

**THE REPUBLIC OF UGANDA
IN THE HIGH OF UGANDA AT KAMPALA
CIVIL SUIT NO.4 OF 2004**

FRED SUNDAY

RICHARD BASEKE DEFENDANTS

Versus

BEATRICE BUSINGYE

MUGALULA JOSEPHPLAINTIFFS

BEFORE: HON. JUSTICE V.A.R RWAMISAZI KAGABA

JUDGMENT

The appellants in this appeal were defendants in Mubende Chief Magistrate's Court Civil Suit No. 24/2001. Judgment was given in favour of the respondents/plaintiffs on 4/2/2003. Tumushabe Gird appeared the appellants on appeal while the respondents were represented by Kenneth Kajeke.

The case for the plaintiffs is that their father Zabuloni Lwabaganda died in 1986 leaving a piece of land situated at Bulonzi village, Buwekula, Kasambya in Mubende District. Subsequent to Lwabaganda's death, the respondents obtained the letters of administration to manage his estate which consisted of the suit land on the 27/2/2001. They sued the defendants on the 6/7/2001 for unlawfully entering and using their land. They prayed for orders of eviction, general damages and special damages of Shs 150,000/=.

It appears, when the plaint was amended to add Richard Baseke, the second defendant did not file his defence but participated in the trial as a co-defendant to Fred Sunday. I will therefore treat Sunday's defence as their joint defence. The defendants in their defence denied trespassing on the plaintiffs' land. They contended that the suit land was purchased by Richard Baseke from Charles Matovu, the brother of the plaintiffs in 1987 and that the defendants their mother, and sister Rose have been in possession of and utilising the suit land since 1989.

On appeal the appellants/defendants presented four grounds of appeal, which were:

- a) That the Chief Magistrate erred in law and fact when he ordered the appellant's' eviction from the land which they had occupied for 16 years.
- b) That the Chief Magistrate erred when he ordered the plaintiffs to harvest the food crops planted by the defendants.
- c) That the Chief Magistrate entered judgment for a non existing plaintiff Mugalula Joseph who had withdrawn from the suit.
- d) That the Chief Magistrate did not consider the available evidence in their favour.

The first appellant's powers include scrutinising the evidence of the trial court evaluate it itself and draw its own conclusions in deciding whether the Judgment of the trial court should be upheld.

See (1) Pandya Vs R. (1957) EA 336

(2) Okeno Vs Republic (2972) LA 32

(3) Selle Vs Associated Motor Boat Co. (1968) LA 193

The issues to be resolved in this appeal, from the memorandum of appeal are:

1. Whether the land in dispute was the property of the seller, Charles Matovu; the brother of the plaintiffs and whether the plaintiff had any locus standi to claim it in a suit?
2. Whether the deceased Zabuloni Lwabaganda gave the suit land inter vivos to Matovu?
- 3 Whether Baseke purchased the land from Matovu?
4. Whether Baseke purchased the land from Matovu of the land he bought from Matovu and trespassed into the plaintiffs land?
5. Whether the Court was entitled to order the plaintiff to harvest the defendant's crops on the land?
6. Whether the Court properly evaluated, the evidence in favour of the defendants?
7. Whether the plaintiff was entitled to any damages?
8. Whether the action was time barred?

As I discuss the issues raised above the answers to one issue may cover another issue or issues so that it will not be necessary to go over the same evidence again. I think the crux of the matter in this case is whether the land in issue was part of the estate of Zabuloni Lwabaganda of which the plaintiff is an administrator per letters of administration granted to

her and whether the suit land was given to Charles Matovu intervivos by his father Zabuloni Lwabaganda as a gift inter vivos?

It is riot disputed that Charles Matovu and Busingye are brother and sister. Both are children of late Zabuloni Lwabaganda. It is not also in issue that Fred Sunday was staying on Baseke's land as an agent/and brother.

The plaintiff admitted that Sunday and Baseke had gone beyond Charles Matovu's land and encroached on hers. This was an admission that Charles Matovu owned land adjacent to that of Busingye. PW3 Sebuliba admitted that Baseke had crossed the land which Matovu had sold to him (Baseke) and entered Busingye's. The same witness told court that the demarcations of Matovu's land were fixed in 1986 by their late father Zabuloni Lwabaganda. Other witnesses testified about the giving of land to Matovu by his late father, followed by the demarcation thereof are Joseph Munyakazi (DW3) and Dominic Kalyekyezi DW4.

The sum total of the evidence on record points to one conclusion that late Zabuloni Lwabaganda gave a precise piece of his land to his son Charles Matovu and this land was demarcated in the presence of witnesses I have referred to above.

The Magistrate was carried away by two facts:

- a) that Busingye was heir and
- b) she had obtained letters of administration.

Whether one is an administrator or customary heir his or her role is merely to collect all the properties of the deceased together and pay all his debts and distribute the balance to those who are entitled to a share of the estate according to the law of succession. The property does not become his or hers but he or she is a trustee of that property on behalf of the beneficiaries.

See (1) Lucy Monica Akulo vs. Michael Kilega Administration 10/1990.

(2) Section 279 of the succession Act

The Chief Magistrate erred in law or was under a misconception that whatever the deceased had given away as gift intervivos still belongs to his estate after death. It was therefore wrong of the plaintiff to claim the land (portion) which her father had lawfully given to his son Charles Matovu, while he (Lwabaganda) was still alive.

If the defendants confined themselves to the boundaries of the land which Lwabaganda gave to Charles Matovu and which land Matovu sold to Baseke, then Busingye had no locus and or cause of action on which to base her suit. This covers issue No I and 2 above.

On whether, Baseke purchased the land of Matovu- there is overwhelming:-evidence to support this fact. The plaintiff, both defendants, Sebuliba Deniyah PW4 Jamada Mutumba and the Sale/Purchase agreement (Exhibit DW2) all support the fact that Matovu sold his land to Baseke. The question is whether he (Baseke) was a bona fide purchaser or whether the buying was fraudulent?

A bona fide purchaser of a legal estate for value without notice has an absolute unqualified and unanswerable defence against the claims of any prior equitable owner. The onus of proof lies on the person setting it up. It is a single plea and is not sufficiently made out by proving the purchase for value and leaving it to the plaintiff to prove notice if he can. Where a party buys land knowing it to be encumbered, the presumption is that the ownership is in dispute and the buyer therefore is not a bona fide purchaser for value.

See (1) Daniel Sempa Mbabali vs. W.K Kidza & others. (1985) HCB 46

(2) Nakabiri and 2 others vs. Masaka District Growers Co-operative Union (1985) HCB 38.

On the evidence I find Baseke was a bona fide purchaser. His purchase transaction was transparent and free from any fraud. The issue of Baseke's buying Matovu's land is answered in the positive.

The duty of the court is to resolve the real issues in controversy between the parties and grant the appropriate remedy or remedies. The magistrate (trial) failed to resolve the issue of:

- a) what the boundary between Baseke's land and that of the plaintiff was
- b) whether the defendants had crossed that boundary
- c) if (b) is yes whether that is trespass
- d) If (c) is answered in the positive, whether (1) the plaintiff is entitled to reap the defendants' crops on her land
- e) She is entitled to damages for trespass.

Instead of the Magistrate resolving the issue of the boundary, and then proceed to decide on the consequential issues to the boundary the Magistrate, in a rather simplistic way, held the land was Busingye's by virtue of her being the heir and holder of letters of administration.

This conclusion is against the evidence on record. The Magistrate did not properly analyse the issues for determination and then evaluate the evidence on record in order to arrive at the proper and reasoned conclusions on the issues before him.

I would therefore agree with counsel for the appellants that the Chief Magistrate did not evaluate the evidence as he should have done. If he had done so (evaluate it) he would have come to a different result about the issues and the case as whole.

For his failure to determine the proper boundary all his conclusions and orders on trespass eviction and damages are irregular both in law and fact. All these orders are set aside.

Under Section 80 (1) (c) of the Civil Procedure Act, this court has powers to frame issues and refer them for trial. I am therefore directing that the record of the proceedings of the Chief Magistrate and his judgment be sent to the new Chief Magistrate so that he can go to the disputed land and fix a permanent and visible boundary between the land that Baseke purchased from Charles Matovu and which land, Matovu is given by his late father, Zabuloni Lwabaganda.

The fixing or planting of boundary marks should be done in a transparent manner and in the presence of the LCS and elders of Bulonzi Village.

After making the order I have made above, I would conclude by allowing this appeal and setting aside all the relief granted to the plaintiffs as they were made without serious regard to the issues and evidence before the court.

As far costs, I will grant costs to the appellants in this appeal. The respondent knew or must have known that their father apportioned off a piece of his land and gave it to her brother/his son Charles Matovu. She admitted that she had been seeing Fred Sunday tilling "Baseke's land" and for a long time. Either out of ignorance or greed she set in motion proceedings which could have been avoided. She was misinformed about the powers of the holder of

letters of administration. But ignorance of the law is no defence. Finally, the appeal is allowed with costs to the appellants.

The Chief Magistrate must act expeditiously to go to the village and fix the boundary between Busingye's and Baseke's pieces of land so that the two neighbours can live in harmony henceforth.

V. A. R. Rwamisazi-Kagaba

Judge

1/9/2004