diligence to avoid any later mischiefs over the same land.

48. In the premises, ground three of this appeal is answered in the negative, thus the same fails.

Determination of ground 4.

49. The learned trial magistrate erred in law and facts when he misdirected himself that compensation was for plot 279 not 280 thus arriving at a wrong decision occasioning a miscarriage of justice.

50. Counsel for the appellant submits that the compensation was for the entire respondent's kibanja and that Mr. Kavuya Ben paid the same compensation to the respondent.

51. Upon perusal of the contents of PEX3 and PEX4 which include the compensation agreements between Mr. Kavuya Ben and the respondent they speak to the fact that the respondent received a

total compensation of Ugshs. 9,000,000 for his kibanja which formed part of Mr. Kavuya Ben land and that Mr. Kavuya Ben would proceed to distract the structures which were on the kibanja over his land.

52. This is a fact that was supported by the locus visit conducted by the trial court where it was established that indeed the respondent was not in occupation and possession of the kibanja that formed part of Mr. Kavuya Ben's plot 279 since the same was fenced and occupied by other persons.

53. Arising from the very over whelming evidence that the compensation was only for the respondent's kibanja that formed part of Mr. kavuya Ben's plot 279 not the respondent's kibanja which formed part of the appellant's plot 280, I would find no reason to disturb the finding of the trial magistrate that the respondent was never compensated for his kibanja that formed part of the appellant's plot 280. Ground 4 is answered in the negative, thus the same fails.

54. In this respect, I have had the opportunity to examine the entire record, testimonies and evidence of the parties as pointed out in grounds 1,2,3 & 4 which I have fittingly resolved. I am satisfied

that the trial court arrived at its decision and findings based on very sound plausible legal principles and the learned trial magistrate arrived at his conclusions upon proper assessment of the evidence.

55. That being the case, I would find that the allegation of miscarriage of justice is misplaced and only an attempt to pervert the cause of justice by the appellant.

56. The conclusion of this court is that the trial court correctly arrived at its conclusion when it decided in favor of the respondent/defendant in its judgement.

57. In the final result, I find no merit in this appeal which I hereby dismiss with no order as to costs.

I SO ORDER.



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NALUZZE AISHA BATALA

JUDGE

15th/01/2024

