THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. DR. MFP 6/90

(Original Fort Portal Civil Suit No. MFP 26/83)

HUSSEIN JUMA :: APFELLANT

— VERSUS —

RAPHAEL BWAMI :: RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

JUDGMENT

This is an appeal against the decision of the learned Chief Magistrate Fort Portal whereby he dismissed the appellant's claim he filed against the respondent seeking for orders for arrears of rent mesne profits and vacant possession of the suit premises situated at Plot No. 44 Bukwali village Fort Portal Municipal Council.

The appellant's case was that he is the registered owner of the house and land plot No. 44 situated at Bukwali village and the respondent was his tenant. He started renting the said premises in 1978 at the monthly rent of Shs. 1,000/=. The defendant paid rents for the year 1979. In 1980 he was harassed by the then government. He was accused of supporting the guerillas. As a result he left the country and went into exile. He left the respondent as his tenant in the suit premises and at the time he left he had received the rents. The respondent used to pay the Municipal council rents directly in the names of the appellant. On his return from exile in 1982 he contacted the respondent and demanded for arrears of rent but the respondent went on dodging him asking for more time in which to meet the outstanding rents. Pressed for rents the respondent claimed he had purchased the house and land and he resisted the efforts of both the

appellant and enforcement officer PW.2 to evict him from the suit premises or to force him to pay for arrears of the rents.

The respondent's case on the other hand was that he hired a house near that of the appellant at a place called Kasusu Village. One day he told the apellant as he wanted to buy land and a house of his own. The appellant told him as he had a house at Bukwali and land that he wanted to sell. Matters were discussed between the parties and both agreed to proceed to Bukwali and view the suit premises. They met a neighbour to the suit premises and some people occupying the house and using the land. The appellant told those people as he had sold the house and land to the respondent. It was the respondent's case that one man had deposited Shs. 70,000/= to the suit premises and remained the balance of Shs. 30,000/=. The said prospective buyer failed to pay the balance and as a result the deal misfired. The respondent was told to pay Shs. 100,000/= for the suit premises. He did not have the money. He had a landrover which he wanted to give to the appellant instead of 100,000/ Shillings. He started work on the landrover by repainting it. At that time the appellant left for Kenya. When he returned he abandoned the original idea of getting the landrover at the price for the house and land. The appellant told him he had a buyer who would pay him Shs. 100,000/=. He asked the appellant to allow him stay in the house because he had a large family of 14 people. Later he sold the landrover and realized Shs. 100,000/=. He put that money into the dirty bag and handed it to Disson and both proceeded to Kasusu and handed the money to the appellant which the latter started counting. The appellant promised to take him on the following morning to Fort Portal Municipal Council and complete the transfer of the premises in his names. The appellant did not turn up. Later the appellant wanted to return the purchase price of Shs. 100,000/= to him but the respondent refused to accept the money because he had stayed in the suit premises for three years. He continued paying for the rents to the Municipal council in the names of the plaintiff/appellant**.**

In his memorandum of appeal the appellant listed about seven grounds:- viz

1. That the learned Chief Magistrate erred in law when he shifted the evidential burden from the respondent to the appellant.

2. That the learned Chief Magistrate erred in law when he decided that evidence of purchase of land could be by mere presumption.

3. That the learned Chief Magistrate erred in law in failing to scrutinize the evidence of both parties in the case and evaluating it before coming to his decision.

4. That the learned Chief Magistrate erred in law in deciding for the respondent when the evidence was so overwhelmingly in favour of the appellant.

5. That the learned Chief Magistrate did not address the issue which fell for determination.

6. That the learned Chief Magistrate erred in law when he introduced extraneous matters into his judgment.

7. And finally that the decision was against the weight of evidence adduced.

Before proceeding to consider the appeal I am mindful of the fact that this being a first appeal it is the duty of this court to submit the evidence, to fresh and exhaustive examination and evaluation and to make its own finding as well as draw its own conclusion in order to determine whether the findings and judgment of the trial court can be supported. In so doing it is a rule of caution that this court must make due allowance for the fact that the trial court unlike this court had had the advantage of hearing and seeing the witness an opportunity which this court lacks. See **Management Training Advisory Centre vs. P.K.IKANZA Civil App. No.6 of 1985 U.C.A. Peters vs. Sunday Rust 1958 EAU 24, Sella vs. Associated Motor Beat Co.1968 EA 123.**

On the first ground of appeal that the learned Chief Magistrate erred in law when he shifted the evidential burden from the respondent to the appellant the learned counsel submitted that the learned Chief Magistrate correctly observed that the facts in issue in this case and the only issue was whether or not the defendant/respondent occupied the premises as a tenant paying a monthly rent or whether he purchased the premises outright and became the owner. He submitted that that was the issue in this case and that the learned Chief Magistrate properly directed himself. He submitted that in a puzzling way he turned around and stated that the plaintiff had thus to prove

that the defendant was a mere tenant and not a purchaser and thus shifted the evidential burden on the plaintiff/appellant. The respondent on the other hand submitted that he was not a tenant but a purchaser of the suit premises. He maintained this throughout his evidence.

The appellant adduced evidence to prove that he was the undisputed Registered owner of the suit premises and the respondent his tenant and had availed to the trial court exhibits, P1 and II and receipts for rents he paid to the Municipal council as documentary evidence of that ownership of the suit premises.

In the absence of fraud the court cannot go behind the fact of registration. See **Figuerede vs. Nanji 1962 EA 756, Okillo v Uganda National Board C. App. No.12 of 1987 Supreme Court of Uganda** and since the respondent was asserting that he was not a tenant but a purchaser of the suit premises. Then the evidential burden of proof shifted on him to prove his assertion by producing legally recognized evidence of the purchase of the suit premises and counter the allegation that he was not a tenant of the suit premises paying monthly rent of Shs. 1000/=. In the end the respondent failed to discharge that burden and I am of the opinion that the first ground of appeal succeeds.

On the second ground of appeal that the learned Chief Magistrate erred when he decided that the evidence of purchase of land could be by mere presumption. The learned counsel referred me to section 40 of the law of property 1925 an English Act, which is relevant to the present cases He submitted that agreement for sale of land must be in writing. He submitted that in law such transaction cannot be recognized as that between the parties. In his evidence the respondent testified that he bought the suit premises but had not yet had the suit premises transferred into his names and also replied in cross examination that the appellant refused to write out the agreement for him. **By the Law of property Act 1925 S. 40 Megarys Manual of the Law of Real Property 6th Edition D.J, Hayton P. 136.** It is provided that no action may be brought upon any contract for sale or other disposition of land or any other interest in land, unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

In the instant case there was no written agreement that the suit premises were sold to the respondent. The latter could not therefore claim when sued for vacant possession that he had indeed purchased the suit premises. Indeed the witnesses called by him in support of his assertion none recognized any sale of the said land and house between the parties. DW2 saw the respondent and the appellant at the 1atters suit premises. The appellant talked to her and told her that Hussein had sold the land to the appellant and that the latter would be her neighbour. DW2 never witnessed the respondent give money to the appellant. DW3 accompanied the respondent to the home of the appellant and held a dirty bag containing money for the purchase of the land. He did not know how much money was in the bag and after handing over ceremony left for home. DW3 did not knew how much money was given to the appellant but only heard rumors that it was Shs. 100,000/=. I further found no convincing reason why that money was so concealed. If the trial Chief Magistrate had scrutinized this, he could have found there was a foul play here. The evidence of DW4 and DW5 did not assist the respondent either. DW4 used to stay with the appellant's workmen in the suit premises and was directed to call a certain woman whom he failed to trace and the appellant told him to tell the woman to stop cultivating the land in dispute because it was no longer in the names of the appellant of course that was untrue in the light of the evidence of PW.2 an enforcement Officer, Fort Portal Municipality. He said that the suit premises were registered in the names of the appellant Ex. P.1 and Ex. P.2. From the testimonies of the defendant/respondent DW3, DW4 & DW5 it is hard to say whether there was any contract of sale of land executed or executory between the respondent and appellant.

The respondent did put in evidence exhibit P. III and P. IV as tenancy agreement for the suit premises in his names. P.W.2 testified that those documents were not genuine ones. They were not accompanied by receipts and names of the appellant. P.W.2 clarified that if there were no documents of sale or inheritance they keep on receiving the dues from the owner until a document was produced. P.W.2 continued that a tenant had no access to such tenancy agreement exhibits P.III and P. IV unless he had paid the transfer fee obviously the premises had never been transferred into the respondent's names. He was trying to forge exhibits P.III and P.IV. If there was any exchange of monies at all between the parties, that was between the appellant and the respondent, alone a fact denied by the former.

On the other hand the respondent stated that the appellant wanted to return the 100,000/= Shs. to him which the former had given to the latter as being the price for the said suit premises but the respondent refused to get the money back because he had been in the house for 3 years. According to the records there was insufficient evidence to prove that he never purchased the suit premises and therefore there was nothing to transfer to him no money ever changed hands. Assuming that he had purchased the premises verbally and the same had not been transferred in his names it was in my opinion unwise for him to have refused to get his money back as money had and received by the appe1lant for consideration that had failed since he did not carry out any improvement on the property.

All in all it is the considered opinion of the court that the learned Chief Magistrate erred when he found that the evidence of purchase could be by mere presumption because even that presumption was never proved. This ground of appeal therefore succeeds.

The fourth ground of appeal was that the learned Chief Magistrate failed to scrutinize the evidence of both parties before coming to his decision. This ground of appeal has been ably dealt with in the above ground and I need not repeat myself here.

The learned Counsel for the appellant argued grounds five, six and part of seven all together.

The fifth ground was that the learned Chief Magistrate erred in law in deciding for the respondent when the evidence was so overwhelming in favour of the appellant. This ground of appeal was covered up when evaluating the evidence in the first ground of appeal.

I need not repeat myself here**.** The respondent had maintained all throughout that he was not a tenant in the suit premises but a purchaser and therefore owner of the suit premises.

The sixth ground of appeal was that the Chief Magistrate did not address the issue which fell for determination. The learned counsel submitted that the learned Chief Magistrate was so over taken by zeal that he did not see the Wood for the trees. That he talked about the plaintiff brother Abdul and about the landrover and gave them a prominence for exceeding the testimony of the appellant. The issue in this case as found by the trial court and this court is whether the respondent bought the suit premises or whether he was a mere tenant. The evidence as testified to

by the appellant and the only witness called by him PW.2 showed that the appellant was still the registered owner of the said premises and that there had never been any transfer of the premises to the respondent and also that no agreement far such sale was ever reduced in writing. I am of the view that had the learned Chief Magistrate addressed himself to the issues as framed by the court he would have came to a different finding.

The learned counsel then hinted on the extraneous matters referred to by the learned Chief Magistrate in his judgment. This was a separate ground of appeal. He did not unfortunately elaborate on this and I failed to find as indeed did Mr. Mugamba the extraneous matters referred to by the trial Chief Magistrate in his judgment. This ground of appeal fails and did not merit any consideration by this court.

In conclusion the facts of this case are somehow similar to the case of **Ashey Musoke Bagirawala v George William Joggo (1976) HCB p.26 before Manyindo J** as he then was. In that case the plaintiff left with the defendant a house for which the latter was to collect rents and make payment to the owner of the land on which the house was situated. The defendant did as instructed, but then maintained that the house was thereby passed to him alone or jointly with plaintiff. It was held that since there was never any transfer of the property to the defendant, it still remained solely that of the plaintiff who was entitled to its vacant possession. The plaintiff was also entitled to the rent for the period between the conversion and the date of judgment, mesne profits from the date of filing the suit till surrender of possession of the property would also be paid to him.

The defendant on his part was entitled to reimbursement for the improvement done on the property.

Turning to the instant case and from what transpired above

1. The suit premises land & house remain the property of the appellant who is entitled to its vacant possession. The respondent has thereby to be evicted from the suit premises within reasonable time and I So order.

2. The appellant would be entitled to the rents for the period between the conversion and the date of judgment.

3. And mesne profits from the date of filing the suit till surrender of possession of the property would also be paid to him.

There was no evidence of any improvement done on the property by the respondent. Therefore the respondent was awarded nothing. The appeal is allowed with costs here and below.

I.MUKANZA
JUDGE
29/1/91