

THE REPUBLIC UGANDA

IN THE HIGH COURT OF UGANDA

AT NAKAWA

CIVIL APPEAL NO. 91 OF 2012

[ARISING FROM MITYANA CIVIL SUIT NO. 16 OF 2007]

MARY ALIDDEKI ::::::::::::::::::::::::::::::::::::::: APPLICANT/APPELLANT

VS

KASANGAKI FRED::::::::::::::::::::::::::::::::::::: RESPONDENT/DEFENDANT

BEFORE: HON. MR. JUSTICE WILSON MASALU MUSENE

JUDGMENT

This is an Appeal from the Judgment of the Learned Magistrate's Court at Mityana by His Worship Lubowa Daniel in Civil Suit No. 16 of 2007 delivered on 28th day of June, 2012 in Mityana wherein the Learned Magistrate entered Judgment against the Appellant. The Appellant being dissatisfied with the whole decision of the Learned Magistrate , Appealed to this Honourable Court on the following grounds:-

1. That the Learned Magistrate erred in law and fact when he dismissed the case without determining the issues raised at trial.
2. That the Learned Magistrate erred in law and fact when he failed to subject the entire evidence on record to a thorough evaluation hence reaching an erroneous decision.

The Appellant prayed that the Appeal be allowed and make an Order awarding the Appellant costs of the suit and Appeal, with interest.

The brief facts of the case are that the Appellant is the Administratrix of the estate of the Late Aliddeki Moses Luminsa who died in 1986. The Late Aliddeki Moses Luminsa had purchased the land from a one Eriyasafu Mulasa at Namakofukiweesa which piece of land straddled across the Mityana- Kampala high way.

On the 29th day of June 1974 and upon the demise of the said Aliddeki Moses Luminsa , the Plaintiff continued to be in full control and Management of her late husbands said land until the 26th day of September 2007 when the Defendant without any scintilla of right or lawful justification trespassed on part of the land ,offloaded two trips of hard core stones and two trips of sand in preparation for house construction.

The Appellant sent the Respondent a notice of intention to sue but he failed to take heed and the Appellant lodged in Civil Suit No.16 of 2013 in the Chief Magistrate Court of Mityana and the Learned Magistrate delivered Judgment in favour of the Respondent thus this Appeal.

The Appellant Mary Aliddeki was represented by Mr. Wadembere, while the Respondent, Kasangaki Fred was represented by Mr. Gedeon Arinaitwe.

When the Appeal came up for hearing, the Advocates for parties were directed to file written submissions. On record are submissions of the Appellant which were served unto the Respondent but to date the Respondent has never filed his reply. A copy of affidavit of service is on record. In the premises, court decided to proceed without Respondent's reply.

The powers of the High Court as an Appellate Court subject to such conditions and limitations as may be prescribed are stipulated in Section 80 of the **Civil Procedure Act Cap 71. The High Court accordingly has power to determine the case finally, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken and to order a new trial. According to Section 80 (2) of the Civil Procedure Act, the High Court has the same powers and nearly the same duties as are conferred on courts of original jurisdiction in respect of suits instituted in it.**

The duty of the first Appellate Court is to evaluate the evidence of the lower court record a fresh to enable it to come to an independent decision if the lower court record can be sustained. **See**

Kifamunte Henry VS Uganda SCU CR. Appeal No.10 of 1997. The same position was stated in Fredrick Zaabwe VS Orient Bank Ltd C/A NO.4 of 2006.

I shall now proceed to consider the grounds of appeal as set out in the Memorandum of Appeal.

The first ground was that the Learned trial Magistrate erred in law and in fact when he dismissed the case without determining the issues raised at trial. During the scheduling before the Trial Magistrate, agreed issues were three;

1. Whether the Plaintiff has an interest in the suit property.
2. Whether the Defendant trespassed on the suit property.
3. Whether the parties are entitled to any remedies sought.

The trial Magistrate in his Judgment held that the suit was not about legal rights but about Kibanja (equitable) interest in the land and he concluded that the issue whether the Plaintiff is the rightful legal owner of the suit land can only be determined between herself and Charles Kawere the heir to Mukasa.

The trial Magistrate further held that since Nakibuuka Miriam who sold to Kasangaki basing on the evidence of the locus, had Kibanja interest on the suit land and when she attempted to buy, she only wanted to acquire legal rights, which extinguished her equitable interest in Kibanja, which is confirmed by the agreement executed by the RC Chairman with a provision that Nakibuuka **“Wadembe Okutunda Plot ye Kungulu”** literally translated **to mean Nakibuuka was free to sale the Plot of land.** Therefore it is clear that the trial Magistrate erred in law and fact when he dismissed the case without determining the issue at trial which were;

Whether the Plaintiff now the Appellant had an interest in the suit land. It was uncontroverted testimony of the Appellant on page 17 of the record that the suit land was bought by the late Aliddeki Moses Luminsa and the Appellant as an Administratrix had been in control and thus possession till 26th September 2007 when the Defendant/ Respondent trespassed thereon.

It was also her testimony on page 19 of the record that the Appellant asked Ssali and Nakibuuka to produce a sale agreement that is purported to have been entered into between

the late Aliddeki and Machamba which the latter failed to do. The Appellant then asked for 5000,000= as a contingency to sell t Nakibuuka Miriam if and when she produced the said purported agreement between the late Moses Aliddeki and Machamba.

The Trial Magistrate was not alive to the fact that the said Kibanja had got no chain of ownership thus who was the first proprietor as a matter of fact.

DW1 Machamba John in his cross examination on page 34 of the record testified that he had bought the said Kibanja in 1984 from the late Aliddeki Moses Luminsa but failed to produce the agreement upon which he purchased the same neither did he state the exact sum he paid for the same and to make matters worse he could not even recall any single witness of the vendor to this transaction.

The said John Machamba further in cross examination on page 34 of the record stated that the purchase price of the said plot was around 400,000= in 1984. Counsel for the Appellant prayed that this Honourable Court takes Judicial notice of the currency value at that material time which would be excessively high for such piece of land.

Counsel for the Appellant referred Court to Section 55 of the Evidence Act.

Counsel for the Appellant further submitted that it is established fact that between 1981 and 1988, the Government of Uganda through the Central Bank devalued the Ugandan Currency in order to stabilize the economy, therefore the 400,000= of that time would just be excessively high for a simple plot of land especially in rural areas like Mityana.

The learned trial Magistrate ought to have taken Judicial Notice of this material fact and thereafter discredit DW1 Machamba's testimony as he had lied to court. **Section 113 of the Evidence Act is to the effect that court, may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct, public and private business, in their relation to the facts of a particular case.**

The Trial Magistrate therefore, failed to determine the above issue at Trial.

The second issue was whether the respondent/ defendant trespassed on the suit land?

Trespass is defined according to Halsbury Laws of England at page 739 as a wrongful act done in disturbance of possession of property of another against his Will, what constitutes trespass to land is as hereunder.

“Every unlawful entry by one person on land in the possession of another is a trespass for which action lies.....”

Considering all the pieces of evidence adduced at trial by the Appellant and PW2 Mawejje proving ownership of the suit land by the Late Moses Aliddeki, and the fact that before the purchase of the suit land by the said Aliddeki in 1974 the same had no occupants all this point to the fact that actually the suit land/kibanja still forms part of the estate of the late Aliddeki Moses.

On the other hand the Respondent with all his witnesses having failed to establish a proper chain of ownership of the suit land / kibanja right from the late Moses Aliddeki to Machamba then Ssali to Nakibuuka and lastly the respondent all this fortifies the fact that the respondent’s actions of entry unto the suit land, ferrying building materials among others without the consent or approval of the appellant constituted trespass.

In light of the above, the Trial Magistrate ought to have resolved this issue in affirmative. This Court therefore finds and holds that the Respondent trespassed unto the suit land.

The last issue was whether the parties are entitled to the reliefs sought:

Pursuant to the two foregoing issues which the trial Magistrate ought to have resolved in affirmative, Counsel for the Appellant submitted that she was entitled to the prayers that!

1. A Declaration that the plaintiffs (now Appellant) is the lawful owner of the suit land,
2. A declaration that the defendant(Respondent) is a trespasser unto the suit land
3. An eviction Order against the defendant/ Respondent.
4. A permanent injunction restraining the defendant and his agents or employers from further trespassing unto the suit land.
5. General damages and given this lengthy inconvenience of 10,000,000/= (Ten Million Shillings only)
6. Costs of the suit.
7. Any other reliefs as court may deem fit.

In my view since the Appellant had proved her case beyond reasonable doubt, and in view of what has been discussed, ground one succeeds.

The second ground of Appeal was that the learned Trial Magistrate erred in law and fact when he failed to subject the entire evidence on record to thorough and exhaustive scrutiny hence reaching an erroneous decision.

The role of the first appellate Court is to subject the entire record to an exhaustive scrutiny and make its own considerations and findings. The appellate Court must then make up its mind by carefully weighing and considering the evidence that was adduced at trial.

From the onset the Trial Magistrate only relied on the evidence of the defendant (now the respondent) as he reached the conclusion to have the suit dismissed against the defendant, for he stated that the case was about the kibanja interest in the land.

The trial Court relied upon an agreement executed by the area RC Chairman which had added words or super impositions that Nakibuuka had a liberty to sell her interest and the same had been objected to for being a photo copy because Nakibuuka had failed to produce its original.

The trial Magistrate went onto hold that though the said clause was denied and objected to by the plaintiff (now appellant) citing the difference in hand writing between the upper part and lower part of the agreement, the part that includes the said provision was part of the agreement and lower part was rejected.

When a transaction has been reduced in writing, either by requirement of law or agreement of the parties, the writing becomes the exclusive memorial thereof, or no extrinsic evidence is admissible to independently prove the transaction.

Extrinsic evidence is not inadmissible to supersede the document but also to control that is to contradict, vary, add to or subtract from the terms of the document though the contents of such documents may be proved by either primary or secondary evidence.

In the instant case the appellate tendered in the acknowledgement as P6 and then DW2 Nakibuuka Miriam equally tendered into a similar acknowledgment purported to have been done by all parties. It's strange that the said acknowledgments were different the only similarity was in

the aspect of refunding 500,000/=. However the exhibit tendered into Court by Nakibuuka had an additional provision that she had a right to sale.

The correct position of law in relation to the interpretation of documents therefore seems to be:

1. The goal of the interpreter is to find the true intention of the parties.
2. Ordinarily, this true intention must be gathered from the words used, the substance is therefore to be determined in accordance with the form.
3. However when it is manifestly clear (from the surrounding circumstances and from the document read as a whole) that the specific words used do not reflect the true intention of the parties, then the words may be ignored., to that extent, substance will prevail over form

Therefore, Court failed to properly evaluate the evidence on court record especially in as far as the exhibits purporting to be made by both parties the same time though with different effect as the true intention of the parties was to cause a refund of the monies paid but further scrutiny thereof does not disclose that a sale or a purported sale could be construed there from.

Furthermore, one of the canons of interpretation are to look at the document as a whole for what purpose was the same made, thus its fatal for court to accept a section of the document and reject another.

It is interesting to note that the Appellant tendered in evidence the same document as an acknowledgment of refund as **P EX 6** however court went ahead and considered the same document as an agreement made between the parties.

DW1 Nakibuuka Miriam testified that she entered into an agreement with the appellant for the refund of the purchase price because she wasn't the landlady; she further stated that Charles Kawere was the landlord but she also stated in the agreement the appellant authorized her to sale the plot.

From the onset the Appellant tendered in the acknowledgment of refund which acknowledgment did not have the particular provision of authorizing Nakibuuka to sale the said kibanja.

Counsel for the Appellant further submitted that there was no express authorization of sale given to Nakibuuka as the said **500,000/= (five hundred thousand shillings)** had been refunded to Nakibuuka by the Appellant the former having failed to produce the purported sale agreement between the late **Moses Aliddeki and Machamba**.

The Respondent further testified that he had bought the said kibanja from **Nakibuuka**, who bought from **Charles Ssali**, who purchased the same from **John Machamba** who also acquired it from the late **Aliddeki**. He further stated that it was later discovered that the deceased Aliddeki wrongly sold this plot as it belonged to Eriasa Mulasa.

However the appellant stated that the land belongs to the estate of the late Aliddeki as he initially acquired the same from the late Mulasa Eriasa she tendered in exhibit P3 as evidence of purchase.

The trial magistrate while evaluating evidence disregarded **P EXH 4** a letter dated **23rd of July 2000** written by a one **Charles Kawere** the heir of the late Mulasa Eliasafu to Mityana Land Office authorizing the appellant to go ahead and survey the remaining part of the land which is now in contention while considering evaluation evidence. This important piece of evidence was not given consideration and hence a wrong decision was reached.

It's further amazing that neither of the earlier owners of the said kibanja had any sale agreement or tendered in evidence any such document pointing towards the ownership of the same save for the agreement made between **Charles Ssali** and **John Machamba**. It is pertinent to state that the said kibanja has no roots to ownership and if it does no such evidence was ever adduced. The late **Moses Aliddeki's** ownership of the suit land is uncontroverted therefore failure to evaluate this important piece of evidence by the trial magistrate led to a wrong finds.

Furthermore as already discussed above John Machamba DW1 stated that the purchase price of he said plot was around **400,000/= (four hundred thousand shillings in (1984))**. This Court has noted that the currency value at that material time which would be excessively high for such piece/plot of land in question.

Its pertinent to note by this honourable court that the respondent on many occasions were demanded to produce **Charles Kawere** for testifying but in vain owing to the fact that he went

ahead to issue a letter of approval/consent to the appellant to proceed to the Lands Registry and secure the title to the land.

However after such fact that said Charles Kawere proceeded to represent himself as the landlord of the said land and went ahead to receive and acknowledge the respondent as his tenant.

Therefore, from the evidence produced there has never been a kibanja on the suit land owned by the respondent's purported predecessors for there was no agreement of sale between **John Machamba** and the late **Aliddeki in 1984**, and further still the deceased went ahead to caveat the said land. Further and according to the Appellant and **PW2** the land was vacant which so remained till 2007 the appellant having guarded the suit land jealously from any encroachers/trespassers.

The second ground of Appeal is allowed.

The Appeal succeeds, Judgment of the trial magistrate is overturned and the Appellant is granted the reliefs as prayed for in her pleadings.

Having allowed all the two grounds of Appeal, I do hereby enter Judgment in favour of the Appellant and order that the Respondent pays costs of the Appeal.

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WILSON MASALU MUSENE

JUDGE

11/04/2014

