THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CASE NO: HCT-00-CV-CA-0078 OF 1998

AHMED KATENDE SALONGO :::::::::::::::::::::::::: PLAINTIFF

VERSUS

HAJI YASIN KIKOMEKO & ANORS ::::::::::::::: DEFENDANTS

BEFORE: HON. MR. JUSTICE J.B.A. KATUTSI:

JUDGMENT:

In the city of Kampala, at place called Bakuli, there is a piece of land known and described as Block 4 plot 663. Part of this land was later divided into plots 719 and 721. Appellant who hereafter will be referred to as plaintiff sued both respondents hereafter referred to as defendants for an eviction order from these plots. In a judgment that turned out to be a complete fiasco the Learned Trial Magistrate entered judgment supposedly in favour of the plaintiff in the following terms:

> "(a) No eviction order is awarded to the plaintiff since he is not the lawful proprietor of the suit land.

(b) Special damages of shs.900,000/= as the purchase price of the suit land.

(c) General damages of shs.500,000/=.

(d) Costs of the suit.

From this quagmire of a judgment both parties appealed to this court. At the hearing it was agreed by both counsel that the appeal that was filed first Appeal while Appeal No. 79/98 be treated as Cross-Appeal. This judgment therefore will be in line with that consensus.

Plaintiff sued both defendants in trespass praying for an eviction order and general damages for trespass. His case was briefly that he by an agreement date 20th May, 1993 purchased the suit property from Norah Twemanye in the presence of John Kizza, Jane Nabwemi and George Kamya Kirabira for shs.900,000/=. Both defendants without his permission or consent built a building on this land. He requested them in writing to vacate the premises but no avail. He examined John Kizza who was the registered proprietor of the premises at the time of sale. John Kizza testified that he was the registered proprietor by virtue of letters of

Administration and that the suit premises went to Norah Twemanye as a beneficiary who later sold it to the plaintiff. After the sale he signed a transfer instrument in favour of the plaintiff who thereafter became the registered proprietor. Jane Nabwemi testified that Norah Twemanye was her elder sister and that she had sold the suit property to the plaintiff and signed for him an agreement of sale. Another witness for the plaintiff was George Kamya Kirabira who said he was a brother of Norah Twemanye who sold the suit property to the plaintiff. He signed the purchase agreement on the side of Norah Twemanye. Later Norah Twemanye and the first defendant approached him with a request that he joins them to disposes the plaintiff of the suit property. He refused us to do so would have been dishonesty.

When it came to the case for the defendants the record of the lower court became a complete mess. This first defendant for reasons best known to the trial magistrate became DW5 while the second defendant became DW3. One wonders whose witnesses they were. Be that as it may, the first defendant testified that he bought a house and a Kibanja from the second defendant and a piece land from Norah Twemanye. Later he placed a caveat over the suit premises. He later found that dispute the caveat plaintiff had had the caveat removed and got himself registered as the proprietor. He went to his lawyers who had the caveat reinstated. The

second defendant testified that his later mother was the daughter of Simeon Mpindi the original proprietor of the suit land. His mother had houses on this land. When Mpindi died that part where his mother had house was given to her. After his mother's death he succeed to these houses but not to the land on which the houses stood which went to Norah Twemanye. As far as he was concerned this land was still with Norah Twemanye, as she had never sold it.

Norah Twemanye who turned out to be a rascal testified that after the death of Mpindi, Kizza became his successor in title. As a successor in title John Kizza distributed the estate to the beneficiaries but not fairly. She succeeds to the share, which had gone to Joweria Nakamanyiro the mother of the second defendant. She sold part of the land to a lady called Akiki. She swore she did not know the plaintiff and never to have sold land to him. She said that Yasin Kikomeko the first defendant was a caretaker of the suit premises. However in cross-examination the true image of a rascal in her emerged. She said that John Kizza had distributed the land but later sold it. She agreed that the signature on the agreement presented by plaintiff resembled hers but disowned it. She went on to admit that Jane Nabwemi had sold the land and passed shs.500,000/= to her which she accepted. She however said she did not know the person to whom Jane Nabwemi had sold the land and that the said Jane Nabwami passed the money to her and told her that she

had sold part of the land. There were two witnesses who said they were the LC officials who had entertained the dispute, which they resolved in favour of the defendants. Then there was Opio Robert who described himself as the Registrar of Titles. His testimony was that though plaintiff had become the registered proprietor of the suit property, the High Court had issued an order directing that caveats, which had been removed, be reinstated. He read this order as an order that the certificate of Title be cancelled and did cancel the Titles accordingly. On that evidence the learned trial magistrate wrote a judgment, which she said, was in favour of the plaintiff. She wrote:

> "Judgment is entered for the plaintiff and the following awards are made.
>
> (a) No eviction is awarded to the plaintiff since he is not the lawful proprietor of the suit land.
>
> (b) Special damages of shs.900,000/= as the purchase price of the suit land.
>
> (c) General damages of shs.500,000/=.

(d) Costs of the suit. Talk of awarding Air. This was classic. Who was to pay the purchase price since Norah Twemanye was not a party to the suit? If plaintiff was not the lawful proprietor how could he get general damages and costs? Both parties appealed and from the circumstances surrounding the both parties were justified. Plaintiff's grounds of Appeal are as follows.

1. The Learned Trial Magistrate erred when she held that the Appellant was not the lawful proprietor of the suit land where as she had found that the Appellant had lawfully bought the suit land.

2. The Trial Magistrate erred when she declined to make an eviction order against the respondent upon finding that the respondent had no lawful interest in the suit land.

3. The Trial Magistrate erred when she ordered that the purchase price of shs.900,000/= as special damages be refunded to the Appellant when she had upheld the validity of the land sale agreement between the Appellant and one Norah Twemanye.

4. The Trial Magistrate erred to award special damages of shs.900,000/= whereas in the pleadings in the trial court and at the hearing the Appellant never asked for award of special damages of shs.900,000/=.

On their part defendants had more woes, which they expressed in a total of 9 grounds of Appeal. They ran as follows:

1. The Trial Magistrate erred in law and in fact having made a finding that the plaintiff was not the lawful proprietor of the suit land.
   (a) When she found and established that the plaintiff had any other interest in this land other than the registered one.
   (b) When she awarded general and special damages to the plaintiff.
2. The Trial Magistrate erred in law and in fact when she awarded special damages of shillings nine hundred thousand (shs.900,000/=) to the plaintiff that was neither pleaded nor specifically proved in evidence.

3. The Trial Magistrate misdirected herself when she based her finding on the fact that the plaintiff had got registered first before the second defendant that was not applicable in the circumstances and thereby

misapplied the authority of CHRISTOPHER ZIMBE VERSUS TOKANA KAMANZA (1954) 7 UL.R 31.

4. The Trial Magistrate erred in law and in fact when she found that the second defendant had no interest in the suit land that he had sold to the first defendant which finding was contrary to both the pleadings and evidence.

5. The Trial Magistrate erred in law in fact and contradicted herself having found that the first defendant had bought the land from PW1 and the second defendant when she subsequently held that the first defendant had no interest in the land.

6. The Trial Magistrate erred in law and in fact when she ruled contrary to evidence and found that PW1 a party to and author of exhibit P1.

7. The Trial Magistrate erred in law when she failed to make any funding on the question whether PW1 the alleged vendor of exhibit P1 was protected under the ILLITERATES PROTECTION Act (cap 73).

8. The Trial Magistrate erred in law when she failed to apply the relevant sections of the evidence Act (cap 43) in the evaluation of exhibits P1 thereby reaching erroneous conclusions.

9. The Trial Magistrate erred in law in fact when she generally failed to make a correct assessment and evaluation of the evidence on record and thereby reaching wrong and misdirected conclusions."

As will be seen later seen later I think with respect the draftsman of the grounds in cross-appeal was under a serious and grave misconception that the more grounds you advance no matter the merit the more chances of success!

Before I embark on considering the merits of this appeal I would like to express an opinion on Opio's claim that he cancelled plaintiff's certificates of Title basing himself on an implication in the order of the High Court. Unfortunately no such order was exhibited for the benefit of the court. However Opio who said was a Registrar of Title testified that there was an application therefore the High Court to reinstate caveats that had been removed. That the High Court made an order that the said caveats be reinstated without directing that the certificates of Title be cancelled. By implication he said such orders incorporated a power to cancel the

certificates of Title. It is clear that there was never an application before the High Court seeking orders that the Registrar of Titles do be directed to cancel the certificates of Title. What there was according to Opio was an application that caveats be put back in place. It is clear that by the time the application was heard and an order made, the application had been over taken by events. Opio did not say whether such an issue was put before the High Court. He appears to have acted on a conclusion without studying the grounds that led to the conclusion. A radio decedent in a case bases its strength on the grounds and premises that led to its passing. Not only that. I think it is a canon construction of documents that if the language is clear it is conclusive. There can be no construction where there is nothing to construe. I am yet to know of orders emanating from a superior court that is couched in a vague manner. If the undertone text of an order is plain and clear then its interpretation stops there. If unclear then the court that passed it ought to be approached for clarification. I am of the humble albeit strong view that wards should never be added by implication into the language of court orders for to do so is not to construe but to alter them. I need only to add that these observations are merely DET DICTUM. And now to the appeal proper.

On ground one the learned trial magistrate in her judgment said:

> "…….. However, since plaintiff's interests in the suit land were cancelled by the High Court order of Misc. App. No. 141/94 which reinstated the former plot 663, the plaintiff is not the lawful proprietor of the suit land, though he is not guilty of fraud."

With respect I think the above was a misconception. The evidence of Opio was that there was nothing in the High Court order directly ordering the Registrar of Title to cancel the certificates of Title in question. There was evidence however that they were cancelled. But assuming the legal title in land had reverted to John Kizza as Opio opined, John Kizza had in no. in certain terms testified that he had executed a transfer instrument in favour of the plaintiff. The first defendant though he claimed that he had purchased the same land and the trial magistrate appear to have accepted that ……pg18 he had and before plaintiff had purchased it, the evidence on record did not bear this out. True there is a document which on the face of it appear to be an agreement of sale between the first defendant and Norah Twemanye, this document is not endorsed by the court as an exhibit. It is therefore of no probative value. Even if it were endorsed there is no evidence that Norah Twemanye ever sold land to the first defendant. Indeed in her evidence before the court she said in no uncertain terms that the first defendant was a mere caretaker of the land. Not only that such a document that was not registerable could not pass

any interest to the first defendant. The second defendant in no uncertain terms testified that he had only succeeded to the houses and not the land on which they stood. He had no title therefore to pass to the first defendant. But not only that, in his evidence he said the suit land was still in control of Norah Twemanye, as she had never sold the land in question. The Claim that first defendant had purchased the land from the second defendant and Norah Twemanye remained only the word of the first defendant. It had no other independent support. The trial magistrate therefore misdirected herself on the evidence when she said that the first defendant had purchased the suit land before plaintiff but only failed to have it registered. There was no such credible evidence on record of the two parties therefore plaintiff had a better and superior title over the suit premises over and above empty claims of the defendants which claim according to the evidence of George Kamya Kirabira brother of Norah Twemanye the crook was based on dishonesty. The Learned Trial Magistrate should and ought to have ordered vacant possession in favour of the plaintiff who although his title had been cancelled under dubious circumstances still had an instrument of transfer in his favour, which he could again have registered any time so long as he was not caught by limitation. Grounds one and two of the appeal must succeed. On these two grounds alone the appeal would be bound to succeed. I will in passing go through the grounds of cross-appeal, in case there is to be a further appeal. It is agreed by both parties that

the ground on special damages do succeed. Grounds 3 & 4 of the appeal therefore succeed.

On cross-appeal there is no merit in ground 1 (a) which is dismissed. On ground 1 (b) I wonder whether the order of special damages affected the defendants since they were not the vendors. The order as it stood only hangs in space. However that sub-ground of ground I succeed for whatever it is worth. Ground 2 of the cross-appeal is a replica of ground 1(b) it's inclusion was a waste of time and paper. There is absolutely no merit in ground 3 of the cross-appeal which stand dismissed. It is a fact that plaintiff became the registered proprietor, the registration, which was later, cancelled. Ground 4 of cross-appeal must fail. From his own mouth the second defendant had no interest of whatever description in the suit land. On the 5th ground of appeal, it is a fact that PW1 was the plaintiff. There is no way the trial magistrate whatever her shortcomings could have held that the first defendant purchased land from PW1.

As regards ground 6, again PW1 was the plaintiff who was of course a party to exhibit P1. As to his being its author that is for the drafts man of the grounds to answer. Suffice it to say that he was a lousy lot: The Seventh ground is clumsy as it is ridiculous. It reads:

> "The Trail Magistrate erred in law when she failed to make any finding on the question whether PW1 the alleged vendor of exhibit P1 was protected under Illiterate Protection Act (cap 73).

To comment on such ground is to give respect where it is not due. Likewise I don't see any value of going though grounds 8 and 9 of the cross-appeal. They stand dismissed. The result is that an order that plaintiff does get vacant possession of the suit premises is hereby made. He will get the taxed costs of the appeal and cross-appeal. I order accordingly.

J.B.A. Katutsi

JUDGE

14/07/2000

Lutakome for appellant.

Respondent and counsel absent.

Nabatanzi interpreter.

Judgment read.

J.B.A. Katutsi

JUDGE

14/07/2000

Court:

Mbalingi holding brief for Nyanzi for respondent/cross appellant carries on.

J.B.A. Katutsi

JUDGE