THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CIVIL APPEAL NO. 106 OF 2014

(ARISING OUT OF CIVIL SUIT NO. 001 OF 2012 OF THE CHIEF MAGISTRATE'S COURT OF NAKAWA)

ALLEN MAYENDE :::APPELLANT

VERSUS

GORDON KARUHANDA :::RESPONDENT

BEFORE: HON. MR. JUSTICE WILSON MASALU MUSENE

JUDGMENT

This is an appeal arising out of a decision of the Magistrate Grade 1 Her worship Mugala Jane in Civil Suit No. 1 of 2012. The background to this Appeal is that, the Respondent sued the Appellant in the Chief Magistrate's Court at Nakawa where he alleged that he is the Administrator of the Estate of the Late Jane Mbabazi who purchased the suit land in 1993. The Appellant contended that she purchased a Kibanja from one Peter Musisi Serugo in 2009 and later purchased the proprietor interest in the suit land which had four tenants including the late Jane Mbabazi who at that time did not object. Court entered Judgment for the Respondent holding that the Defendant/ Appellant vacates the suit property, pays the Plaintiff general damages of 7,000,000/= and Costs. The Appellant being dissatisfied with this decision lodges this Appeal on grounds that;

1. The learned trial Magistrate erred in law and fact when she held that the Defendant / Appellant is a trespasser on the Plaintiff's Kibanja.
2. The learned trial Magistrate erred in law and fact in evaluating the evidence on record and as a result reached a wrong finding.
3. The learned trial Magistrate erred in law and fact when she awarded UGX 7,000,000/= as general damages to the Plaintiff.

4. The learned trial Magistrate erred in law and fact in conducting locus in quo visit exparte and thus came to a wrong conclusion.

The Appellant was represented by Kakooza & Kawuma Advocates whilethe Respondent was represented by M/S Ngaruye Ruhindi, Spencer & Co. Advocates.

Both Counsel filed written submissions.

In relation to ground one, Counsel for the Appellant submitted that the trial Magistrate stated that Section. 35 (2) of the Land Act as amended is to the effect that an owner of land who wishes to sell the reversionary interest shall first give priority to the tenant by occupancy, she then held that neither Mbabazi nor her representative were aware of the transaction between the Defendant and the late Muzungu or Serumu thus the transaction being null and void.

Counsel cites Section 59 of the Registration of Titles Act Cap 230 which is to the effect that;

> **"No certificate of title issued upon an application to bring land under this act shall be impeached or defeasible by reason or on account of an informality or irregularity in the application..."**

He further referred to the case of **Mugerwa Muliisa Paul & Anor Vs Twaha Kiganda, High Court Civil Appeal No. 9 of 2012**, where Court emphasized that a certificate of title can be impeached on account of fraud in registration. He then contends that fraud was not pleaded in this matter thus the Appellant's title is conclusive evidence that she is the registered proprietor of the suit property.

Counsel further argues that a Magistrate has no power to cancel a certificate of title, that it is only the High Court that possesses such power. He refers to Section 177 of the Registration of Titles Act Cap 230 which provides that;

> " **Upon the recovery of any land, estate or interest by any proceeding from the person registered as proprietor thereof, the**

high court may in any case which the proceeding is not herein expressly barred, direct the registrar to cancel any certificate of title or instrument or any entry or memorial in the register book relating to that land, estate or interest."

On that basis Counsel for the Appellant referred to **Issaka Semakula & Anor Vs William Setimba HCCA No. 5 of 2013**, where Hon. Justice Bashaija K Andrew stated that'

> **".....since the trial court (chief magistrates court) was acutely aware that it had no jurisdiction to cancel the certificate of title of a registered owner, it forwarded the case to the high court for consequential orders."**

Counsel for the Respondent on the other hand argues that Section 35 of Land Act Cap 227 as amended is to the effect that "a change of ownership of title effected by the owner by sale, grant or succession or otherwise does not in any way affect the existing lawful interests or bonafide occupants and the new owner shall respect the existing interests."

Counsel then submitted that it is clear here that the late Mbabazi had kibanja interest on the land and that according to the case of **Justine E.M.N Lutaya Civil Engineering Company Civil Appeal No. 11 of 2002 (SC)**, the law on trespass was stated;

> **" trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes or portends to interfere with another person's lawful possession of land... the tort of trespass is committed not against the land but against the person who is in actual or constructive possession of the land...."**

He then cited the case of **Watu-Ofei Vs Danquah 111(1961) 3 ALLER 596** where His Lordship stated that possession did not mean physical occupation rather the slightest amount of possession would suffice.

Counsel therefore concluded that the Respondent is a bonafide occupant of the Kibanja thus it follows that he has a lawful possession thereof with a right to sue for trespass against any one that made an unlawful entry. That the Appellant being the lawful and registered owner of the poperty on which the Respondent has a Kibanja does not save her from being a trespasser as long as she purports to illegally evict the Respondent without sufficiently compensating him. Counsel finds there is no meit in the first ground of appeal.

In respect to the second ground, Counsel for the Appellant referred to the trial magistrate's decision at page two where she relied on Article 26 (2)(b)(i) of the Constitution that prohibits compulsory taking of a person's land unless adequate compensation is provided prior to the taking of the land. Counsel then submits that UGX 8,000,000/= was offered to the Plaintiff who refused to take the same, therefore the trial Magistrate did not address her mind on whether that sum offered by the Appellant was adequate compensation for the Kibanja. That the Evidence Act Section 101 states that;

> **"Whoever desires any court to give judgment as to any right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist."**

It is thus contended here that that the burden lay on the Respondent to prove that the UGX 8,000,000/= was not adequate compensation for the Kibanja, which burden was not disposed of. Counsel further avers that the trial Magistrate completely disregarded the Appellant's evidence that she is the lawful and registered proprietor of the suit land, but only considered the Respondent's evidence.

Counsel for the Respondent argues that according to the Land Act, it is not allowed to evict a Kibanja holder if they refuse or fail to reach a mutual agreement with the registered owner. He then prays to Court to find no merit in this second ground of appeal.

As far as ground three is concerned, Counsel for the Appellant submits that there is no requirement in law requiring a purchaser to obtain consent from a Kibanja holder before purchasing or acquiring a mailo interest. That the trial Magistrate erred when she found that the Appellant had to obtain prior interest from the late Jane before purchasing the mailo interest. He relied on the decision in **Muluta Joseph Vs Katama Sylvano SCCA No. 11 of 1999** where Court cited with approval the case of **Mugerwa & Anor Vs Kiganada HCCA No. 9 of 2012.** It was held that an agreement to sell and transfer a Kibanja holding was not sufficient for acquisition of a lawful Kibanja in the absence of the essential element of obtaining consent of the mailo owner. Counsel further contended that there was no justification for the award of general damages as the constructions carried out were on the Appellant's land and there was no evidence adduced to show that the Respondent the respondents suffered or was inconvenienced in any way to justify such an award of general damages.

It was however contended for the Respondent that he has a kibanja on the Appellant's land and that the Appellant trespassed on the same which warranted the award of damages by the trial Magistrate.

In regards to ground four, the Appellant contends that the locus in quo visit was held exparte. It is alleged that Counsel for the Respondent admitted to have served the Appellant with the affidavit of service but that he forgot to file it in Court, and the trial Magistrate went ahead to visit the locus exparte claiming that the Defendant and her Counsel chose not to appear despite service. Counsel refers to the case of **Valery Alia Vs Alionzi John HCCS No. 157 of 2010, where Hon. Justice Christopher Madrama** held that in Uganda, the requirement under Order 9 rule 5 of the Civil Procedure Rules to file an affidavit of service upon the Court record is mandatory and the proceedings following the failure of this service are an irregularity. He also refers to Article 28 of the Constitution about a fair hearing. That the mere fact that the hearing at the locus in quo proceeded exparte without availing them the opportunity to cross examine the Plaintiff's witnesses amounted to unfair hearing Contrary to Article 28 (1) of the Constitution. That during the trial

on the 2/07/2014, the parties and their Counsel consented to the date of the visit fixed for 8/07/2014, whereby on that date the Appellant and her witnesses showed up, but the trial Magistrate, the Respondent and his Counsel never turned up. That when the visit eventually took place, the Appellant and her Counsel were not aware as they were never served with the notice. That since there was never proper service; this was an irregularity that led to a miscarriage of justice. Counsel cited the case of **Sebudde Joseph Vs IGG HiGH Court Misc. Cause No. 0032 of 2010**, where Hon. Justice Yorokamu Bamwine held that;

> **"The rules of natural justice apply to all judicial and quasi judicial bodies and provide for example, that hearings must be unbiased. Other principles of natural justice include the right to have ones case considered -audialteram, including the right to notice of the case against one, and the right to have notice of hearing."**

Counsel then asserts that the proceedings at the locus in quo were irregular, null and void and prayed for this ground of appeal to be allowed.

The Respondent on the other hand argued that visiting the locus did not in any way influence the Magistrate's decision. That the Magistrate was exercising her discretion in conducting the visit exparte. Counsel referred to the cases of **Mbogo & Anor Vs Shah (1968) EA, and Peter Mulira Vs Mitchel Cotts Ltd Civil Appeal No. 16 of 2002** where it was stated that;

> **"It is well settled that an appellant Court will not interfere with the exercise of discretion unless there has been failure to take into account a material consideration or an error in principle was made."**

That the Appellant was served but chose not to appear and that there was an affidavit of service on Court record indicating that the Appellant's Counsel refused to acknowledge service.

Counsel then avers that the trial Magistrate exercised her discretion judicially thus no justification to interfere with her decision.

Having looked at the evidence on record and the submission by both Counsel, I will now examine the grounds raised by the Appellant. The duty of the first Appellate Court is to evaluate the evidence which was adduced before the trial Court and to arrive at its own conclusion as to whether the findings of the trial Court can be supported. **(See Pandya Vs R (1957) EA 336.**

In relation to the first ground of appeal, Counsel for the Appellant argues that the Appellant possesses the certificate of title and is therefore the registered proprietor of the suit land. I do not contest this point as a certificate of title is conclusive evidence of ownership. See Section 59 of the Registration of Titles Act. The Respondent also avers that he has a kibanja interest in the same land and should be given first priority. According to Section 35 (2) of the Land Act Cap 227, the owner of land who wishes to sell the reversionary interest in the land shall give the first option to the tenant by occupancy. In the case of Aminu Charles Vs Aboke Christine, HCCA No. 32 of 2012 also cited by the trial Magistrate, Wolayo J, held that;

> **"As a sitting tenant, the Appellant had the first option to purchase and failing which, the offer would be made to another interested party.**

The trial Magistrate relied on these provisions to hold that the transaction between the late Muzungu and the Appellant was null and void as the late Mbabazi was never given the first option to purchase the mailo interest in the suit land. It is on these facts that the Appellant was held to be a trespasser on the Respondent's land after constructing blocks on his land without consent. In the premises, I find that the Appellant is the legal owner however; the equitable interest of the Respondent cannot be prejudiced as he also has a right over the land. That by the appellant carrying out constructions without consent from the Respondent amounted to trespass. I thereby agree with the trial Magistrate's decision that the acts of the Appellant amounted to trespass. I thereby dismiss the first ground of Appeal.

In relation to the second ground , Counsel for the Appellant argued that UGX 8,000,000/= was offered to the Plaintiff who refused to take the same, therefore the trial Magistrate did not address here mind on whether that sum offered by the Appellant was adequate compensation for the Kibanja. That because of this, the trial Magistrate came to a wrong conclusion by not evaluating all evidence. However, Counsel for the Respondent argues that a registered proprietor cannot evict a Kibanja holder simply because they failed to reach an agreement. He referred to Section 36 of the Land Act. It should be noted that compensation was offered to the Respondent who declined to take it and this does not necessarily entitle the Appellant to ownership since he offered compensation. The mere fact that the Respondent never allowed the compensation, he remained a Kibanja holder on the land as the agreement between them was not consented to. I thus find no merit in this ground of appeal.

As far as ground three is concerned, Counsel for the Appellant contended that there was n justification for the award of general damages as the constructions carried out were on the Appellant's land and there was no evidence adduced to show that the Respondent suffered or was inconvenienced in any way to justify such an award of general damages. It was however, contended for the Respondent that he has a Kibanja on the Appellant's land and that the Appellant trespassed on the same which warranted the award of damages by the trial Magistrate.

Looking at the lower Court's record, it was submitted that the Defendant/ Appellant blocked the road leading to the Plaintiff/ Respondent's Kibanja and latrines. That the Respondent has no compound because of the Appellant's construction and that his houses have lost value for no access. It is also proved that the Defendant/ Appellant admitted in cross examination that her structures were not approved by KCCA. It should be noted from this evidence that the Respondent suffered some losses therefore the Magistrate was justified in awarding general damages. On this basis I also find ground three of the appeal lacking merit.

Ground four, the Appellant contends that the locus in *quo visit* was held exparte which occasioned a miscarriage of justice and an unfair hearing. That there was never an affidavit of service on Court record for them to attend the visit which was then held in their absence. On the other hand, the Respondent argued that visiting the locus did not in any way influence the Magistrate's decision. That the Appellant was served but chose not to appear and that there was an affidavit of service on Court record indicating that the Appellant's Counsel refused to acknowledge service. It should be noted that filing an affidavit of service upon Court record is a mandatory requirement, under Order 9 rule 5 of the Civil Procedure Rules. I however, agree with Counsel for the Respondent to the effect that visiting the locus would not have taken away evidence which was already on record concerning the Respondent owning a Kibanja in the suit land. In the premises, I find the fourth ground of appeal also lacking merit.

In the premises therefore taking into consideration the issues discussed above and in the interest of justice, I hereby dismiss this Appeal with Costs. .

WILSON MASALU MUSENE
JUDGE
1/12/2015