

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT FORT PORTAL CIRCUIT

CIVIL APPEAL No. 0014 OF 2010

[Appeal from the ruling and orders of His Worship Boniface Wamala - Chief Magistrate; in Fort Portal Civil Misc. Applica. No. 0079 of 2009, delivered on the 27th of January, 2010]

STEPHANIA NAKIMERA
APPELLANT

VERSUS

**1. MASTULA HAMIS KABABIITO }
2. ELIZABETH KUNIHIRA } :::::::::::::::::::::::::::::::::::::::
RESPONDENTS**

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

The Respondents herein had, as Plaintiffs, brought an action in the Chief Magistrate’s Court seeking, amongst others, declaratory orders, and an order for eviction and vacant possession; and of permanent injunction against the Appellant as Defendant. They had in their plaint challenged the sale, of the suit property, by the administrator of their late father’s estate, to one Johannes Casper Jenster from whom the Defendant claimed proprietary interest; asserting that the said sale had been fraudulent, hence an illegality, and was therefore null and void; and for which they held the Defendant guilty of trespass and consequently they sought an order of eviction and vacant possession.

The Defendant, in her written statement of defence, contested the suit; claiming that she, with another person, had proprietary interest in the suit property through bequest to them by Johannes Casper Jenster who had acquired the suit property by lawful purchase. She also put the Plaintiffs on notice of an intended preliminary objection, contending that the suit property is vastly developed and its worth is in the region of 200m/=; well beyond the pecuniary jurisdiction of the Chief

Magistrate's Court. She then put up a counterclaim, thereby seeking, inter alia, an order of Court for enjoyment of quiet possession of the suit premises.

Before the suit came up for hearing, the Defendant made their threat of preliminary objection true and brought an application by way of chamber summons under 0.9 rr. 3 (1)(g), (2), and (3), of the Civil Procedure Rules; and section 98 Of the Civil Procedure Act, seeking dismissal of the suit on grounds that the Chief Magistrate's Court lacked jurisdiction over the matter as aforesaid; contending that if the Court entertained the suit, it would occasion injustice to her. In her affidavit, sworn in support of the application, she deposed that she had, with the leave of Court, caused the suit property to be valued; and the worth of the suit property turned out to be U. shs. 247,000,000/= (Two hundred and forty seven million only).

In her deposition in reply, the first Plaintiff (Respondent) stated, amongst other things, that what the Plaintiffs' suit sought were declaratory orders based on the contention that the Defendant was a trespasser. When the application came up for hearing, counsels on either side made their submissions pursuant to and reiterating the adversarial positions held by the parties to the suit in their respective pleadings, and affidavits sworn in the application; with counsel for the Plaintiffs/Respondents contending quite strongly that the issue of monetary value of the suit property did not arise, and accordingly the head suit was properly instituted in Court which enjoys unlimited jurisdiction to determine it.

In his short ruling, the learned Chief Magistrate agreed with the legal position presented by the Plaintiffs/Respondents' counsel that the head suit was not based on any monetary claim, but on trespass. He accordingly dismissed the application, holding that he was seized with jurisdiction to entertain the suit. It is this decision with which the Defendant/Applicant has been aggrieved, and has resulted in this appeal.

A Court faced with an application contending that it lacks jurisdiction, as in the instant case, has to be guided by the facts contained in the averments in the pleadings; especially the plaint. At this stage, the evidence requisite to determine the merit of the case would of course not have been adduced. Whatever evidence that may be allowed would be such as is necessary strictly to enable the Court determine the points of contention raised in the preliminary objection. In the instant case, the relevant paragraphs of the plaint by which the suit had been instituted stated quite clearly that:

- “3. *The 1st and 2nd plaintiffs institute this action as beneficiaries and children of their deceased father Hamis Juma against the defendant for;*
- a. A declaration that the plaintiffs have a beneficial interest in the residential holding and property comprised in LRV 863 Folio 3 Plot 10 Mwenge Block 60 at Rwebitaba village, Bugaki Sub-county, Mwenge County, Kyenjojo District.*
 - b. A declaration that the sale of the residential holding and property above by the widow Administrator to one Johnnes Casper Jenster was illegal, void, null and void ab-initio.*
 - c. ...*
 - d. ...*
 - e. ...*
 - f. General damages for intermeddling and trespass, deprivation of property and inconveniences occasioned onto the plaintiffs.”*

The Plaintiffs then further pleaded that their father, Hamis Juma (deceased), died on the 10th day of August, 1979 at a time when they were still minors; and, they stated in paragraph 4 of the plaint, that the deceased’s widow, one Farida Juma, obtained letters of administration to the deceased’s estate; and further that:

“*c. Upon obtaining the said Letters of Administration on the 17th day of May, 1983 the said widow Administrator purportedly sold the suit property comprised in LRV 863 Folio 3 Plot 10 Mwenge Block 60 at Rwebitaba comprised of the deceased’s and plaintiffs’ residential holding, the deceased Hamis Juma’s grave, a tea shamba and forests to Johannes Casper Jenster on the 1st day of February, 1986. The sale agreements are hereto attached as annexures A3 and A4.*

.....

f. The plaintiffs had no knowledge of the widow Administrator’s sale and all along believed that the widow had protected their interests and believed that upon the widow’s death their deceased brother one Ahmed Juma son of the deceased widow who also lived in the suit property had also protected their interests but only to learn in the month of July 2009 that the deceased Johannes Casper Jenster had bought the

suit property from the deceased widow and the defendant was claiming to be a beneficiary of the said purchase.

6. *The plaintiffs aver and contend that the purported sale of the suit property between the deceased widow and Administrator and the deceased Johannes Casper Jenster was fraudulent, illegal, null and void ab-initio for reasons herein ...*
7. *The plaintiffs therefore aver and contend that the defendant is a trespasser on the suit property on the ground that she derived no title from the deceased Johannes Casper Jenster who derived none from the deceased widow Administrator and continuing to occupy and use of the suit property without the consent, knowledge and approval of the plaintiffs which amounts to intermeddling with the estate of the deceased of the deceased for which the plaintiff shall seek general damages to the tune of shs. 40 million.*

It is quite evident from the pleadings above that the Plaintiffs' action was not brought based strictly on trespass. My understanding of the pleadings is that the issue of trespass was derived or consequential to the main issue of the sale of the suit property by the administrator of the estate of the late Hamis Juma to Johannes Casper Jenster. The plaint clearly brings out this issue in several of the paragraphs or clauses cited above. Had it been an issue of encroachment onto the suit property without a claim of proprietary interest based on a sale, it would easily have fallen under the tort of trespass; and for which, without much ado, I would have concurred with the learned Chief Magistrate's findings.

There are serious issues raised in the plaint of whether the administrator of the estate could have validly conveyed the suit property to Johannes Casper Jenster without having registered herself on the title; and if so, what proprietary interest would have been acquired by such conveyance. Further to this, the Defendant's proprietary interest is based on a bequest; thereby raising the issue of what rights she would, for instance, have in the event that the conveyance to Johannes Casper Jenster were held to be unlawful. Until all this was determined, there would be no way of stating whether the Defendant who is in possession was a trespasser or not.

Counsel for the Plaintiffs argued both before the learned Chief Magistrate and this Court that the Plaintiffs had merely prayed for declaratory orders. In the case of ***Jubilee Insurance Co. Ltd. vs. Rex Hotel Ltd. [1973] E.A. 437***, the Respondent had first obtained a declaratory order that it was

entitled to possession of the suit property; but because it could not obtain vacant possession, it filed a subsequent application for an order for possession which the trial Court decided to entertain. On appeal from the Judge's decision to entertain the suit for order of vacant possession, Law J.A. – with whom the other members of the Court concurred – held that a declaratory order of entitlement to possession made the matter *res judicata*, thereby barring any need for a consequential application for an order for possession. He stated at p. 438, that:

“I can see no distinction in this respect between a declaration that the landlord is entitled to possession at a future date, and an actual order for possession. ... I have no doubt at all that the matter of possession is subject to res judicata, and that the appellant is entitled to an order for vacant possession.”

In the instant case before me, and with respect to the learned Chief Magistrate, the Plaintiffs did not merely seek a declaratory order for the eviction of a trespasser who has no claim of rights over the property, but have clearly prayed for both declaratory orders and orders of possession of the suit property which would have the effect of achieving a recovery of the suit property the legality of whose sale they are challenging; and this would be an order which would only be granted after nullifying the sale.

The high Court has unlimited jurisdiction in all matters, unless otherwise by law excepted. My understanding of the provisions of section 11 of the Civil Procedure Act is that for an action for recovery of property, it is preferable to err on the side of caution; and institute such action in the High Court. That is the essence of sub sections (1), (2), and (5) of that section. It was necessary for the Plaintiffs to determine, even if by mere estimation, the value of the subject matter of the suit property which in their pleadings they clearly disclose they are quite familiar with as comprising, amongst other fixtures, a tea estate.

Even without recourse to the defence pleadings, the plaint clearly manifests that the Plaintiffs ought to have seriously considered the issue of the monetary jurisdiction of the Court before instituting the suit. I therefore allow the appeal, and substitute for the order of the learned Chief Magistrate the order that the head suit is struck out for reason of want of pecuniary jurisdiction over the matter by the Chief Magistrate's Court; and accordingly award costs to the Appellant here, and also in the Court below.

A handwritten signature in dark ink, appearing to read 'Alfonse Chigamoy Owiny'. The signature is fluid and cursive, with a large, sweeping initial 'A'.

Alfonse Chigamoy Owiny – Dollo

JUDGE

07 – 05 – 2010