THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 27 OF 2010

PROF. GORDON WAVAMUNNO :::::::::::::::::::::::::::: APPELLANT

VERSUS

SEKYANZI SEMPIJJA :::::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE RUBBY AWERI OPIO

JUDGMENT

This is an appeal against the judgment of Her Worship Babirye Mary, Magistrate Grade I, Entebbe Chief Magistrate's Court. The brief facts of the case are that the Respondent sued the Appellant for unlawful grabbing and alienation of his suit Kibanja measuring about 3 acres located at Vubufu village, Katabi Sub-County, Wakiso District known as Block 5 Plot 447 Nkumba. The Respondent sought vacant possession of the Kibanja, general and exemplary damages, interest and costs of the suit.

The Appellant, the registered proprietor of the land on which the suit land is situate, denied the Respondent's claims and stated that the Respondent was a trespasser on his land.

During the trial three issues were framed for determination:

(1) Whether the Plaintiff is a lawful customary tenant or a bonafide occupant of the suit land.

(2) Whether the undertaking signed between the parties constituted a legally binding contract.

(3) Whether the Plaintiff is entitled to the remedies sought.

After the trial of the case, judgment was granted in favour of the Respondent. The Appellant being dissatisfied with the said judgment appealed to this Honourable Court on the following grounds:

(1) The learned trial magistrate erred in law and fact when she held that the Respondent was a bonafide occupant.

(2) The learned trial Magistrate erred in law and fact when she did not properly evaluate evidence thereby arriving at wrong conclusion.

(3) The learned trial Magistrate erred in law and fact when she held that the contract entered between the Appellant and the Respondent was not legal.

(4) The learned trial Magistrate erred in law and fact when she awarded payment of compensation at a government rate that was ambiguous.

(5) The learned trial Magistrate erred in law and fact when she awarded general damages that were not justifiable and excessive.

Duty of the first Appellant Court:

It is trite law that the duty of the first Appellate Court is to rehear the case, re-evaluate the evidence, reconsider all the materials which were before this trial Court and make its own findings. It does not deal with the question of the demeanour of the witnesses since it did not have an opportunity of observing

the witnesses testify and has to rely on the findings of the trial Court on the question of demeanour of witnesses. See **Kifamunte Henry v Uganda, SCCA No. 10 of 1997.** In that case the Supreme Court emphasized that the general principle on the duty of the 1st appellant Court whether it is handling a criminal matter or civil matter are the same.

In the instant case the learned Trial Magistrate admitted that she did not hear and see the witnesses testify and was therefore unable to comment on their demeanour. She only relied on the evidence on record submission of the lawyers and the law in relation to the issues. This Honourable Court equally too cannot make any findings in regard to the demenour of the witnesses since it neither saw nor heard them testify. Further, there is no finding of the trial Court on the demenour for this Court to rely on. Equally too, this Court will rely on the evidence on record, the submissions of Counsel and the law in regard to the issues raised for determination.

Resolution of grounds of Appe

Ground No. I

It was contended that the learned trial Magistrate erred both in law and in fact in holding that the Respondent's father was the owner of the suit Kibanja and that by the time the Respondent inherited the suit Kibanja, his father had been on the suit Kibanja and he acquired the interests of the father who was a bona fide occupant. It was contended that the Respondent did not adduce cogent evidence to prove that his father owned the suit Kibanja. The only evidence produced in Court to prove the father's alleged Kibanja interest was oral evidence which evidence is susceptible to fabrication.

That documentary evidence was adduced to show how and when the father acquired the alleged Kibanja interest.

Secondly, it was contended that there was no evidence adduced to show when, and in which year the Respondent's father acquired or took possession of the land to acquire his alleged interest.

Thirdly, it was contended that the criteria to be a bonafide occupant was not proved because there was mere utilization of land without occupation as required by **Section 29 (2) of the Land Act.**

Lastly, it was contended that the Respondent did not qualify to be a bonafide occupant because he did not prove that he legally inherited such interest because he did not have Letters of Administration.

The Respondent's thrashed all the above contentions and argued that the learned trial Magistrate appropriately evaluated both fact and the law and arrived at a correct position that the Respondent was a bonafide occupant of the suit Kibanja. The findings of the Trial Magistrate was based on the evidence of **Pw_2** and **Pw_3** who confirmed that the Respondent's father was their neighbor and that the Respondent's father used to utilize the said Kibanja by way of planting coffee trees before the Respondent inherited it upon the father's death.

The question whether one is a bonafide occupant is one of law and fact. A bonafide occupant is defined under **Section 29 (2) of the Land Act** to mean*: a person who before the coming into force of the 1995 Constitution,*

(a) Had occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or

(b) Had been settled on land by the Government or agent of the Government, which may include a local authority.

Under **Section 29 (5) of the Act** any person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant under this section shall be taken to be a bonafide occupant for the purposes of this Act.

In a nutshell, a bonafide occupant is defined under three categories:-

(1) A person who occupied and utilized or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more; or

(2) A person who had been settled on land by Government or agent of Government; which may include a local authority.

(3) Any person who has purchased or otherwise acquired the interest of the person qualified to be a bonafide occupant.

In the instant, case the Respondent's claim was based on the contention that he inherited the Kibanja interest from his deceased father who had occupied the same for over twelve years. The Respondent testified that he inherited the suit Kibanja in 1986 after the death of his father in 1985. In support of the Respondent's claim **Kanyike Pw_2** and **Muliso Lule Pw_3** testified that they knew the Respondent since childhood as they knew his father as the owner of the

Kibanja in dispute and that the Respondent's father died in 1985 and the Respondent inherited the Kibanja. Both witnesses testified that the Respondent's father had planted coffee trees on the Kibanja. It was the contention of the Appellant that the Respondent did not show evidence when the Respondent's occupation of the suit land commenced to determine the 12 years adverse possession.

As I indicated earlier question as to bonafide occupancy is that of law and facts. The law is set out in **Section 29 (2)** and **(5).** According to the facts of the case as stated by the Respondent and his witnesses, the suit Kibanja belonged to the Respondent's father since the Defendant's childhood where the deceased had planted coffee trees. By the time the deceased died in 1985, the Respondent was about 11 years old. The Respondent inherited the Kibanja in 1986. By 1995 the Respondent had clocked 10 years on the Kibanja. It can therefore be presumed on the balance of probability that the interest of the deceased was more than twelve years according to **Pw_2** and **Pw_3** and the nature of use the Kibanja had been put to. The Respondent had clearly discharged the legal burden of the deceased adverse possession, thereby shifting the burden on the Appellant to prove otherwise.

Another contention was that the Respondent did not prove occupation of the Kibanja. The Appellant contended that the provision of the law was that one must prove that he or she was in occupation of land and also utilized or developed the same. It was the contention of the Appellant that the Respondent's father, from whom the Respondent claimed he derived the interest of bonafide occupancy by inheritance, only cultivated (utilized) the suit land and did not occupy it but resided on (occupied) another piece of land which was not in dispute in the case. As such he did not satisfy the test of occupation and utilization.

With the greatest respect, I do not think it was the intention of the legislature that for one to have a Kibanja interest he or she ought to occupy and utilize the same. It was merely directory and not mandatory because it is not possible for one to occupy a Kibanja without utilizing it and you cannot utilize a Kibanja without occupying it. The test of occupation and utilization were merely for emphasis to prove that there was possession of the Kibanja. The mischief the provision of the law was protecting was ownership of the Kibanja interest and not the use of the Kibanja. Thus one may have several Bibanja and only occupy one of them leaving others for economic activities like farming, etc.

Lastly it was the contention of the Appellant that the Respondent would not still qualify to be a bonafide occupant on account of inheriting the father's interest because he (the Respondent) did not adduce evidence of inheritance by grant of Letters of Administration or probate. Learned Counsel relied on **Section 191 of the Succession Act** and the case of **Aisha Nantume Tifu v Damulira Kitata James, HCCS No. 77 of 2007 (Hon. Justice Joseph Mulangira)** and **Vincent Tamukedde v Serunjogi, HCCS No. 85 of 1995 (Hon. Justice Moses Mukiibi).**

The above cases support the view expressed in the provision of **Section 191 of the Succession Act** which states as follows:-

> *"Except as hereafter provided, but subject to* ***Section 4 of the Administrator General's Act,*** *no right to any part of the property of a person who has died intestate shall be established in any Court of justice, unless Letters of Administration have first been granted by a Court of competent jurisdiction."*

In my view the ratio decidendi in the case of Aisha Nantume (Supra) is that a person who has no Letters of Administration cannot deal in the estate of the deceased person. In my view dealing would mean selling or giving away property of an intestate person. **Vincent Tamukedde (Supra)** does not preclude or bar a beneficiary who has not taken out Letters of Administration from filing a case for the purpose of protecting his or her interest in the estate or for the purpose of preserving the estate or keeping together its property.

In the instant case, the Respondent filed his case at the Chief Magistrate's Court solely to preserve the estate as a beneficiary. He never alienated the estate. Had he sold the same then he would have no legal basis. It is accordingly my view, with greatest respect, that the above laws and submission of Counsel for the Appellant were quoted out of context and should be disregarded.

Furthermore, I also find outrageous, the submission of Counsel that the learned Trial Magistrate erred in law for basing her ruling on oral evidence that the Respondent inherited his father's estate without proof of grant of Letters of Administration. The above argument is untenable in law. Inheritance and obtaining Letters of Administration are two different things. Obtaining Letters of Administration is not proof of inheritance but rather a legal process of getting authority to administer the estate of a deceased probate. One can inherit a deceased person's property without necessarily taking out Letters of Administration; one can be a heir and not the Administrator of a deceased estate and obtaining Letters of Administration perse is no proof of inheritance as one can be an administrator without being the heir.

In the instant case therefore, what was required of the learned Trial Magistrate was satisfaction that the Respondent inherited his father's interest in the

Kibanja, which she did on the available oral evidence. There is therefore no way this Court can fault the Learned Trial Maigstrate.

In the premises, it is my conclusion that the learned Trial Magistrate was correct to rule that the Respondent qualified to be a bonafide occupant.

Ground 2:

The learned Trial Magistrate erred in law and fact when she failed to properly evaluate evidence thereby arriving at wrong conclusion.

It is a cardinal principle of law that Courts of law should decide disputes before it on the basis of the evidence before it and not on conjecture, fancifal, or attractive reasoning.

In the instant case, the claim before Court was the determination whether the Respondent had a Kibanja interest in the suit property. The Respondent adduced evidence and relied on the evidence of **Pw_2** and **Pw_3** who confirmed that the Respondent inherited his deceased father's Kibanja. The Appellant gave evidence that the Respondent was not known to him as one of the people who had been occupying and or utilizing the land at the time he purchased it. He testified further that the settled claims of the people who had been utilizing the land for cultivation in the presence of the Local Council officials and the Respondent was not among the people who presented their claims and neither was he found carrying on any activity on the land. **Dw_2** on his part testified that when he visited the Appellant's land in 2007, he found the Respondent utilizing part of the land for brick making and the rest of the land was empty.

In her judgment, the learned Trial Magistrate found that the evidence of **Pw_2** and **Pw_3** proved that the Respondent had a Kibanja on the Appellant's land.

In her judgment, the learned Trial Magistrate never mentioned the weight he put on the Defendant's evidence, never the less, after re-evaluating the whole evidence, I am satisfied that the Respondent had adduced evidence on the balance of probability to prove that he had a Kibanja interest which he inherited from his father. Their Kibanja interest had a track record from the former registered owner called Bulage. Therefore, the contention of the Appellant that the land was free of Kibanja interest could not be believed. Furthermore the Appellant's claim that the Respondent never presented his claim to the Appellant did not mean that the Respondent did not have a Kibanja interest. It could have been that the Respondent did not want to leave his Kibanja hence no need for compensation. It is trite law that any person who buys registered interest in land in Buganda is subject to the Kibanja interest on the land. See **UPTC v Abraham Lutaya, SCCA No. 36 of 1995**.

Ground 3:

The learned Trial Magistrate erred in law when she held that the contract entered between the Appellant and the Respondent was not legal.

The record of the lower Court clearly shows that the contract between the parties were not illegal. The contract was for the Respondent to remove his bricks from the land which the Respondent accepted and performed and that the Respondent could not later plead duress or coecrion. The learned Trial Magistrate observed that the said contract was about removal of bricks and not about the interest of the Respondent in the land. She observed that the interest of bonafide occupants could not be alienated except as provided by law:

"The undertaking between the parties before Court in my view could not override the provisions of the law. Moreover I already said it was for bricks to be removed and not about interests of the Plaintiff on the land…. In conclusion, I hold that the contract before Court was not legal if its purpose was to override provision of the law which seems to be the reasoning of the Defendant which I am not in agreement with."

The learned Trial Magistrate did not state that the undertaking between the parties were illegal except that if it was to be interpreted to mean that it extinguished the Respondent's right as a bonafide occupant of the suit property. The undertaking was not a contract compensating the Respondent's Kibanja interest but rather it was facilitation for the Respondent to remove his bricks from the site. As a matter of fact, the wordings of the said contract was so clear and therefore nothing more should be added on its clear terms.

Be that as it may, I think the learned Trial Magistrate did not handle the issue of duress meticulously. The Respondent clearly spelt out the particulars of duress and testified that he was alone in the meeting where he was hijacked and the Defendant made use of Police personnel and he signed the document amidst them because the Defendant had many people accompanying him. In my view the issue of duress should have been investigated more seriously by the Trial Court in view of the allegations that the Appellant used the Police to intimidate him into signing the undertaking above.

Ground No. 4:

The learned Trial Magistrate erred in law and fact when she awarded payment of compensation at a government rate that is ambiguous.

The contentions of the Appellant was that the Land Act did not provide for anything like a government rate. As such the learned Trial Magistrate misdirected herself when she granted award and based its computation on non-existent criteria. That in itself made the order ambiguous and unenforceable.

In reply Counsel for the Respondent submitted that the Respondent was entitled to compensation because the law provides that a Kibanja holder must be compensated before being forced to leave the Kibanja. The Appellant contended further that the Respondent did not seek for an award of compensation in his prayers. The learned Counsel relied on the case of **Gonstan Enterprise Limited v John Kakos Oumo, SCCA No. 8 of 2003** where it was observed as follows:

> *"It is a well settled principle that no decision must be made or granted by any Court of law on ground which was not pleaded. See the case of* ***Candy v Cospair Air Charter Limited (1956) EACA 139 at page 140*** *where* ***Sir Ronald Sindair VP*** *stated that* ***"The object of pleadings is of course to secure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given."***
>
> In the instant case the law provides that a bonafide occupant is not to be evicted without compensation. Having found that the Respondent had been evicted without compensation as provided by law, the learned Trial

Magistrate did have inherent jurisdiction to order for the same to be paid according to law. Normally compensation at Gvoernment rate are determined by the office of the Chief Government Valuer. In the premises I do not see any ambiguity in the order of the lower Court.

Ground No.5:

The learned Trial Magistrate erred in law and fact when she awarded general damaged that were not justifiable and were excessive.

The general principle regarding the award of general damages is that they should be awarded to compensate a party for the damage, loss or injury he or she has suffered. The above principle was emphasized by **Justice A. A. Oder (JSC; RIP)** in **Robert Coussens v Attorney General, SCCA No. 8 of 1999.**

It was the contention of the Appellant that the Respondent did not prove that he suffered an injury or loss. With greater respect; I do not agree with that position. The law stipulates that a Kibanja holder must be compensated before he or she is forced out of the Kibanja. The moment it is proved that eviction was carried out without compensation, the Kibanja holder would automatically be entitled to damages because such eviction would tantamount to trespass. The learned Trial Magistrate was therefore right to award damages. In her plain judgment the Trial Magistrate went further and analysed particulars of the Respondent's injury and loss as follows:

"Indeed the Plaintiff's request for general damages is justified as the Defendant who according to law would have accorded protection did not,

instead he made him to remove his bricks and denied him access to his Kibanja and thereafter sold it illegally. Such acts inconvenienced the Plaintiff, ***affected him psychologically, economically, etc and caused him suffering and incurred costs.*** *The Court takes note of the suffering of the Plaintiff and grants him the request for general damages to the tune of Shs.3,000,000/=* ***"emphasis mine".***

It is clear from the above that the learned Trial Magistrate was alive as to the principles to be considered in awarding general damages and she applied the same judicially. On the award of damages, I feel the amount of Shs.3,000,000/= was very reasonable in the circumstances.

Lastly the Appellant contended that the order in the decree for the payment of compensation of 59,875,350/= as professionally established value of the Kibanja was contrary to the judgment and therefore erroneous.

I have perused the record of proceedings of the lower Court and found a copy of Valuation Report done by Katuramu & Company in which the above figure was arrived at. However I do not see on whose instructions the said valuation was commissioned. The learned Trial Magistrate did not make an order in her judgment to that effect. The above figure was inserted in the decree was erroneous and is accordingly expunged. It is important to emphasize that the decree of Court ought to only include the terms that were pronounced in the judgment and any deviation becomes an illegality.

In conclusion, I find that generally, the learned Trial Magistrate appropriately addressed herself to the law concerned and also appropriately evaluated the evidence. The only faulty on record was the decree which

provided for payment of 59,879,350/= which was smuggled on Court record. Accordingly I find no merits in the appeal and it is dismissed with costs.

HON. MR. JUSTICE RUBBY AWERI OPIO
JUDGE
4/3/2013.

5/3/2013

Court:

Martin Kakuru for the Appellant.
Appellant not in Court.
Musisaba Najib for the Respondent.
Respondent in Court.

Betty Nabirye for Court Clerk.

Judgment read and delivered in the presence of the parties and their Counsel.

HIS WORSHIP ALEX AJIJI
ASSISTANT REGISTRAR
LAND DIVISION
5/03/2013.