REPUBLIC OF UGANDA

IN THE SUPREME CCURT OF UGANDA AT MENGO

(CORAM: TSEKOOKO, J.S.C., KANYEIHAMBA, J.S.C., AND MUKASA-KIKONYOGO, J.S.C) CIVIL APPEAL NO. 11 OF 96

BETWEE N

MITWALO MAGYENGO.. APPELLANT

AND

NEDADI MUTYABA…………………………………………… RESPONDENT

(Appeal from the judgment of the High Court at Kampala (Kityo, J.) dated 16th June 1995 from High Court Civil Appeal Ho. 64 of 1992)

JUDGMENT OF TSEKOOKO, J.S.C.:

This is a second appeal. It is an appeal against the decision and decree of Kityo, J. in the exercise of appellate jurisdiction.

The facts as can be gathered from the record are simple. The appellant's father called Magyengo lived On Mailo land of the family of Kawalya Kaggwa allegedly since 1940 in Nalya Karunga village known as Kyaggwe Block 97 Plot 203. Magyengo seems to have lived on the land with the permission of Kawalya-Kaggwa. The appellant claimed that his father lived under the customary land tenure system known as Kibanja. Magyengo produced children including the appellant. When the appellant came of age, he erected some house on the Kibanja. The Kawalya-Kaggwa offspring had a series of successions to the land so that by 1980 Harriet Kawalya Nansinkombi (P.W.1) was the proprietor of the land. She did not recognize him (appellant) as a Kibanja holder. She offered to sell to the appellant the portion occupied by him. He was unable to buy it. About 1987, P.W.1 sold to the respondent a portion of the land which included the area occupied by the appellant. It appears that a few years thereafter the appellant started developing more land belonging to the respondent. Although the respondent was prepared to grant to the appellant temporary stay on the land, the appellant was unco-operative in that in defiance of the respondent's title the appellant continued to expand cultivation of the respondent's land. Efforts by R.Cs Court to settle the matter did not help. Consequent1y in 1992 the respondent instituted an action in the Chief Magistrate's Court of Mengo alleging that the appellant was a trespasser and prayed for a

permanent injunction among other reliefs. The appellant filed a defence and counter claim. By his counterclaim the appellant alleged that he was given the land by his father; that he was not a trespasser. The appellant further averred that he was a customary tenant and gave evidence at the trial to that effect. The learned trial Ag. Chief Magistrate decided the action against the appellant and therefore ranted the permanent injunction and awarded shillings 50,000/ as general damages to the respondent. The appellant appealed to the High Court. The appeal was dismissed. He has flow appealed to this Court against the judgment of the High Court.

The memorandum of appeal contains the following six grounds -

1. The learned Judge erred in law and in fact when he failed to evaluate evidence pertaining to the history of ownership of the suit Kibanja. The Judge did not subject the evidence on record as a whole to fresh and exhaustive examination and scrutiny.
2. The Learned Judge erred when he failed to find in favour of the Appellant on the ground that P.V1.i was not the title of the land where the suit property is/was situate.
3. The learned Judge failed to find that the Appellant was settled on the said land in the Kibanja long before the Plaintiff acquired ownership thereof and could therefore not have been continuing trespasser.
4. The Learned Judge erred in law and in fact in believing the trial Magistrate that P.W.1 was the Successor of Late FLAVIA SSENDAGALA (deceased) without having produced letters of Administration or any other legal document authorising her to administer the estate of the above stated deceased. The death of late Flavia Ssendagala was not established.
5. The Learned Judge erred in law and fact when he failed to observe that the trial Chief Magistrate did not visit the suit property in order to establish where the suit Kibanja was exactly situated.
6. The Learned Judge erred in upholding the trial Magistrate’s finding that the Appellant had all along been a trespasser on the suit land.

We drew the attention of Mr. Ddamulira-Muguluma, Counsel for the appellant, to the provision of Section 74(1) of Civil Procedure Act and Pointed out that the first five grounds offended this Section. It reads in its relevant parts -

“74(1) ...., An appeal shall lie to the Court of Appeal from every decree passed in appeal

by the High Court, on any of the following grounds namely that -
(a) the decision is contrary to law or to some usage having the force of law,

(b) the decision has failed to determine some material issue of law or to some usage having the force of law;

(c) a substantial error of defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error of defect in the decision of the case upon the merits".

These provisions require that second appeals be based on law.

Mr. Damulira-Muguluma realized this and quite rightly abandoned grounds 1 to 5 as they were based on facts.

We heard him and Mr. Kawere, Counsel for the respondent, on the 6th ground which has been produced above.

Mr. Ddamulira-Muguluma appeared rather unsure of his arguments. He first suggested that the appellant's Counsel during the trial and during the appeal to the High Court erred in arguing that the appellant was a customary tenant on the disputed land. He later changed and contended that the appellant was a Kibanja holder and as such he was not a trespasser. Learned Counsel did not sufficiently explain the difference between customary tenure and Kibanja holding.

Mr. Kawere for the respondent supported the conclusions of the Chief Magistrate and of the learned Judge and contended that the appellant did not hold any Kibanja and as such he was a trespasser.

During the trial before the Chief Magistrate, the appellant testified that (page 16) -

> “I live on the same plot with my brother and sisters and my father. This is my father’s plot which was given to my father by Kawalya-Kaggwa……………...
> My father Paid Busulu for the land. He paid Busulu to Kapere, Benard Kaggwa and Nsobya” .. . .

Later on he testified -

> “I know the plaintiff and he is my neighbour. He is my master who bought the land at Mutuli. He bought the land where I am living”.

During cross-examination the appellant testified (at page 18)

> “Nansikombi at on time asked me to buy this same Kibanja. By the time I approached her she told me that she had already sold it to Mutyaba”.

The appellant’s witness Christopher Nsobya (D.W.2) testified that the appellant was given the Kibanja when he was young. D.W.2 then testified about successive ownership through inheritance of the land by Members of the family of Kawalya-Kaggwa. He claimed that the appellant was given the Kibanja when he was young. D.W.2 does not say who gave the Kibanja to the appellant. D.W.2 certainly contradicted the appellant on ownership of Kibanja.

Be that as it may, the evidence from the mouth of appellant shows that if anybody held a Kibanja on the disputed portion of land, it was his father. It transpired that his father is or was alive at the time of the trial. The father never testified. There was no evidence that the father had passed over any Kibanja holding interest in the land to appellant. There as no explanation

why the father could not be party to the proceedings, or why he could not testify.

P.W.1 testified that the father of the appellant was allowed on the disputed land to assist in "looking after the lusuku". P.W.1 questioned the presence o the appellant's father. She further testified (at page 14) -

> "Eventually Mitwalo (Def) son of Majengu settled there.
>
> He did not settle as a Kibanja holder as I do not recognize him. The defendant was never introduced to me ………………………………………………….
>
> There were no houses but today there are houses. I told the defendant once and asked him to buy himself. He told me he just wanted a Kibanja I told him I was going to sell the land. I sold the land to one Mutyaba/Plaintiff in this case. This was in 1990/91".

To do justice to the complaints in the appeal I will refer to the manner in which the learned Judge considered the appeal in the Court below.

I have already reproduced art of the evidence of the appellant.

The evidence of the appellant clearly shows he does not claim ownership of the land. He acknowledges the respondent as his "master" having bought the land which includes the disputed portion from P.W.1. The appellant attempted unsuccessfully to persuade the respondent to sell to him the portion of 'and in dispute. This clearly shows ho is the owner. The owner is the respondent. In the Court below there were two grounds of appeal which appear at page 2 of the judgment of the learned judge in the following words -

> “(1) That the learned trial Magistrate erred in law and fact by holding that the appellant was a trespasser on the land where he has lived all his life; and
>
> (2) That the trial Magistrate erred in law because his finding was against or contradictory to the weight of evidence that had been adduced”.

The learned Judge dealt with the appeal in this way (at pages 2 - 3 of his judgment).

> “The perusal of the plaintiff’s pleadings reveals that he was claiming Ownership of an interest in land classified as the MAILO LAND OWNERSHIP which was governed by the BUGANDA KINGDOM LAW CITED as the POSSESSION OF LAND LAW which in 2b confers ascertained rights. The owner of Mailo Land interest and limits the extent of the right to deal with that kind of land, and the other relevant law, recognised the Possession of interest of a person on another person’s mailo land is the Busulu and Envujjo Law, which sets out, the right of Kibanja holder and those of mailo owner and then provides procedural enforcements of the same. See: Section 3, 4, 8 9 and 11. There is no right to transfer or dealing in Kibanja interest without the express consent of the mailo owner.
>
> According to the evidence that was adduced by plaintiff at the trial, it esta1ished the direct chain of ownership, commencing from the original mailo owner down to the plaintiff who had purchased the land in the manner as prescribed and authorised by law. It is that same evidence which was
>
> urged by Nr. Kawere, in his submissions at the end of the evidence and the defendant’s unauthorised continued stay on the land, as trespasser, which the trial Magistrate believed in preference to that of the defendant’s claim.
>
> The defendant’s plea was all the way from his pleadings, that he was a customary tenant and claimed his right to emanate from the PUBLIC LAND ACT - a law which deals with a different kind of land ownership, and which creates different ownerships that is where title of customary tenant is known. He clams his ownership to have been from his own father, but who had no established lawful interest to transfer. He did not establish that his father had the right to transfer.

There was a claim by the appellant that the Kibanja now in issue, was given to his father (deceased) by the former owner Kawalya-Kaggwa (deceased) at the end of the 2nd World War, that is in 1945. That he built a house for himself in 1960 and that the land was subsequently inherited by the Nansikombi in 1980, and that his father used to Pay Busulu and produced a ticket for Busulu of 1981 which was not signed and witness who produced the exhibit claimed to have become blind in the year 1979.

These two facts weight against attachment of any weight or credibility, in the evidence earlier stated above:

(a) The Busulu payment was abolished in 1975.

(b) The tickets produced were not signed.

(c) The person who gave the land though is still alive and lives within the same general area, yet, he was not called, to appear and support the plaintiff's (sic) claim at the trial.

In addition thereto, there were some decided cases cited in the Court below, dealing with customary tenant of Public Land but not a Kibanja holder on mailo land.

In conclusion, a claim of ownership based upon the land being given by another, who had acquired it before, would only be established beyond reasonable doubts by the donor of the gift particularly in circumstances as those in this case, where the donor is still alive. Payment of Busulu up to the year 1981 by the donor can not be believed as such a levy had long before been abolished, i.e., six years before, and the reason given for failure to sign the ticket adduced as exhibit i.e. untenable because he became blind 4 years subsequent to the abolition of the levy.

I therefore find no error in law, or fact in the trial Magistrate's assessment, to incline me to alter the findings in his judgment. I accordingly dismiss this appeal with costs to the

respondent”.

The issue really is whether the appellant can on the facts be described as a trespasser.

He was on the land when the respondent acquired the land. On the evidence on the reccr3 I can state that the dispute between the appellant and the respondent came to a head when the appellant expanded cultivation possibly beyond where he was staying. The respondent explained the position in the following words (at page 15) -

> “I came to know the defendant in early 1980’s. He happened to live in my land. But by the time I bought this land I was taken around by the agent of Nansikombi (P.W.1) who is now dead. There was some banana plantation which was bushy and this was the land I acquired first. The defendant has of late up to yesterday carried out massive developments. He is clearing the swamp and he had cleared the gardens the first land I acquired.
>
> ………………..When I saw this I wrote him to (sic) stopping from carrying out further development. He refused to adhere to the meeting. When he came later on the defendant prayed to me to give a temporary kibanja. Since he was not co—operative I did not give him the Kibanja.
>
> We tried to enlist the support of the Local R.Cs as he did not follow my notices. We shook hands and the defendant promised to come on a specified date, so that I would reconsider his request over temporary ownership. But the defendant failed to turn up. Instead the defendant went ahead to clear the swamp”.

The above passage shows that the appellant was on the land either as a squatter or as a licensee. The respondent and P.W.1 were aware. The respondent became licensed by the massive cultivation which the appellant carried out or intended to carry out without prior

knowledge of the respondent. The evidence is not clear whether the cultivation or intended cultivation covered new ground or grounds which the appellant had previously cultivated though it had become bushy. All that I can say is that the appellant became a trespasser possibly when he was told to stop further development and he failed to stop. Can he strictly be called a trespasser when his original stay was lawful particularly since the evidence does not delineate the extent of the portion of area he previou1y occupied. I do not think so.

In my opinion the respondent was entitled to an injunction to prevent the appellant from further development of the disputed land. But in the circumstances of this case, I can not hold that the appellant was in law a trespasser to justify award of damages. I think that this appeal should succeed in part. In that respect I do not think that the respondent was entitled to shs. 50,000/= as damages for trespass.

For the reasons I have given I would allow this appeal in Part;
in relation to the award of Shs. 50,000/= a damages. I would set aside the order awarding that sum as damages.

I would uphold the order of the High Court and of the Chief Magistrate that the respondent is entitled to a permanent injunction. I would award the respondent half the costs of this appeal, half his costs in the High Court and half his costs in the Courts of the trial.

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16th June 1995 from High Court Civil Appeal No.64 of 1992).

JUDGMENT OF LAETITIA E.M. MUKASA-KIKONYOGO, J.S.C.

I have had the benefit of reading in draft the judgment prepared by Tsekooko, J.SC, and I agree with his reasoning and conclusions I have nothing useful to add.

Dated this 25th day of March 1998.

Laetitia Eulalia Mary Mukasa-Kikonyogo

Justice of the Supreme Court

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JUDGMENT OF KANYEIHAMBA J.S.C.

I have had the benefits of reading the draft judgment of my brother, Hon. Justice Tsekooko J.S.C. and I agree with his reasoning and conclusions.

I have nothing more useful to add. The appeal partly succeeds.

DATED THIS 25TH DAY OF MARCH 1998

G.W. Kanyeihamba
JUSTICE OF THE SUPREME COURT