

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 036 OF 2016
(ARISING FROM CIVIL SUIT NO. 064 OF 2014)

WAGABA AMILI ::::::::::::::: **APPELLANT**

VERSUS

NAYIGA RUTH ::::::::::::::: **RESPONDENT**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

a) Introduction

1. This is the judgment in an appeal from the decision of His Worship Matenga Dawa Francis at Mpigi Chief Magistrates Court at Wakiso. In his judgment of 2nd September 2015, the trial Magistrate found that the Respondent bought a kibanja from the Appellant in 1998, paid the full purchase price of Ug. Shs 1,600,000/= and was on the suit land as a bonafide purchaser. He declared the Respondent as the lawful owner of the suit land; declared the Appellant a trespasser on the Respondent's Kibanja; issued an eviction/demolition order against the Appellant on the portion trespassed upon; issued a permanent injunction against the Appellant; awarded the Respondent costs incidental to the demolition of the Respondent's house and costs.
2. The Appellant is represented by Mr. Okwalinga Moses of M/s. Legal Aid Project of the Uganda Law Society and the Respondent is represented by Mr. Muhumuza Simon of M/s. KRK Advocates.
3. The grounds of appeal as per the memorandum of appeal and cross appeal are:
 - i. The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence before him thereby arriving at a wrong conclusion.

- ii. The learned trial magistrate erred in law and fact when he unjustly disregarded the contents of the handwriting expert's report thereby arriving at a wrong conclusion.
 - iii. The learned trial magistrate erred in law and fact when he irregularly visited locus in quo and later wrote a judgment for a civil suit that he never tried.
 - iv. The learned trial magistrate erred in law and fact when he allowed himself to be misled by the Respondent thereby arriving at a wrong conclusion.
4. The Respondent's ground of appeal in the cross appeal is:
 - v. The learned trial magistrate erred in law and fact when he failed to consider the Respondent claim for general damages.
5. The Appellant filed civil suit No. 64 of 2010 against the Respondent for recovery of his kibanja at Ganda Nansana in Wakiso, general damages for trespass on his kibanja and costs. It was the Appellant's case that on 20th December 1998, he entered into an agreement with the Respondent with the intention of selling to her his kibanja measuring 200ft by 60ft at Ug. Shs. 1,600,000/=. The Respondent retained the original of agreement. At the signing of the agreement, the Respondent paid a deposit of Ug. Shs. 700,000 (Uganda shillings seven hundred thousand) and took possession of the kibanja on the understanding that she would get full ownership upon paying the balance. The Respondent later paid other two installments of Ug. Shs. 100,000/= and Ug. Shs. 230,000/=. For a period of over 10 years the Respondent refused to pay the balance of Ug. Shs. 570,000/= without any reasonable justification despite numerous demands.
6. The Appellant called four witnesses. He testified as PW1, PW2 was Mr. Kafeero Kijukideki who drafted the sales agreement between the Appellant and Respondent; PW3 was Mr. Kizza David the LC1 Chairperson Ganda and the PW4 was Mr. Nakabale Abas who was a member of the LC Committee of Ganda. The Respondent testified on her own behalf.

b) Analysis

7. I have carefully looked at the trial record, pleadings and submissions in this appeal. The Supreme Court in **Father Nanensio Begumisa and 3 Ors v. Eric Tiberaga SCCA No. 17 of 2004** observed that the legal obligation of the first appellate court is to re-appraise evidence and is founded in common law, rather than rules of procedure. On a first appeal, the parties are entitled to obtain from the Appeal Court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the Appeal Court has to make due allowance for the fact that it has never seen or heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. (Also see **F.K. Zabwe v. Orient bank and others SCCA No. 4 of 2006.**) I will adopt this standard in my assessment.
8. The Respondent raises a preliminary objection that the Appellant filed his suit in the Chief Magistrates court outside the six year mark provided by the statute of limitation and that this appeal arising from the suit should not be entertained. Respondent counsel contends that they raised this objection in their submissions before the trial Magistrate but that it was not addressed.
9. I have perused the entire lower court record. Nowhere in it is the Respondent counsel demonstrated to have raised this preliminary objection. Moreover if the Respondent counsel only raised the said objection in the closing submissions, there would be a problem there too.
10. In my discernment a preliminary objection must be raised timely and normally in the early stages of the trial. In this case, without any demonstration from the trial record that it was raised during the trial, it is difficult to give this preliminary objection the weight counsel wants when even on appeal, he only raised it in the closing written submissions. In the circumstances of this case where the parties were heard interparte by the trial magistrate, an appeal was filed in this court and heard interparte and this matter is coming up only in the final submissions in reply by the Respondent, I consider this to be too late for the ends of justice to be met.

11. So even if I considered that the Appellant's suit was filed out of time, in the circumstances of this case, dismissing it would be in contravention of the requirement to administer substantive justice under article 126 of the Constitution. It would in my view amount to using a technicality to defeat substantive justice. I have no understanding that this was the intention of the limitation clause that counsel wants to apply at this late stage. Moreover I am more inclined to consider as valid Appellant counsel's submission that trespass which is the cause of action in the plaint was a continuing act not barred by the limitation clause. Accordingly, the preliminary objection is over ruled. I will now turn to the substantive appeal.
12. I have carefully looked at all the pleadings and submissions on record in this appeal. It is within the trial Magistrate's discretion whether to rely on or disregard the handwriting expert's opinion. So even though I am not convinced with his reasoning, it was well within the trial Magistrate's assessment discretion to disregard the handwriting expert's opinion as he did at pages 3 to 4 of the trial judgment. In my assessment I also consider that it was improper for the Respondent not to be given an opportunity to cross examine the handwriting expert on his report. To avoid any prejudice to the Respondent, I will not rely on it in my assessment.
13. On the other hand, I have no basis to say that the trial Magistrate's locus visit and writing the judgment in a matter where the initial trial Magistrate was transferred and he took over were irregular. I also have no basis to consider that the trial Magistrate was misled by the Respondent. Accordingly grounds 2, 3 and 4 are dismissed.
14. In resolving ground one, I have re-evaluated the evidence on record. The Appellant had four witnesses, himself and three others. The Respondent was the only witness for herself. It is not disputed that the Appellant sold a portion of his kibanja in issue to the Respondent. The portion sold measured 200ft in length on the neighbouring of one Nalongo and 60ft in width. This is also demonstrated in the sale agreement between the two dated 20th December 1998 and more importantly the Respondent admitted this fact of measurements during my locus visit on 8th January 2019. In addition all the Appellant witnesses confirm this. Of these, Kafeero Kijukideki was one of the witnesses of the sale agreement who also drafted the agreement. PW3 and PW4 were

the Chairman and member of the LC1 Ganda zone respectively where the suit kibanja is located.

15. PW2, PW3 and PW4 corroborate the Appellant's position that the Respondent only paid Ug. Shs. 700,000/= leaving a balance of Ug. Shs. 900,000/= out of the total sale price of Ug. Shs. 1,600,000/=.
16. The agreement stipulates that the Ug. Shs. 900,000 balance was to be paid by 30th March 1999, and the Respondent was at liberty to use the purchased kibanja on completion of payment of this balance. PW3 and PW4 explained that the Appellant and the Respondent never went back to them for the payment or receipt of this balance. PW2 who witnessed and drafted the sale agreement also explained that he never witnessed any payment of this balance. It means that of all those who testified, any payment of the balance can only be spoken about by the Appellant and the Respondent. The Respondent claims that the Appellant's wife was present but she is dead.
17. The Respondent claims that she paid the full balance and took possession of the kibanja in issue. The Appellant on the other hand insists that of the Ug. shs. 900,000/=, the Respondent paid two instalments of Ug. shs, 100,000/= and 230,000/= leaving a balance of Ug. Shs. 570,000/= unpaid to date. The Appellant acknowledged receipt of the Ug. Shs. 100,000 on the sale agreement on 17th April 1999.
18. If the Respondent is to be believed, her position is supported by an addendum clause on the agreement in black ink dated 13th May 2001 she tendered claiming that the Appellant received the balance. However the Appellant denies that this addendum is acknowledgement of receipt of this balance. The Respondent also contended that the size of the kibanja she bought was the size described in the sketch drawing in black at the back of the agreement. This sketch presents that the kibanja the Respondent bought from the Appellant measured 223ft by 78ft.
19. These measurements present a glaring contradiction of the 200ft by 60ft size of the kibaja in issue that is presented on the front page agreement between the Appellant and Respondent that was witnessed by PW2 and reported to PW3 and PW4 as the LC

officials of the area. Even on appeal, the Respondent insisted orally before me and initially at the locus visit that the kibanja she bought was 223ft by 78ft.

20. After hearing extensively from both the Appellant and Respondent on appeal, I felt the need to visit the locus for the effective determination of this kibanja dispute. I visited the locus on 8th January 2019. I heard from the different neighbours in particular a one Nalongo whose kibanja borders the Appellant's kibanja on the side that the Respondent bought, the LC officials and different neighbours who had gathered. While I sensed some kind of connivance between the said Nalongo and the Respondent regarding the original boundary between the Appellant and Nalongo's kibanja, it became more apparent to me that for the determination of the appeal, I needed the services of a surveyor who would open boundaries of the Appellant's original kibanja and from which the original boundaries of the Respondent's kibanja in issue would be determined. I informed the parties as much.
21. I then instructed the Registrar to procure the services of a neutral surveyor from those listed in court to establish the boundaries of the Appellant's original kibanja and the Respondent's suit kibanja. This was done by Surveycom Surveyors who returned their report in this court on 21st February 2019.
22. The explanations in this report and annexures thereto demonstrate that the Appellant's building at the boundary of the Respondent's kibanja encroached into the Respondent's kibanja by a small portion. Immediately above the Respondent's building also encroached on the Appellant's kibanja by a size bigger than the Appellant's encroachment. Even part of the Respondent's toilet encroached on the Appellant's kibanja. In addition the Respondent took possession of the area between the perimeter wall and her toilet which is outside her 60ft radius for her kibanja. Paragraphs 6, 7 of the surveyors report together with the annexures A and 2 demonstrate these clearly.¹

¹ Paragraph 6 of the report reads "the straight line of the kibanja also cuts through Amiri's building, Naiga's building and Naiga's toilet as seen on sketch attached. (refer to sketch attached (Annex 1,2) for details)."

23. The independent surveyor's report has assisted this court understand the boundaries of the Appellant's original kibanja from which the Appellant sold to the Respondent based on the agreement in issue. It has also demonstrated the exact boundaries of the Respondent's said kibanja with clarity. Without such verification of a professional surveyor, I am inclined to consider that the trial magistrate could not safely determine the boundaries of the Respondent's kibanja in issue or whether there was trespass by the Respondent or Appellant. Because two determinations were central to the determination of the trespass claim he had before him, I am with all due respect inclined to consider that the trial magistrate erred in law and fact when he failed to properly evaluate the evidence before him thereby arriving at a wrong conclusion. Accordingly ground one is resolved in the affirmative.
24. With my bear eyes, I also see from the sketch plan that a portion of the Appellant's kibanja on the side of the Respondent's kibanja at point C was left out when the Respondent's kibanja was being measured. My view is that the Respondent's kibanja at point C should have aligned the Appellant's original kibanja boundary marked red adjacent to point C. Without this alignment, a portion of the Appellant's kibanja may have been lost to the Respondent.
25. I am more inclined to consider the Appellant's version that the Respondent did not pay the balance of Ug. shs. 570,000/= and it remains due and owing to date. To this end I considered that if the Appellant could acknowledge that the Respondent paid 100,000 and 230,000 of this balance, then he would have said the same of the full amount if it was paid indicating the amount. It makes no sense in the circumstances of this case that he would insist that the balance of 570,000 was not paid when it was paid. If the Appellant signed specific acknowledgments for the Ug. shs 100,000/= and Ug. shs. 230,000/=, why didn't he acknowledge the Ug. shs 570,000/= specifically indicating this amount when it was paid.

Paragraph 7 provides reads "the area between the perimeter wall and Naiga's toilet is being utilized by Naiga but it is outside the 60 feet corridor (refer to sketch attached (annex 1,2) for details)."

26. It also looks sinister that the Appellant's copy of the agreement which he says was what he remained with while the Respondent took the original, and later acknowledged receipt of the Ug. shs. 100,000/= and Ug. shs. 230,000/= does not have the addendum acknowledging receipt of the balance on the agreement the Respondent tendered in court or the measurements of 223ft by 78ft at the back.
27. I view the addendum claiming that all balance was paid which the Appellant denies together with the sketch in black at the back of the agreement claiming that the Respondent's suit kibanja measured 223ft by 78ft to be well calculated moves to deprive the Appellant of the balance of 570,000/= which remains due and owing from the Respondent to date.
28. As part of this scheme, the Respondent first insisted at the locus visit that the kibanja she bought measured 223ft by 78ft but later admitted that the kibanja she bought actually measured 200ft by 60ft. This shift by the Respondent from the false measurements to the accurate ones which are in the agreement which was well witnessed not only buttresses the Appellant's consistent and well corroborated position, it also clearly demonstrates the Respondent's questionable credibility. I am left wondering why I should believe the Respondent's claim that she paid the full balance when she could lie for a long time about the measurements of the kibanja she bought.
29. All in all, based on all the above, I am inclined to disbelieve the Respondent and take the Appellant's version that a balance of 570,000 remains due and owing to him. With this even if I consider that the surveyor's report presents that each party encroached on each other's kibanja, the same report shows that the Respondent encroached much more on the Appellant's kibanja than the Appellant encroached on the Respondent's kibanja.
30. Moreover with the balance of 570,000 remaining due and owing to the Appellant since 30th March 1999 when the agreement says the balance should have been paid up, I cannot safely say in these circumstances that the Appellant trespassed on the Respondent's kibanja. However on the other hand with nothing due or owing from the Appellant to the Respondent in the circumstances of this case, as demonstrated in the surveyor's report, the Respondent trespassed on the Appellant's kibanja. For this the

Appellant is entitled to general damages and costs. In addition, the Respondent must immediately vacate the same.

31. With the above, the Respondent's cross appeal/ground cannot stand and is dismissed.

The Appellant's appeal is allowed with costs with the following orders:

- i. The Respondent must immediately vacate the part of the Appellant's kibanja on which she continues to trespass as demonstrated in the surveyor's report.
- ii. Because I found that the Respondent has a balance of 570,000 due and owing to the Appellant for the kibanja she bought, I hereby direct that the Respondent pays the Appellant the Ug.shs. 570, 0000 balance at an interest rate of 10% per annum from the date of default of 30th March 1999 till payment in full.
- iii. For the encroachment (if any) by the Appellant on the Respondent's land, the parties can either agree to offset from the total amount in (ii) above or in the alternative, if they are disagreeable to this, upon payment of the amount in (ii) above, the Appellant can vacate the portion he is demonstrated to be encroaching on the Respondent's kibanja.
- iv. For the trespass on the Appellant's kibanja, including the inconvenience, pain and suffering the Respondent shall pay general damages of Ug. shs. 10,000,000/= (Uganda shillings ten million).
- v. The Respondent shall also pay costs to the Appellant of this appeal and in the lower court.

I so order.

Lydia Mugambe
Judge
19th December 2019