

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 012 OF 2012

1. NYAKETCHO VANESSA LEONIE

(Appealing through her next friend Elizabeth Tuhaise)

2. GETRUDE LUSWATA

3. THE REGISTRAR OF TITLES.....APPELLANTS

VERSUS

OBOTH OBUYA GERSHOM.....RESPONDENT

**CORAM: HON. MR. JUSTICE RUBBY AWERI OPIO, JA HON. MR.
JUSTICE KENNETH KAKURU, JA**

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

[An appeal against the Ruling and Orders of the High Court of Uganda at Nakawa by the Honourable Lady Justice Faith Mwendha J, in Miscellaneous Cause No. 35 of 2009 dated 28th June 2010]

JUDGMENT OF THE COURT

This appeal arises from the Ruling and order of Hon. Faith E. Mwendha J (as she then was) in Nakawa Miscellaneous Cause No. 35 of 2009 dated 28th June, 2010.

Although the record of appeal and all the proceedings at this court indicate that the appellants are three namely:-

1) Nyaketcho Vanessa Leonie,

(Appealing through her next friend Elizabeth Tuhaise)

2) Gertrude Luswata

3) The Registrar of Titles, only Nyaketcho Vanessa Leonie filed an appeal in this Court.

In this Judgment we shall therefore only refer to one appellant.

Background

The facts giving raise to this appeal are scanty. Some facts are in issue as the parties do not seem

to have agreed on them. What is undisputed is that Mrs. Gertrude Luswata was the registered proprietor of the land comprised in mailo register, Kyadondo Block 220 Plot 1465 situated at Kiwatule and measuring approx 0.102. Hectares on 1st November, 2006.

On 12th November, 2007 she transferred that land to the appellant a minor, at the time.

On 27th March, 2007 the respondent brought a suit at the High Court of Uganda *vide High Court Civil Suit No. 175 of 2007*, against Mrs. Gertrude Luswata. In that suit the respondent's claim was for vacant possession of the land comprised in Mengo Kyadondo Block 220 Plot 1465 situated at Kiwatule (herein after referred to as the 'suit land').

The respondent claims in the plaint to have purchased part of the suit land in September 2006 (the plaint reads 2007) at shs. 10,000,000/=. The respondent also claims to have paid to the said Mrs. Luswata shs. 7,000,000/= in 2 instalments of shs. 5,000,000/= and shs. 2,000,000/=. He, claims that the respondent failed to turn up to collect the balance of shs. 3,000,000/=. The respondent sought a number of reliefs among which are the following:-

- a) *A declaration that he is the owner of the suit land.*
- b) *A declaration that the 2nd appellant was a trespasser on his (respondents land).*
- c) *Mesne profits, General exemplary and punitive damages.*

Mrs. Luswata filed a written statement of defence contending that the respondent had breached the contract of sale when he failed to pay the full purchase price. She stated that she had already sold the land to the appellant. She contended further that she had refunded to the respondent the 7 million shillings paid on the agreement of sale, and annexed to written statement of defence bank deposit slips contending that she had banked the money on the respondent's account. Mrs. Luswata also indicated in her written statement of defence that the appellant had become the registered proprietor of the suit land.

The High Court Registrar transferred the case file to Nakawa Chief Magistrates Court for trial. The case was heard by George Obong Magistrate Grade I who found for the respondent then plaintiff. He made a declaration that, the respondent was the rightful owner of the suit land having acquired it by purchase. The Judgment is dated 27th August, 2009.

On 10th November, 2009 the respondent filed at the High Court Nakawa, a Notice of motion under Section 177 of the Registration of Titles Act (RTA) and Section 99 of the Civil Procedure Act (CPA), seeking the following orders;-

- a) *Subdivisions of 12 decimals be made without using the mother title Block 220, Plot 1465***

Land at Kiwatule Kyadondo in respect of the Suit Property in favour of the applicant by ordering the Registrar of titles at Kampala and district surveyor at Wakiso to carry out the said subdivision. (SIC)

b) Delivery be made by putting the applicant to receive delivery/possession of the said Suit Land of 12 decimals [after subdivision] at Kiwatule referred to as the suit land. (SIC)

The motion is supported by the affidavit of the respondent's Advocate a one Justine Oboth.

The motion was registered at High Court Nakawa as Miscellaneous Cause No. 35 of 2009. The appellant and the Registrar of titles were named as respondents in that motion. The matter was heard and determined by Hon. Justice Faith Mwendha J (as she then was) and she allowed the application and made the following orders.

20 plot 1465 land at

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Kiwatule Kyadondo in respect of the suit property in favour of the applicant by ordering the Registrar of Titles at Kampala and district surveyor at Wakiso to carry out the said subdivision.

1. Delivery be made by putting the applicant to receive delivery/possession of the said suit land of 12 decimals after division at Kiwatule referred to as suit land.

2. 1st and 2nd Respondent Pays Application Cost of the application.

The appellant being dissatisfied with the said order filed this appeal on the following grounds

1. The learned trial Judge erred in Law and fact when she granted consequential orders in Miscellaneous Cause No. 35 of 2009 to enforce the trial Magistrate's orders in Civil Suit No. 169 of 2007 against the Appellant when the Appellant had not been a party to the said original civil suit No. 169 of 2007.

2. The learned trial Judge erred in law and fact when she gave orders to impeach the certificate of title of the Appellant when no particulars and evidence of fraud had been pleaded and proved against the Appellant.

3. The learned trial Judge erred in law and fact when she failed to hold that the Appellant, as a minor, could not be sued in her individual capacity without the authority of her next friend.

- 4.** *The learned trial Judge erred in law and fact when she failed to hold that the vendor of the suit land had no proprietary interests in the suit land to pass to the Respondent at the material time of the sale.*
- 5.** *The learned trial Judge erred in law and fact when she failed to hold that the Respondent was in breach of the sale agreement of the suit property to the vendor.*
- 6.** *The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thereby coming to wrong conclusions.*

Both the appellant and the respondent filed detailed conferencing notes at this court. When this appeal came up for hearing **Mr. Aggrey Bwire** appeared for the appellants while **Mr. Nester Byamugisha** appeared for respondent. They both sought and were granted leave to adopt their conferencing notes as submissions. In addition they addressed the court orally.

In the resolution of this appeal we have considered both the written and oral submissions.

The appellants case

On ground 1 it was contended for appellant that the learned Judge erred when in High Court Miscellaneous No. 35 of 2009 she granted consequential orders against her when she was not a part to Civil Suit No. 169 of 2007 at the Nakawa Chief Magistrates' Court.

That at the time the original suit was filed on 28th March, 2007 the appellant was already the registered proprietor of the suit land.

That the respondent had never recovered land or any interest in land from the appellant the registered proprietor and as such the learned Judge erred when she impeached her title under Section 177 of the RTA.

On ground 2 counsel submitted that the appellant's title could only be impeached under Sections 59 and or 176 of the RTA for fraud attributed to her. That fraud was neither pleaded nor proved against her. That fraud could not have been pleaded and proved against her by affidavit evidence in High Court *Miscellaneous Cause No. 35 of 2009*, which

application was not a suit to impeach title.

On ground 3 it was contended that the learned Judge erred when she allowed a suit to proceed against the appellant a minor at the time in her individual capacity without the authority letter of her next friend, thereby offending Rule 2(1) of order 32 of the *Civil Procedure Act*.

On ground 4 and 5 counsel contended that the Mrs. Luswata could not have been sued in respect of land that she had no proprietary interest in. The sale agreement between her and the respondent was invalid having been executed on 7th September, 2006 before she became registered proprietor on 1st November, 2006. In the alternative that the respondent breached the sale agreement when he failed to complete the payment of the purchase price. And that the money paid on that contract was refunded to him by the Mrs. Luswata and that evidence of the refund was on record.

On issue 6 learned counsel argued that the learned Judge failed to properly evaluate the evidence on record and came to wrong conclusion on a number of issues. We have found no reason to reproduce the details of the respondents' arguments on this ground. We shall revert to it later in this Judgment.

He asked court to allow the appeal.

The Respondents case.

On ground one counsel for the respondent argued that since the issue raised therein was not raised at the High Court it was not open for the appellant to raise it on appeal.

He argued that the learned Judge had correctly found that the appellant could not have been entered on the register. On 12th February, 2007 when the sale agreement was executed on 8th August, 2007 in respect of the agreement between the 1st and 2nd appellants.

He argued that the suit from which the proceedings arose was first filed at the High Court on 28th March, 2007 before the appellant became fraudulently registered on the certificate of title of the suit land. That accordingly she never became registered on that land as proprietor.

On issue 2 counsel argued that the learned Judge was correct when she found that the registration of the appellant on the certificate of title was fraudulent and that the appellant had

no title capable of being impeached.

On ground 3 counsel submitted that the issue of the capacity of the respondent was never argued before the learned Judge and as such she could not be faulted for not deciding on it. The matter was neither pleaded nor argued in the court below.

On ground 4 counsel contended that the learned Judge was correct when she found that the appellant did not have proprietary interest in the suit land. That by the time the 1st respondent was registered as proprietor the respondent was already a beneficial proprietor /owner of the suit land, the 2nd respondent having passed on to him her equitable interest.

On issue 5 counsel argued that the ground was misconceived as the vendor Gertrude Luswata did not appeal the decision of the judge to this court. The appellant was not party to the agreement of a sale between the respondent and Mr. Luswata.

On ground 6 counsel went on at length to show that the Judge had properly evaluated the evidence on record and that she had come to the correct conclusion.

He asked court to dismiss the appeal.

Resolution of grounds of appeal

We have carefully listened to both counsel in his appeal. We have also perused the court record, the conferencing notes and the authorities cited to us.

The appellant faults the learned Judge for having issued consequential orders against her which orders were arising from Nakawa Chief Magistrates' Court *Civil Suit No. 169 of 2007* which she was not a party. In the result she contended she was condemned unheard and was deprived of her property in contravention of the law.

The background to this appeal has been set out in detail earlier in this Judgment. We shall not repeat it here. It is not in contention that the appellant herein was not a party to High Court *Civil Suit No 175 of 2007* which became Nakawa Chief Magistrates' Court *Civil Suit No. 169 of 2007* upon being transferred from the High Court to Nakawa Chief Magistrates' Court. The parties to that suit were Oboth Obuya Gershom, as *plaintiff and Ms. Gertrude Luswata as defendant. It is undisputed that the plaint in that suit was lodged at the high court registry on 28th March, 2007.*

It is also not in dispute that the appellant in this appeal was registered as proprietor of the suit land on 12th March, 2007 a few weeks before the suit from which this appeal arose was filed. The certificate

of title in respect of the suit land was annexed to the written statement of defence. It indicates the date when the title was registered in the appellants name. In her written statement of defence the Mrs. Luswata, the defendant in the original suit clearly stated that she had sold the land to the appellant. No attempt was made by the respondent to add the appellant as a party to that suit.

The Magistrate who heard and determined the suit did not inquire as to why the appellant had not been made a party to the suit having been named in the written statement of defence as the registered proprietor. He went ahead to issue orders cancelling her title when it was clear from the title which was on court record that the appellant had been registered as proprietor before the suit had been filed in that court. Had the learned Magistrate observed the above, he would have found that the suit against the defendant Luswata was misconceived in respect of recovery of land since at the time that suit was filed Luswata was no longer the registered proprietor . He would have found that the suit in these circumstances could only have been maintainable on the basis of contract of sale but not for recovery of the land.

The learned Magistrate could not have issued the orders that he did, effectively depriving the appellant a registered proprietor of her property without according her an opportunity to be heard.

We find that the decision of the learned Magistrate was made in contravention of the Rules of natural Justice which demands that no person shall be condemned unheard.

In the case of Caroline Turyatemba and 4 other vs Attorney General and other (Constitutional Petition No. 15 of 2006)

The Constitutional Court held that;-

“The right to be heard is a fundamental basic right. It is one of the cornerstones of the whole concept of a fair and impartial trial. The principle of "Hear the other side" or in Latin: "Audi Alteram Partem" is fundamental and far reaching. It encompasses every aspect of fair procedure and the whole area of the due process of the law. It is as old as creation itself, for even in the Garden of Eden, the Lord first afforded a hearing to Adam and Eve, as to why they had eaten the forbidden fruit, before he pronounced them guilty: See R V University of Cambridge [1723J1 Str. 557 (Fortescue J.) This principle is now of universal application. Article 10 of the Universal Declaration of Human Rights, 1948, Article 6 (I) of the European Convention on Human Rights and Fundamental Freedoms, 1950, and section 2 [2] of the Canadian Bill of Rights, as well as Article 7 (1) (c) of the African Charter on Human and Peoples' Rights, all provide for this right.

In Uganda, the traditional saying, that one ought not to decide a dispute between a boy and a girl without first having heard the case of each side, goes to show that even our forefathers in Uganda also embraced and practiced this universal principle of justice. The principle is currently constitutionally provided for in Uganda by Article 28 (I) of the Constitution. This Article provides that in the determination of civil rights and obligations, or any criminal charge, one is entitled to a fair, speedy and public hearing before an adjudicating body established by law. This right is so fundamental that Article 44 of the Constitution prohibits any derogation from its enjoyment.

*The concept of a fair and impartial trial involves a hearing by an impartial and disinterested tribunal. This tribunal affords to the parties before it, a hearing before it condemns, proceeds upon inquiry and results in judgment, only after consideration of evidence and facts as a whole. Fair hearing involves the right to present evidence, to cross-examine and to have findings supported by evidence: See: Black's Law Dictionary (6th Edition) and also Supreme Court of Uganda Election petition No. 04 of 2009: *Bakaluba Peter Mukasa v Nambooze Betty Bakireke, (Judgment of Katureebe, JSC).*” See also *Marko Matovu and others versus Senviri and Another*[1979] HCB 174 and *Bon Holdings LTD vs Busoga Growers Co-operative Union Ltd (Court of Appeal Civil Appeal No 224 of**

2013) Unreported.

A decision made in contravention of the rules of natural justices is null and void *abnitio* and has no effect.

We hold that the decision of the Magistrate in *Civil Suit No. 169 of 2007* was null and void and of no effect. No consequential orders could arise there from.

Ground one therefore succeed.

As this ground disposes the whole appeal, we find no reason to delve into the other grounds.

We therefore make the following orders

- 1) *The Ruling and order of the High Court in HC.MC No. 35 of 2009 is hereby set aside.*
- 2) *The Judgment and decree in Nakawa Chief Magistrates³ Court Civil Suit No 169 of 2007 are hereby set aside.*
- 3) *The respondent shall pay the costs at this Court and at both courts below.*

Dated this 26th day of November 2015

HON. JUSTICE RUBBY AWERI OPIO

JUSTICE OF APPEAL

HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL

HON. JUSTICE GEOFFERY KIRYABWIRE

JUSTICE OF APPEAL