

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO. 78 OF 2012

(ARISING OUT OF CIVIL SUIT NO. 39 OF 2007 AT ENTEBBE CHIEF MAGISTRATE'S COURT)

1. JOHN BYEKWASO
2. JANE NAMUBIRU NAKATO.....APPELLANTS

VERSUS

YUDAYA NDAGIRE.....RESPONDENT

BEFORE LADY JUSTICE PERCY NIGHT TUHAISE

JUDGEMENT

This was an appeal from the judgment and decree of Her Worship Ajio Hellen Senior Principal Magistrate Grade 1 Entebbe chief Magistrate's Court delivered on 30th October 2012.

The background to the appeal is that the appellants, who were plaintiffs in the lower court, filed civil suit no. 39 of 2007 against the defendant/respondent seeking an order of eviction of the respondent from the suit land comprised in Busiro Block 383 – 391 Plot 4183 situate at Kitende Kawoto, Kajjansi, Sissa Sub County, and for general damages. The plaintiffs/appellants are the registered proprietors of the said land having purchased it from Mukasa Bulega. The plaintiffs alleged in the civil suit that the defendant/respondent entered part of the said land in May 2007 without their permission and started carrying out illegal activities. The defendant/respondent on the other hand pleaded that she is a lawful occupant on the land for value of the kibanja with an old semi permanent structure or building, having bought the same from a one Nababi Damalie. She also counter claimed for an order restraining the plaintiffs/appellants from evicting her from the suit land where she claims a kibanja interest. The trial magistrate found for the defendant/respondent.

The appellants, being dissatisfied with the judgment, appealed against it on the following grounds:-

1. *The learned trial magistrate erred in law and fact when she based her decision on a sale agreement which is null and void.*
2. *The learned trial magistrate erred in law and fact when she held that the respondent's witness called Nababi Damali had the capacity to sell the respondent the property which belonged to the late Charles Nkeera.*
3. *The learned trial magistrate erred in law and fact when she held that the respondent has got a kibanja on the appellants' land.*
4. *The learned trial magistrate erred in law and fact when she allowed the evidence which was not pleaded by the respondent in her written statement of defence.*
5. *The learned trial magistrate erred in law and fact when she allowed the respondent's counter claim.*
6. *The learned trial magistrate erred in law and fact when she failed to apply the correct principles governing the award of general damages.*
7. *The learned trial magistrate erred in law and fact and misdirected herself when she failed to properly evaluate the evidence on record as a whole and came to a wrong conclusion.*

The appellant prayed this court that the appeal be allowed with costs, and that the judgement and orders of the learned trial magistrate be set aside.

At the hearing of the appeal, this court gave time schedules within which counsel filed written submissions.

Ground 1: The learned trial magistrate erred in law and fact when she based her decision on a sale agreement which is null and void.

Ground 2: The learned trial magistrate erred in law and fact when she held that the respondent's witness called Nababi Damali had the capacity to sell the respondent the property which belonged to the late Charles Nkeera.

Ground 3: The learned trial magistrate erred in law and fact when she held that the respondent has got a kibanja on the appellants' land.

Both counsel submitted on grounds 1 and 2 together. I will however address the said grounds together with ground 3 since the issues and arguments raised in the three grounds are common and they overlap.

Learned counsel for the appellants submitted on grounds 1 and 2 that the respondent based her claim to the suit land on a sale agreement dated 4th June 2006, marked **D. ID. 1** stating she bought the land from Nababi Damali DW5. The learned trial magistrate based her decision on the said sale agreement and found DW5 to have had the capacity to sell the property belonging to the late Charles Nkeera. He submitted that it was clear from the sale agreement marked **D. ID. 1**, and from PW3's testimony, that the property sold by DW5 to the respondent belonged to the late

Charles Nkeera. He contended that the property is governed by section 180 of the Succession Act which vests ownership of such property to the administrators of his estate; and that, in the instant case, where no letters of administration were issued in respect of the late Nkeera's estate, DW5 or any other person reflected in the sale agreement did not have capacity to sell the property.

Secondly, he submitted that the testimonies of PW2, DW2, and DW5 reveal that the sale agreement was executed by minor children of the deceased Charles Nkeera who had no capacity to contract, which rendered the contract null and void. He submitted that the said issues were brought to the attention of the trial magistrate but she ignored them. He cited **Active Automobile Spares Ltd V Crane Bank & Another Civil Appeal No. 21/2001** where it was held that no court ought to enforce an illegal contract or transaction once it is brought to the attention of court; and **John Buteraba V Edirisa Sserwanga & 3 Others HCCS No. 222/2008** where it was held that without letters of administration the defendant had no authority to sell and could not enter into a legal contract with the plaintiff. He submitted that the learned trial magistrate erred in law and fact when she held that Nababi Damali DW5 had the capacity to sell the suit land belonging to the late Charles Nkeera to the respondent, yet Nababi had no such authority to sell the property.

The respondent's counsel submitted in reply that the validity of the sale agreement **D. ID. 1** was not in issue in the appellants' pleadings, neither was it an issue agreed on during scheduling; that it was admitted in evidence as a defence exhibit and never challenged by the appellants. He submitted that the testimony of DW5 that she bought the kibanja interest on the said land in 1980s and let her son Charles Nkeera stay in the house on it was not controverted by the appellants who are not family members. He contended that the appellants' evidence that they first bought a kibanja interest followed by a mailo interest as per exhibits **PEI** and **PEII** was rebutted by DW3 Ntege Patrick who testified that **PEII** the agreement for sale of the kibanja was only for their house and did not include the neighbouring house which is on the suit kibanja. He submitted further that the appellants did not produce documentary evidence to support their claim that the suit kibanja belonged to the late Nkeera and not Nababi Damali. He contended that Nababi Damali had capacity and authority to sell her kibanja to the respondent.

The respondent's counsel also submitted that the appellants' counsel's refuting of the sale agreement between the respondent and DW5 is a total departure from the plaintiff's pleadings which did not allude to the matter which was moreover not an issue at the trial. He argued that evidence to be adduced at a trial ought to be as per the issues framed as held in **GM Combined V A. K Detergents SCCA No. 7/1998**.

On ground 3 the appellants' counsel more or less reiterated his submissions in the first two grounds. He contended that the respondent cannot rely on a null and void contract to acquire good title to the suit kibanja. He cited **Maureen Macario Detero V Macario [2006] HCB 127** to support his argument. The respondent's counsel submitted in reply that DW5 Damali Nababi's evidence that she gave her son money to buy the property was not challenged, and as owner of

the property she had the right to dispose of the same the way she wished. He also argued that on her son's death DW5 took over responsibility of the orphans and had to dispose of the property to take care of them, and that the minors were only witnesses to the contract between DW5 and the respondent. He argued that by the time the appellants took the mailo interest in the suit land, there was already the respondent's kibanja interest.

I have carefully scrutinized the record of proceedings, the judgement and the submissions of both counsel here and in the lower court record, including the relevant authorities on the matter.

The learned trial magistrate based her decision on the sale agreement between Damalie Nababi and the respondent. She found DW5 Nababi Damali to be the owner of the suit kibanja who validly sold it to the respondent. She based this on the testimony of Nababi that she purchased the plot and Nkeera was her son whom she put in the premises. On page 8 of the record of proceedings, she opined in her judgement that:-

“It is common practice that usually parents live (sic) their children in premises and then it is assumed that the property belongs to the occupant as it seems to be the case. If that was the case which fact was not challenged, in my view then that makes the sale valid since Nababi is the owner of the kibanja.”

On the plaintiffs' counsel's submissions that the kibanja belonged to Charles Nkeera, she reasoned on page 8 that even if that was the case, the fact that Nababi sold it without letters of administration just means that the sale is null and void, and that this meant therefore the plot must revert back to Nkeera's estate and not the plaintiffs. She stated that in her view the plaintiff's case fails. She then proceeded to state that there were only two parties to the suit, the plaintiff and the defendant, and that since court had found that the defendant (she meant plaintiff) has failed, it means that the defendant succeeds.

The testimonies of PW1, PW2, PW3 and PW4 reveal that the suit kibanja belonged to the late Charles Nkeera. PW3 the Local Council 1 chairman in cross examination testified that he did not recognize the defendant as the owner of the suit kibanja and that the wrong persons sold to her. PW4 a son to Charles Nkeera testified that his father Nkeera bought the house with her mother and that they never sold to the defendant. The testimonies of DW2, DW5 and PW4 also revealed that the people who executed the sale agreement between Damali Nababi and the defendant/respondent, who happen to be the children of the late Charles Nkeera, were minors.

In my opinion, there is ample evidence on record to show that the suit kibanja belonged to the late Charles Nkeera. Once this factor was established, though the family of the late Nkeera were not parties to this suit, the question of whether whoever sold the said kibanja to the defendant/respondent had capacity to do so was inevitable if the defendant's claims on the property as spelt out in the counter claim were to be determined.

The plaintiffs/appellants' counsel brought it out in his submissions to the lower court, as he did in this court, that since the said property belonged to the late Nkeera it is governed by section 180 of the Succession Act, that in that respect DW5, not being an administrator or executor of the estate of the late Nkeera had no capacity to sell the late Nkeera's kibanja to the defendant. The same counsel also raised the factor of the sale agreement between Nababi and the defendant being null by virtue of it having been executed or witnessed by minors.

The trial magistrate overlooked the legal point raised by the plaintiff's counsel which was backed by evidence on record. Instead she relied on a sale agreement **D. ID 1** which had not even been tendered in evidence as an exhibit to make her decision and conclude that Nababi was the owner of the suit kibanja. She also wrongly concluded that Nababi's evidence that she bought the kibanja was not challenged. Instead of considering the evidence adduced that the suit kibanja belonged to the late Charles Nkeera, she chose to rely on a document that had not been tendered in evidence to decide in the defendant/respondent's favour. This was contrary to the decision in **Active Automobile Spares Ltd V Crane Bank & Another Civil Appeal No. 21/2001** where the Supreme Court held that no court ought to enforce an illegal contract or transaction once it is brought to the attention of court.

Secondly, in **John Buteraba V Edirisa Sserwanga & 3 Others HCCS No. 222/2008**, it was held that without letters of administration the defendant had no authority to sell and could not enter into a legal contract with the plaintiff. There was no evidence on record that DW5 Damali Nababi had letters of administration to the estate of her son the late Nkeera as to have the authority to sell his kibanja.

Thirdly, DW2, DW5 and PW4 revealed that the people who executed the sale agreement between Damali Nababi and the defendant/respondent, who happen to be the children of the late Charles Nkeera, were minors. The sale agreement **D. ID 1** reads in part that Nababi Damali together with her children and grandchildren of the late Charles Nkeera sold the kibanja to Yudaya Ndagire (respondent), though those who signed as sellers were Ddamulira Z and Damali N. Ddamulira was stated by various witnesses to be a child and heir of the late Charles Nkeera but his age at the time of selling did not come out clearly in the evidence on record. There is ample evidence however that the other children stated to have sold Nkeera's land with their grandmother were not adults at the time of selling the suit land to the respondent. This alone rendered the sale agreement null and void.

It is my opinion that once the illegalities were raised before court, the trial magistrate ought to have addressed them. Once established that the contract on which the defendant sought to enforce her rights was null and void, the trial magistrate ought not to have enforced it or relied on it to make the decision she made in favour of the defendant.

I do not agree with the defendant/respondent's counsel's arguments that the validity of the sale agreement **D. ID. 1** was not in issue in the appellants' pleadings, and that the same was not an

issue agreed on during scheduling, or that it was admitted in evidence as a defence exhibit and never challenged by the appellants.

On the validity of the sale agreement not being in issue, learned counsel for the defendant/respondent ought to appreciate that this matter was raised as an illegality. It was held in **Makula International V Cardinal Nsubuga [1982] HCB 11** that a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings including any admissions thereon. This is a well established principle of law which this court cannot overlook. Besides, this court as an appellate court is empowered under section 80 of the Civil Procedure Act to, among other things, determine a case finally. In this case, where there is evidence on record to enable this court make a decision, it can rely on that evidence to determine the case finally. On the sale agreement, contrary to the submissions of the respondent's counsel, the record of proceedings is very clear that sale agreement **D. ID. 1** was never tendered in evidence as an exhibit though a photocopy of the same was initially identified for eventual tendering in as an exhibit.

In view of the adduced evidence on record, and the legal authorities on the issue, it is my opinion that the learned trial magistrate erred in law and fact when she based her decision on a sale agreement which is null and void. She erred in law and fact when she held that the respondent's witness called Nababi Damali had the capacity to sell the respondent the property which belonged to the late Charles Nkeera. She erred in law and fact when she held that the respondent has got a kibanja on the appellants' land.

Ground numbers 1, 2 and 3 of this appeal are allowed.

Ground 4: The learned trial magistrate erred in law and fact when she allowed the evidence which was not pleaded by the respondent in her written statement of defence.

Counsel for the appellant submitted that the respondent did not plead anywhere in her written statement of defence that the suit kibanja she claims to have acquired by virtue of a sale agreement with Damali Nababi belonged to Damali Nababi. He argued that the respondent was supposed to stick to her pleadings which are that she acquired an interest in the suit land by virtue of a sale agreement with Nababi which agreement reflects that the property sold belonged to the late Charles Nkeera. He contended that the respondent departed from her pleadings and produced DW5 Damali Nababi who testified that the suit property she sold to the respondent belonged to her. The trial magistrate allowed the said evidence and relied on it to make a decision in favour of the respondent. He submitted that this was contrary to Order 6 rule 7 of the Civil Procedure Rules which bar a party to a suit from departing from his/her pleadings. The respondent's counsel submitted in reply that paragraph 5(b) of the respondent's written statement of defence is clear that the respondent purchased the suit property from Damali Nababi as shown in the sale agreement.

Paragraph 5(b) of the respondent's written statement of defence states that the defendant purchased the kibanja by agreement executed between her and a one Damali Nababi, a photocopy and translation of which were annexed as **A1** and **A2** respectively. These were later marked **D. ID. 1** for identification during the trial but were never eventually exhibited. The said annexures reveal that Damali Nababi and her children and grandchildren of the late Charles Nkeera sold to the respondent "*a house which was for the late Nkeera*". The evidence of DW5 Damali Nababi clearly departs from the respondent's pleadings and their annexures when she testified that she was the owner of the property she sold. The trial magistrate allowed this evidence and relied on it as shown on page 8 of the record of proceedings where she stated that in her view, "*that makes the sale valid since Nababi is the owner of the kibanja.*"

This was contrary to Order 6 rule 7 of the Civil Procedure Rules which bar a party to a suit from departing from his/her pleadings. The said rule provides that no pleading shall, not being a petition or application, except by way of amendment, raise any new ground or claim or contain any allegation of fact inconsistent with the previous pleading of the party pleading that pleading. The court decision in **Interfreight Forwarders (U) Ltd V East African Development Bank Civil Appeal No. 33/1992** emphasizes pleadings as a system through which pleadings operate to define the real matters in controversy with clarity upon which the parties can prepare and present their respective cases and upon which court will adjudicate. The learned trial magistrate therefore erred in law and fact when she allowed the evidence which departed from the defendant's pleadings.

Ground 4 of the appeal is allowed.

Ground 5: The learned trial magistrate erred in law and fact when she allowed the respondent's counter claim.

The appellants' counsel submitted that much as the defendant/respondent put in a counterclaim in her pleadings, she did not adduce any evidence at the hearing to support her counterclaim. He argued that the trial magistrate erred in law and fact when she relied on the sale transaction between the respondent and DW5 to decide that the respondent had a kibanja and issue an injunction against the appellants from interfering with the respondent's quiet enjoyment of her premises. The respondent's counsel in reply submitted that the respondent adduced evidence to show she possesses the kibanja interest in the suit land, having bought it from DW5.

The trial magistrate based on the sale transaction between the respondent and DW5 to allow the respondent's counterclaim and make a declaration that DW5 has a kibanja on the suit land, and to issue a permanent injunction restraining the appellants from interfering with the respondent's quiet enjoyment of her premises. The sale agreement in question, as already decided in grounds 1, 2, and 3 above, was null and void. The trial magistrate therefore erred in law and fact when she allowed the respondent's counter claim, based on the reasons and authorities already given in grounds 1, 2 and 3 of this appeal.

Ground 5 of the appeal is allowed.

Ground 6: The learned trial magistrate erred in law and fact when she failed to apply the correct principles governing the award of general damages.

The appellants' counsel submitted that apart from the respondent's prayer for damages in her counterclaim, the respondent did not inform court the degree of pain and suffering she had incurred, or that she had been denied access to the suit kibanja. He submitted that the trial magistrate did not apply the correct principles governing award of damages when she awarded a sum of U.Shs.3,000,000/= (three million) as general damages contending that the respondent had suffered at the hands of the appellants by being denied access to her kibanja. He cited **Eric John Watana V Bugisu District Administration [1985] HCB 164** to support his position.

The respondent's counsel submitted in reply that the respondent's testimony as DW1 clearly stated that she had been having trouble with the 1st appellant who had planted boundary marks on her kibanja. He cited **Kasekya Kasaija Sylvan V Attorney General HCCS 1147/1998** where it was held that general damages are damages which the law implies from the wrongful act and may be recovered without proof of any amount. He contended that the respondent did plead and testify to court about the mental torture and anguish she suffered when the appellants planted mark stones in her kibanja.

The learned trial magistrate stated in the last page of her judgement that the defendant had suffered under the hands of the plaintiff by being denied access to her kibanja and was entitled to damages. She awarded damages of U.Sh.3,000,000/= (three million) to the defendant. Apart from the respondent's prayer for damages in her counterclaim, no evidence was led on the defendant's part concerning the damages. The respondent did not inform court the degree of pain and suffering she had incurred in the circumstances, or state anywhere in her testimony that she had been denied access to the suit kibanja. I do not agree with the respondent's counsel's submissions that the respondent pleaded and testified to court about the mental torture and anguish she suffered when the appellants planted mark stones in her kibanja. Though the damages are pleaded in the defendant/respondent's written statement of defence and counterclaim, there is nothing in the defendant's sworn testimony or other evidence adduced before the trial court that she suffered damages, or specifically that she suffered under the hands of the plaintiff by being denied access to her kibanja.

It was held in **Kampala District Land Board & George Mitala V Venancio Babweyana SCCA No. 2/2007** that general damages must be pleaded and proved. In **Kasekya Kasaija Sylvan V Attorney General HCCS 1147/1998** it was held that general damages are damages which the law implies from the wrongful act and may be recovered without proof of any amount. The gist is that the exact amounts of damages suffered need not be proved as in the case of special damages, but one must prove the direct probable consequences of the act complained of, like physical inconvenience, mental stress, pain and suffering. In this case though they were

pleaded, no evidence was adduced in court to prove them. The trial magistrate, in my opinion, did not apply the correct principles governing award of damages when she awarded a sum of U.Shs.3,000,000/= (three million) as general damages on basis that the respondent had suffered at the hands of the appellants by being denied access to her kibanja.

Ground 6 of the appeal is allowed.

Ground 7: The learned trial magistrate erred in law and fact and misdirected herself when she failed to properly evaluate the evidence on record as a whole and came to a wrong conclusion.

The appellants' counsel reiterated his submissions on grounds 1, 2, 3, and 4 of the appeal. He contended that if the learned trial magistrate had bothered to evaluate the evidence on record, she ought to have taken note of the fact that the agreement made between the respondent and DW5 is null and void; and that DW5 Damali Nababi had no capacity to sell the suit kibanja belonging to the late Charles Nkeera to the respondent; and that by allowing the evidence of DW5 to the effect that she owned the suit kibanja would be a complete departure from the pleadings on record. He also submitted that the evidence adduced by DW5 in support of the respondent was full of glaring contradictions, inconsistencies, and lies, such that it was dangerous for the trial magistrate to rely on it. He cited **Shokatali Abdula Dhall V Sadrudin Meralli SCCA 32/1994** and submitted that where there are contradictions in the evidence of a witness, the deciding factor in law is whether they were such major contradictions as to indicate that the witness deliberately told lies to court. He prayed court to subject the evidence of the lower court to a fresh and exhaustive scrutiny and come up with its own conclusions. He cited **Ephraim Ongom & Another V Francis Banega SCCA 10/1987, [1993] KALR 77 at 80**, to support his position.

The respondent's counsel repeated his earlier submissions that there was no evidence brought out during the trial that the suit kibanja belonged to the late Charles Nkeera. He also referred to the evidence of DW3 Ntege Patrick a witness to exhibit **PE1** the appellants' certificates of title and sale agreement **PE2** revealing that the kibanja the appellants bought did not include the neighbouring house which is the suit property. He contended that the appellants' obtaining a registered interest on a kibanja they had not bought or compensated the owners for was illegal. He also contended that there were no inconsistencies or contradictions in the respondent's evidence, and that the respondent's evidence that she was the rightful owner of the kibanja was not rebutted.

I have already made a finding in the course of addressing grounds 1, 2 and 3 of this appeal, that the agreement made between the respondent and DW5 is null and void, that DW5 Damali Nababi had no capacity to sell the suit kibanja belonging to the late Charles Nkeera to the respondent, and that by allowing the evidence of DW5 to the effect that she owned the suit kibanja was a complete departure from the pleadings on record. As a result the learned trial magistrate reached wrong conclusions.

I do not find merit in the submissions of learned counsel for the respondent that the appellants' obtaining a registered interest on a kibanja they had not bought or compensated the owners for was illegal. It tantamounts to giving evidence from the bar, which this court will not accept. Section 59 of the Registration of Titles Act (RTA) states that a certificate of title is conclusive evidence of title and it cannot be impeached except for fraud. In this case, though fraud was pleaded by the defendant/respondent in her written statement of defence, there was no evidence led on the part of the defendant to prove it to the requisite standard, nor did the defendant pray to impeach the plaintiffs' title in her counterclaim and prayers, as to prompt court to inquire and deliberate on the transactions behind the plaintiffs/appellants' interest in the suit land, including questions of whether the appellants compensated anyone.

I find the evidence adduced by DW5 in support of the respondent to be full of glaring contradictions, inconsistencies, and lies. I have already made a finding that DW5 Damali Nababi's evidence departs from the respondent's pleadings and their annexures when she testified that she was the owner of the property she sold. It is also clear from the record of proceedings that though DW5 Damali Nababi testified to court that she was the owner of the suit kibanja and had merely rented it out to her son the late Charles Nkeera, in the agreement she signed when selling the suit kibanja to the defendant/respondent (annexures **A1** and **A2** to the defendant/respondent's written statement of defence) she stated that they were selling a house which was for the late Nkeera. I find these to be glaring contradictions and deliberate lies on the part DW5, calculated to give credibility to the defendant/respondent's claims on the suit kibanja. It was dangerous for the trial magistrate to rely on such evidence which was flawed with a glaring major contradiction. See **Shokatali Abdula Dhall V Sadrudin Meralli SCCA 32/1994**.

In my opinion, the learned trial magistrate erred in law and fact and misdirected herself when she failed to properly evaluate the evidence on record as a whole and came to a wrong conclusion.

In the final result this appeal is allowed. The judgement and orders of the learned trial magistrate are set aside. The appellant is awarded costs of the appeal here and in the court below.

Dated at Kampala this 11th day of July 2013.

Percy Night Tuhaise

JUDGE.