

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA CENTRAL CIRCUIT
CIVIL APPEAL NO. 23 OF 2012
(Arising from Entebbe Chief Magistrate’s Court
Civil Suit No. 216 of 2010)

SSEMANDA HENRY ISRAEL KIRONDE:.....
APPELLANT

V E R S U S

1. SAFARI PHILLIP :.....
RESPONDENTS

2. SSEMANDA SSEMADAALI FAISAL

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

JUDGMENT

This is an Appeal from the Judgment of the His worship B.N.D Sande, Grade 1 Magistrate, Entebbe delivered on the 20. 12.2011 in which he dismissed the Plaintiff’s suit and awarded costs to the Respondents. The background to this Appeal is that the Plaintiff herein ‘the Appellant’ jointly and severally instituted a suit against the Defendants ‘the Respondents’ herein for unlawful grabbing or alienation of the suit kibanja. The suit was for orders of vacant possession, demolition, vacant possession, general damages and costs of the suit. The Respondents filed separate pleadings and each claimed to lawfully be on the suit *kibanja*.

In his Judgment, the learned trial magistrate found the Plaintiff and his witness were not clear about the exact size of the suit land that he gave to the 2nd defendant and therefore could not be convinced as to whether the

Plaintiff enjoyed any right over the suit kibanja. He also stated that the Plaintiff should have sued the current people in possession since the first defendant is a bonafide purchaser for value who is no longer in possession of the suit land.

The Appellant now appeals against the learned trial magistrate's findings on the following grounds;

1. That the Learned trial Magistrate erred in law and fact when he rejected the otherwise strong and credible evidence of the Appellant without giving any sound reasons for so doing whatsoever;
2. That the trial Magistrate wrongfully rejected the documentary evidence of the Appellant though the same was a copy of the original;
3. That the trial Magistrate equally erred in law and fact when he found that the Respondents were legally blameless because they were not in physical position of the suit *kibanja*;
4. That the trial Magistrate was also at fault to believe the evidence of the Respondents when the Respondents produced no single witness to back up their allegations;
5. That the trial Magistrate further erred in law and fact when he failed to appreciate that the findings at the locus greatly supported the version of the Appellant;
6. That the trial Magistrate legally blundered when he ruled that the first Respondent was protected by the principle of bonafide purchase for value without notice whereas not.

The brief facts which form the basis of this case are that the Appellant (Plaintiff) who is also the biological father of the 2nd Respondent purchased the suit *kibanja* in 1990 from Nakanwagi Edith. On the 5th May 1999, he distributed the *kibanja* amongst his sons, Godfrey Sebuuma and Faisal Ssemadali (2nd Respondent). He gave the portion in the East to his son

Sebuuma, retained the middle piece of the land for himself and allocated the piece in the West to Semadaali Faisal (2nd Respondent). The Appellant stated that the demarcations were carried out in the presence of the mother of the two sons (PW2), another relative and a friend. The 2nd Respondent subsequently developed and sold his portion of the land to another person and settled somewhere else. According to the Appellant, the 2nd Respondent subsequently returned, grabbed the middle portion of the land which belonged to the Appellant and sold it to the 1st Respondent. The 1st Respondent also sold it to Lubega Vincent.

The Appellant was represented by Counsel Magala Valentine of M/S Lutakome & Co whilst the Respondents were represented by Counsel Kintu Felix of M/S Kintu Nteza & Co. Advocates.

SUBMISSIONS

Ms Magala in her submissions intimated to the Court that the Appellant had decided to drop grounds 3 and 5. She dealt with grounds 1 and 4 concurrently and ground six separately.

On the 1st and 4th grounds, Ms. Magala submitted that the trial Magistrate put more emphasis on the first portion of land that was given to the 2nd Respondent which was not in fact the crux of this case. The Appellant was interested in the 'middle' portion of the *kibanja* which the trial Magistrate did not consider. Further that the Trial Magistrate over emphasized the size of the suit *kibanja* yet this was not the most important issue for consideration.

Counsel Kintu Felix for the Respondents submitted that the trial Magistrate properly evaluated the evidence and hence prayed for the dismissal of the Appeal. He submitted further that there were contradictions in the evidence of the Appellant's witnesses as to the size of the *kibanja* and that the witnesses also confirmed that none of them had seen the 2nd respondent sell

or alienate the *kibanja*. Learned counsel also submitted that the evidence of the appellant was based on hearsay and was therefore not admissible as per section 58 and 59 of the Evidence Act cap.6 and ***Kinyatta vs R (1976-1985) E.A 234***. He submitted that the Appellant had failed to prove his case.

RESOLUTION

PW1 (Semanda Israel Kironde) stated that he was originally the owner of the suit *kibanja*. He purchased the same from Nakanwagi on the 5th May 1990. It was his testimony that on 5.05.1999, he distributed the suit land amongst his sons Semadali Faisal, Sebuuma and that he also retained part of the suit land constituting the middle portion thereof. The Appellant's evidence was corroborated by PW2 (Nalunkuuma Joyce), PW3 (Emmanuel Ssazi, and PW4 (Luwandagga Godfrey) who, according to the Appellant, were present when he was making this distribution.

Whereas DW1 (Ssemanda Faisal) stated that the 1st Respondent is not a trespasser on the suit property; rather that he (DW1) received the suit land as a gift from his father, Ssemanda Henry (appellant) in 1999. DW1 testified that he then constructed a house on the *kibanja*. According to DW1, the dispute over the suit *kibanja* accrued when he converted to Islam in 2004. It was his testimony that his family members turned against him and vowed to remove the *kibanja* from him when they learnt of his conversion. He testified that he reported the matter to the Local Council. DW1 adduced evidence through a letter dated 07th June 2006 which was admitted and marked Exh.D.1. The letter emanated from the chairman in which he gave directives to PW1 to desist from evicting DW1 from the *kibanja* and not to deny DW2 from using his part of the *kibanja* as he so pleased.

DW1, who gave evidence for the Respondents, did not refute the fact that he sold part of the *kibanja* which he obtained from the Plaintiff to Safari Phillip which was later disposed off to Lubega Vincent.

Size of the Kibanja

The Trial Magistrate ignored the need to establish the true size of the suit land and to establish the boundaries. Instead, he relied on his own observation/ estimation and stated;

“At locus in quo, all the kibanja was estimated to be about 3-4 acres not 6, or 7 or 8 acres. What I believed, however, was that indeed Plaintiff out of parental natural love and affection gave a portion of the suit –kibanja with no measurements on agreement and no sketc (sic) plan of what Plaintiff gave to his son-2nd Defendant.”

He pointed out that since the Plaintiff and his witnesses were not clear about the actual size of the suit land, he could not determine whether the Plaintiff enjoyed any right over the suit land.

He also observed that; *‘...PW3 did not know measurements of portion that plaintiff gave to 2nd defendant but he knows it by facial observation, that currently there are many houses thereon but he does not know thereof. That 2nd and 1st Defendant are no longer in possession of suit kibanja..... It cannot be said that Plaintiff’s right was violated by the Defendants because the Plaintiff and his witnesses testified that they are aware that there are people who are building on the suit land, who are not in Court, that they are not aware of any sale agreement between the sellers.. ’*

It should be observed that this Appeal arises out of a claim for wrongful alienation of the Appellant’s kibanja or part of it. According to **Black’s Law**

Dictionary at 8th Ed. Page 80, 'alienation' refers to the conveyance or transfer of property to another.

However, as earlier highlighted, the suit *kibanja* is unregistered and neither is it surveyed nor are there demarcations of the land in dispute. It is an essential element of proof of alienation that the land in contention belongs to the party contesting the transfer.

It is my finding that the Learned Trial Magistrate did not properly analyse the issues for determination and 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, Ms. Magala that the Magistrate did not evaluate the evidence as he should have done. It is my finding that he did not arrive at a fair and just conclusion based on principles of law.

Ground six

Learned Counsel for the appellant submitted that the trial magistrate found that the 1st Respondent was a bonafide-purchaser for value without notice yet this principle does not arise in matters of *kibanja* ownership. He cited the case of *Mubiru vs. Mukwanga* HCCA 39/1991 in reference to this.

On the other hand, Counsel for the respondents argued the 1st respondent carried out a thorough due diligence with all the concerned authorities, which revealed that the 2nd respondent was the owner of the suit *kibanja* having acquired it as a gift from his father.

The 1st Respondent testified that he had carried out a thorough search with due diligence to all the concerned authorities which revealed that indeed the

2nd Respondent was the owner of the suit kibanja having acquired it as a gift from his father.

The basic principle for determination of bonafide purchaser for value without notice is that such a person must derive title from registered land otherwise there is no such thing as a bonafide purchaser for value without notice on unregistered land. **See Hannington Njuki v. William Nyanzi HCCS No. 434 of 1996** and **Black's Law Dictionary** on definition of bonafide purchaser for value without notice.

According to the record, there is no certificate of title to prove that the first respondent or those claiming through him, *to wit*, Lubega Henry is registered on the title. However in his Judgment the trial magistrate found that Safari Phillip is a bonafide purchaser for value. Therefore I find this holding quite contrary to the established principles of law.

As I noted earlier, the trial Magistrate did not properly evaluate the evidence on record. This Court is empowered under Section 80 (1) (c) Civil Procedure Act Cap 71 to frame issues and refer them for trial. ***See Fred Sunday & Another vs. Beatrice Busingye & Another C.S No. 4 of 2004.*** I therefore make the following directives and order. That the record of proceedings and the judgment thereof in the lower Court be sent to another trial Chief Magistrate so that he or she can:

- a) Determine whether the Appellant owns the suit kibanja.
- b) Carry out a Locus in Quo on the disputed *kibanja* and determine the particular demarcations and boundaries on the *kibanja* between Ssemanda Henry Kironde and Semanda Faisal.
- c) Establish whether Semanda Faisal sold off the whole part of the land that was given to him by his father which was transferred to the present occupant, Lubega Vincent.

d) The visit to determine the particular demarcations and boundaries should be carried out in the presence of the LCs, elders and other area authorities as well as the Registrar of Nakawa High Court under Commission.

Appeal allowed and all orders and reliefs made by the trial Magistrate are set aside.

Each party is to bear its own costs.



Signed:

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Hon. Lady Justice Elizabeth Ibanda Nahamya

J U D G E

6TH DECEMBER 2013