

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 289 OF 2016

HELLENA NAMAZZI APPELLANT

VERSUS

- 10 **1. BANADDA KAYONDO KIWANUKA**
 2. SSEMAKULA SULAITI
 3. COMMISSIONER FOR LAND REGISTRATION..... RESPONDENTS

15 *(An appeal from the decision of the High Court of Uganda at Kampala by Hon. Mr. Justice Wilson Masalu Musene dated 20th October 2016 in High Court Civil Suit No. 186 of 2007)*

CORAM: Hon. Mr. Justice Alfonse Owiny- Dollo, DCJ

Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Lady Justice Percy Night Tuhaise, JA

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JUDGMENT OF JUSTICE KENNETH KAKURU, JA

This appeal arises from the decision of the High Court at Kampala in High Court Civil Suit No. 186 of 2007 by Hon. Mr. Justice Wilson Masalu Musene dated 20th October 2016.

25 The background to this appeal as far as I could ascertain from the Court record is as follows:-

The appellant who was the plaintiff at the High Court, in her plaint contended that she was the owner of 3.5 acres of land part of what was formerly Kyadondo Block 222 Plot 206 land at Namugongo which she purchased sometime in 1963 from one Enoka Seremba the registered proprietor at the time.

30 Further, that she inherited one acre of land also part of Kyadondo Block 222 Plot 206 from her husband the late Canon Eli Sserwanga who had in 1950's purchased it

5 from Erisa Musoke, who had obtained title from Enoka Batulabudde the grandfather of Enoka Seremba referred to above.

The appellant did not at any one time demarcate, alienate and or transfer the said parcels of land into her names or those of her deceased husband's estate. She states in her plaint that Kyadondo Block 222 Plot 206 measured 7 acres, 4.5 of which
10 belonged to her.

The first defendant now the first respondent in 2013 obtained letters of administration of the late Anderaya Walabyeki his grandfather Enoka Seremba who had acquired title by registration from Enoka Batulabudde the grandfather of Enoka Seremba. He sold the land to the second defendant now the second respondent who
15 had it transferred into his own names on 2nd September 2015. For clarity Enoka Batulabudde was the registered proprietor of Kyadondo Block 222 Plot 26 on 15th December 1964. This land was transferred from his name to that of Andereya Walabyeki on 6th September 2002 and subsequently to 1st respondent on 19th May 2005.

20 On 22nd November 2005 the land was transferred to Ssemakula Sulaiti the 2nd respondent herein. The appellant alleged fraud against the respondent contending that the first respondent had obtained a forged succession certificate of the Late Enoka Batulabude, which he used to have the land transferred into his name and that the 2nd respondent was not a *bonafide* purchaser for value without notice.

25 She sought cancellation of the instruments of transfer, and a declaration that she was the owner of 3.5 acres of the suit land in her own right and the beneficial owner of one acre of the same land by virtue of inheritance from her deceased husband, the late Serwanga. The respondents denied all the allegations.

The trial Judge found that the appellant's claim was unsustainable and he dismissed
30 it. He also found that the second respondent was a bonafide purchase for value

5 without notice. Further, that no fraud had been proved against the 1st respondent from the 2nd respondent acquired title.

The learned trial Judge went on to find that one Rex Regus Semulya the appellant's son was entitled to 0.5 acres of the suit land from the second respondent as a result of an agreement between the two parties.

10 The first and second respondents filed a cross appeal against that finding contending that:-

The said Rex Ssemulya provided no consideration for the said 0.5 acres. They also cross appealed against the decision by the trial Court not to award costs to them at the trial following the dismissal of the appellant's suit against them.

15 Being dissatisfied with the decision of the learned trial Judge, the appellant filed this appeal.

The appellant's appeal is against the whole of the Judgment of the trial Court. The appellant sets out 15 grounds of appeal in her memorandum. They are set out as follows:-

- 20
1. *That the learned Judge erred in law and fact when he found that the appellant had failed to prove ownership of the claimed land whereas she has been and remains in uncontroverted occupation of the same land for over 40 years.*
 2. *The learned trial Judge erred in law and fact when he found that the*
25 *appellant had not proved boundaries of her land whereas he declined, ignored and or neglected to visit the locus in quo to establish the physical location of the suit land and the way it is occupied.*
 3. *The learned trial Judge erred in law and fact when he failed to evaluate the appellant's evidence alongside that of the respondents and wrongly declared*

- 5 that the 1st respondent had not been proved to have forged any document
which gave him title to the suit land and was not guilty of any fraud whereas
there was plenty of evidence led by the plaintiff to prove forgery and or
fraud.
- 10 4. The learned trial Judge erred in law and fact when he ordered that 0.5 acres
of land be transferred to a one Rex Semulya a son of the appellant in
contradiction with his own finding that the appellant had not proved
ownership of the suit land.
- 15 5. The learned trial Judge erred in law and fact when he exercised his
discretion unjudiciously in awarding 0.5 acres on land to Rex Semulya who
was never a party to the proceeding and in thereby arrogating to Court
powers it did not have.
- 20 6. The learned trial Judge erred in law and fact in purporting to note
observations of demeanour of a witness when he noted prejudicially and
incorrectly that PW5 took 30 minutes without answering questions relating
to paragraphs 4 (k) & (j) of his witness statement whereas no such thing
happened.
- 25 7. The learned trial Judge erred in law and fact when he found as a fact that
the conviction of the 1st respondent on forgery had been set aside by the
High Court judgment of Justice Lameck Mukasa in a criminal matter thereby
refused failed/ ignored to evaluate the evidence before him as a judge of
Court of co-equal jurisdiction in a different cause of action of a civil nature.
- 30 8. The learned trial Judge erred in law and fact when he found that the
appellant had failed to prove that the 2nd respondent had cut her crops and
was a bonafide purchaser of the suit land because no case of malicious
damage to property had been reported at police against him.

- 5 9. *The learned trial Judge gravely misdirected himself to the extreme prejudice of the appellant when he deliberately / by honest error arrogated to her witness words they not utter*
10. *The learned trial Judge erred in law and fact when he relied on evidence that was never adduced on record and introduced into the record statements/*
10 *legal propositions that had not been pleaded mentioned or proved.*
11. *The learned trial Judge erred in law and fact in making a finding that was never based on the agreed issues or those borne out by evidence such as when he found without proof that the appellant was not an “official wife”.*
12. *The learned trial Judge erred in law and fact when he found that if any*
15 *customary marriage existed between the appellant (who was 90 years at the she testified) and Canon Serwanga such marriage was illegal.*
13. *The learned trial Judge erred in law and fact when he held that the appellant had departed from her pleadings.*
14. *The learned trial Judge erred in law and fact in finding without justification*
20 *that the appellant had manufactured evidence.*
15. *The learned trial Judge erred in law and fact when he failed to evaluate the evidence on record or so wrongly evaluated it hereby arriving at a wrong and unjust conclusion.*

25 At the hearing of this appeal *Mr. Kafuuzi Kwemara* learned Counsel appeared for the appellant while *Ms. Joweria Mukalazi* learned Counsel appeared for the respondents.

Both Counsel sought and were granted leave to proceed by way of written submissions which were already on record, as conferring notes. It is on the basis to those written submissions that this Judgment has been prepared.

5 I have carefully read the submissions of the both Counsel, however I have found no reason to reproduce them here. I have nonetheless taken them into account while resolving the grounds of the appeal before me.

This is clearly a claim of land registered under the Registration Titles Act. The appellant is not and has never at anytime been a registered proprietor of the suit
10 land. She states in paragraph 4(b) of the plaint that acquired interest in the suit land, by purchase of 3.5 acres thereof in 1963. In respect of that portion of the land therefore, her claim goes back to 1963. She did not bother at all to have her interest registered. I find that the agreement of purchase of that land executed in 1963 cannot sustain at cause of action as the same is barred by limitation. Section 5 of the
15 limitation Act provides as follows:-

"Limitation of action to recover land

*No action shall be brought by any person to recover any land after the expiration of twelve years from the date of which the right of action accrued to him or her if it first accrued to some person through whom he or she claims to
20 that person."*

I am inclined to find that, appellant's claim is premised on a 1963 land purchase agreement alone. This agreement cannot be enforced against the seller's successors in title 12 years after it was executed. This is not a situation in which a party procures registration of unregistered land by defeating an unregistered interest as
25 was the case in *Matovu vs Seviri 1979 HCB 174*. See also: *John Katarikawe versus William Katwiremo & Another [1977] HCB 187*.

I find that the appellant's action so far as it is premised on the Registration Titles Act and the Land Act is unsustainable. I would dismiss the appeal on that account alone.

In respect of one acre of land inherited from her late husband, I find that the
30 appellant's evidence was insufficient to sustain the claim. No evidence was adduced to show that she was the sole beneficiary to the late Serwanga's estate. It is

5 unknown whether or not the late Serwanga's estate was ever administered by
anyone under the Succession Act and whether or not it was distributed. It is not too
late for her to obtain letters of administration of the late Serwanga's estate and
pursue her claim thereafter. If that is what is required and if she so desires. I say so
because the process of obtaining letters of administration or probate would resolve
10 questions of inheritance that could not have been resolved at High Court. Obtaining
letters of administration would also revive an action that would otherwise have
been barred by limitation.

From the evidence on record, it is possible if not probable that the appellant is a
bonafide occupant of the suit land. The fact that the 2nd respondent was willing to
15 transfer 0.5 acres of land to the appellants' son lends credence to the appellant's
claim that she has been in occupation of the said land since before 1963. The
question is to whether or not the appellant is a *bonafide* occupant was neither
pleaded nor determined by the trial Court. My considered view is that *Article 126*
2(e) of the Constitution requires Court to administer substantive justice without
20 undue regard to technicalities. Clearly the appellants evidence was insufficient to
determine whether or not she occupies the suit land and if so the exact extent of her
occupancy.

However, in *Kampala District Land Board vs Vanesio Babweyaka and Others*,
Supreme Court Civil Appeal No. 2 of 2007 and in *Kampala District Land Board and*
25 *another vs National Housing and Construction Corporation, Supreme Court Civil*
Appeal No. 2 of 2004, it was held that a party who had been in possession of land for
a long time and utilized it was entitled to have his/her interest recognized and
protected by the law. There is need therefore, in law and if not, in equity for the
Court to ascertain the exact nature and extent of the appellant's occupancy and to
30 determine whether or not she is indeed a *bonafide* occupant or a lawful occupant
under the Constitution and the Land Act.

5 The evidence adduced by the appellant was insufficient to prove that the 1st respondent was registered on the title to the suit land through fraud. It is clear from the evidence adduced in Court that the 1st respondent was registered as an administrator to the estate of the Late Andereya Walabyeki.

10 If the appellant's claim had not been barred by limitation, she would still have procured a transfer only from a person or persons in possession of the letters of administration of the estate of the late Walabyeki who was the registered proprietor prior to 2002. Only such a person would have been clothed with authority to subdivide the land and parcel out hers. That person is the 1st respondent against whom she filed a suit alleging that he was registered as proprietor through fraud.

15 In my humble view her action ought to have been against the 1st respondent, requiring him to transfer the 4.5 acres to her contending that, the 3.5 out of 7 acres did not belong to the estate of the late Walabyeki the same having been sold to her by Enoka Seremba in 1963 and one acre having been acquired by her through inheritance before Walabyeki became registered proprietor. In that regard the
20 appellant's suit against the 1st respondent appears to have been misconceived. That however, is now moot following my finding that the suit is barred by limitation.

I would uphold the cross appeal in respect of the second ground relating to 0.5 acres granted to one Rex Ssemulya as he was not a party to their suit and set aside the decision of the trial Court in that respect. Mr. Ssemulya is at liberty to pursue his
25 claim on his own, in different suit if he so desires under the contract between him and the 2nd respondent.

I find no reason to interfere with the trial Judge's discretion on the award of costs.

This appeal therefore substantially fails while the cross appeal partly succeeds. I would make the following orders.

- 5
1. *This appeal is hereby dismissed in respect of the appellant's action to recover land under the Registration of Titles Act and to impeach the 1st and 2nd appellant's title.*
 2. *The Registrar of this Court is hereby directed to return this file to High Court with the followings directions and orders.*
 - 10 (a) *The hearing of the suit proceeds under another Judge to ascertain whether or not the appellant is a bonafide occupant on the suit land and if so the exact extent of her occupancy.*
 - (b) *A temporary injunction is hereby issued against the respondents and their succession in title from evicting the appellant from the land she occupies and uses until the decision of the High Court in paragraph 2(a) above.*
 - 15 (c) *Ground one of the cross appeal is hereby dismissed.*
 3. *Ground 2 of the cross appeal is hereby upheld for the reasons set out in this Judgment.*
 - 20 4. *I make no orders as to costs here and at the High Court for reasons that all parties appear to have been unaware of nature and extent of their respective rights in respect of the suit land.*

Dated at Kampala this 22nd day of Nov. 2019.

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Kenneth Kakuru
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL AT KAMPALA
CORAM: OWINY - DOLLO DCJ, KAKURU AND TUHAISE JJA.

CIVIL APPEAL NO 239 OF 2016

*(Appeal from the judgment of Musalu-Musene, J; in High Court (Civil Division)
Civil Suit No. 189 of 2007)*

HELLENA NAMAZZIAPPELLANT

VERSUS

- 1. BANADA KAYONDO KIWANUKA**
- 2. SSEMAKULA SULAITI**
- 3. COMMISSIONER FOR LAND REGISTRATION..... RESPONDENTS**

JUDGMENT OF OWINY - DOLLO; DCJ

I have had the benefit of reading the judgment of my learned brother Kakuru, JA; in draft. I agree with him that the appeal substantially fails while the cross appeal succeeds for the reasons he has given in the Judgment.

Since Tuhaise JA also agrees, orders are hereby issued in the terms proposed by Kakuru JA in his judgment.

Dated, and signed at Kampala this 22nd day of NOV. 2019


Alfonse C. Owiny - Dollo
Deputy Chief Justice

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ; Kakuru & Tuhaise; JJA]

CIVIL APPEAL NO. 289 OF 2016

HELLENA NAMAZZI.....APPELLANT

VERSUS

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| <ol style="list-style-type: none">1. BANADDA KAYONDO KIWANUKA2. SSEMAKULA SULAITI3. COMMISSIONER FOR LAND REGISTRATION | } | RESPONDENTS |
|--|---|--------------------|

An appeal from the decision of the High Court of Uganda at Kampala by Hon. Mr. Justice Wilson Masalu Musene dated 20th October 2016 in High Court Civil Suit No. 186 of 2007.

JUDGMENT OF PERCY NIGHT TUHAISE, JA

I have read in draft the judgment of my brother Kenneth Kakuru, JA, on the above matter.

I agree with the analysis of evidence, the decision, the conclusion and the orders given.

I have nothing useful to add.

Dated, signed and delivered at Kampala this.....day of 2019


Percy Night Tuhaise
Justice of Appeal