THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL No 105 OF 2015
(ARISING FROM CIVIL SUIT No. 10 of 2013 at BUGIRI)

MBULAMUKO MOSES ============= **APPELLANTS**

VERSUS

OCHWO ROBERT ======== **RESPONDENT**

BEFORE: HON. JUSTICE MICHAEL ELUBU

JUDGMENT

This appeal was filed by **MBULAMUKO MOSES** against **OCHWO ROBERT,** challenging the judgment and orders of HW Komakech Kenneth, the Magistrate Grade I Bugiri Court, which was delivered in Civil Suit No. 100 of 2011, on the 24th of August 2016.

The brief background is that on the 21st of March 2013 the plaintiff, **OCHWO ROBERT** (Respondent) filed a civil suit against **MBULAMUKO MOSES** (appellant). The plaintiff's facts were that he bought a plot of land that measured 50ft by 100ft, located in Nkusi village in Bugiri District, from one Mbatya Abbas, the deceased son of one Katawo Erizafani Nandhubu. The purchase price was 1,100,000/- (One million one hundred thousand). That the plaintiff poured trips of sand and bricks on the plot before he built a foundation. In 2013 the defendant trespassed on this land prompting the plaintiff to file a suit praying for a declaration

that the plot belongs to him; that a permanent injunction restraining the defendant or his agents from trespassing on the plot issue; vacant possession; costs and any other relief.

The defendant (appellant) denied the claim stating that he bought the land from one Isabirye William on the 12th of March 2012 for one million five hundred thousand shillings (1,500,000/-). That there were some building materials on the plot which Isabirye said were his. That Isabirye had bought the land in 1970. The defendant stated that he did not know the plaintiff and that Abbas Mbatya who sold him the land did not own the plot.

The trial magistrate found in favour of the plaintiff, the defendant being dissatisfied filed this appeal with 6 grounds which are,

1. The trial magistrate erred in law and fact when he failed to evaluate the evidence adduced on court record thereby occasioning a miscarriage of justice
2. The trial magistrate erred in law and fact when he failed to hold that the appellant is the rightful owner of the land.
3. The trial magistrate erred in law and fact when he failed to hold that neither Katawo Erizafani nor Abbasi Mbatya are not the original owners of the land.
4. The trial magistrate erred in law and fact when he failed to conduct the locus in quo proceeding in accordance to the law and thereby occasioned a miscarriage of justice.
5. The trial magistrate erred in law and fact when he failed to find that the suit land is part of a chunk of land owned by Isabirye William.
6. The trial magistrate erred in law and fact when he held that the respondent is the rightful owner of the land without any evidence on the Court record.

The appellant prayed that the appeal be allowed and the judgment of the lower court be set aside.

This is a first appeal and as such this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect (see ***Selle Vs. Associated Motor Brad Company (1968) EA 123, Uganda Breweries Limited Vs. Uganda Railways Corp S.C.C.A. No. 6 of 2001).*** I am mindful that the standard of proof in a civil case of this nature is on a balance of probabilities.

Grounds 1, 2, 3, 5 and 6

The appellant argued these grounds of appeal jointly. They challenge the manner in which the trial court evaluated the evidence before it. The complaint is that had the evaluation been done differently the trial court would have found in favour of the appellant.

That the respondent had testified that he bought the suit land but did not tender the agreement of sale in evidence. During scheduling he had stated that the agreement would be tendered at trial. In the course of the hearing however, Counsel for the respondent realised the agreement had not been translated into English and undertook to have the translation done before he would exhibit it. By the close of the trial the translated version had not been tendered in evidence.

The appellant also challenged the evidence of the plaintiff (respondent) witnesses who testified that PW 2 was originally the rightful owner of the suit land (and gifted it to his son, Abasi Mbatya, who in turn sold to the respondent). The appellant argues that without the sale agreement then the evidence of ownership is inadequate. That there was no evidence from Abasi Mbatya (the vendor) or other evidence on record to show that PW 2 had gifted the land to his son Abasi Mbatya.

That the argument that the respondent was first in time cannot stand in view of the fact that the person he bought from had no valid interest to transfer to him. For that same reason the lease offer the respondent is alleged to have obtained would not carry any weight as the title is flawed.

That the appellant on the other hand adduced sufficient evidence to show that he was the rightful owner. That the original owner of the land Isabirye William DW 2 testified stating he was the original owner of the land. That he had bought a huge chunk, from one Emanuel Mukwaya in 1970, for which the suit land formed a part. That two children of PW2, the alleged seller, also bought their plots from DW 2

DW 2 stated farther that he was the owner of the sand and bricks that were on the land. That purchase agreements showing that the appellant was the rightful owner were tendered. That the evidence of ownership was corroborated farther by the evidence of DW 3, DW 4, DW 5 and DW 6 who all confirmed to the court that the land belonged to the appellant. These witnesses stated that they were neighbours to the suit land and did not know the respondent. All stated that the appellant was the owner of the land. That the building materials on the land belonged to DW 2. That DW 3 and DW 4 were immediate neighbours who purchased their plots from DW 2 but did not know the respondent. That the appellant did not inquire from these persons who the rightful owner of the land was before he purchased it. He is said to have inquired from the LC I chairman but that chairman was never called to testify.

The appellant cited the case of **Mpagazihe & Anor vs Nchumisi (1992-1993) HCB 148** where it was held that a purchaser would not qualify to be a bona fide purchaser if he carelessly bought land occupied under customary tenure (which has no title) without inquiring to know whether the land belongs to the seller or whether he has any title or power of attorney to sell the land.

That the respondent in this case did not make sufficient inquiries about the ownership of the land.

In the reply, the respondent argued that he is the rightful owner of the suit land which he purchased, in 2003, from Abas Mbatya, a son of PW 2, Katawo Nandubu, at 1,100,000/-. The agreement of sale was not tendered in as evidence. During the hearing, Counsel for respondent sought leave to have an English translation made but did not produce it. Later that lawyer withdrew from the case, and the respondent, then representing himself, was not guided by the court to produce the English translation. It is the argument of the respondent that it was an error of counsel which should not be visited on the innocent litigant. It is the submission of the respondent that there was nevertheless sufficient evidence, aside from the sale agreement, to prove his ownership of the suit land.

That it was the evidence of the respondent that upon purchase of the land he enjoyed quiet possession from 2003 to 2013. That the land was originally owned by PW 2 Katawo Erizafani Nandhubu who gave it to his son Abasi Mbatya who, in turn, sold to the respondent. PW 3 was the person who drafted the sale agreement. PW 2 testified that the land was ancestral and that he inherited it from Henry Mugoya. The respondent testified farther that he bought building materials and constructed a foundation. That he even applied for a lease and the lease offer was tendered as PEX 1. There was no objection voiced at the public hearing preceding the grant of the lease. That both the purchase in 2003 and the lease offer in 2011 preceded the purchase by the appellant. That as the buyer who was first in time, the respondent had better title to the land.

The submission of the respondent is that the appellant's case is very weak. That DW 2 Isabirye who allegedly sold to the appellant, did not state how big his chunk of

land was. That there are several persons on this land who did not acquire their interests from DW 2. That the respondent ferried building materials and built a foundation without objection from DW 2. That Abasi Mbatya sold the land to the respondent in 2003 without objection from Isabirye. These pieces of evidence go to prove that the land did not belong to Isabirye.

That the only land that belonged to DW 2 was the land he litigated over with PW 2. It was a plot that measured 80ft by 100ft and that at the end of that litigation, Isabirye had misled the court bailiffs to trespass and evict persons beyond the decreed land.

The respondents therefore pray that this Court find that the land did not belong to Isabirye William and he could not have therefore passed good title to the appellant.

In resolving these grounds of appeal, it would appear from the evidence that the parties claim the same plot of land which is situate in Nkusi zone, Bugiri Town Council in Bugiri district.

The respondent's claim is based on the purchase he said he made from one Abasi Mbatya, a son of Katawo (PW 2). Abasi did not testify as he was deceased at the time this matter came up for hearing. Katawo, Mbatya's father, stated that he inherited the land from his brother called Henry Mugoya.

The appellant on the other hand said he purchased the land from Isabirye William (DW 2). The said Isabirye stated that he acquired his interest from Mukwaya Munvelle in 1970. I have looked at the agreement of sale. It appears that it is in regard to land that Katawo litigated over with Isabirye in the Bugiri District Land tribunal vide 006/2003. Isabirye was the successful party on that occasion.

It is the testimony of the appellant that he inquired about the particulars of ownership from neighbours before he purchased the land. The respondent on the other hand

states he bought the land in 2003. He did not rely on any of the neighbours but a member of the executive of the local council (General Secretary) (PW 3). He also stated that he inquired from the then LC I Chairman about ownership and was told that the land belonged to PW 2.

DW 3 Kaina Nathan owns a plot adjoined to the suit and was present as author of the sale agreement when the appellant purchased the land. This witness stated that he does not know the plaintiff.

One Muwanga Akim DW 4 stated that he has been a neighbour to the suit land since 2000. It is his evidence that he does not know the respondent and that he was a witness to the sale of the land by DW 2 to the appellant.

DW 5 is a son of the vendor and stated that he remembered when his father purchased the land. It is his evidence that it was his father using the land prior to purchase.

DW 6 is a next door neighbour who purchased a plot in 2011. It was his evidence that he had never seen the plaintiff (respondent) and does not know him.

This court has closely examined the evidence on record. It is true that in the lower court the burden lay with the plaintiff to prove his claim as it was he who alleged that the defendant then had encroached on his land. It would also appear that the appellant was in possession of the land at the time the suit was filed. He had built a structure up to the level of the ring beam. Therefore as stipulated in Section 110 of **the Evidence Act** when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

The evidence shows that the appellant took steps to ascertain the ownership of the land which was clearly customary land as it was not yet leased. He verified ownership from immediate neighbours many of whom testified on his behalf. Before any party purchases customary land, it is incumbent on him to establish the ownership of that land [see **Mpagazihe (Supra)**]. DW 2 who sold the land clearly established his ownership by producing proof of purchase.

I am not persuaded by the evidence of PW 2 who is said to have inherited the land from a brother called Mugoya. From the Judgement in Land Tribunal Case No. 006 of 2003, PW 2 had always challenged the ownership of land in Nkusi by DW 2. The land was purchased by DW 2 from a 'clan brother' of PW 2. That Court found that the claims of ownership by Katoto (PW 2) against Isabirye (DW 2) were baseless.

In this case I find that the suit land was bought by DW 2 from Mukwaya. DW 2 was therefore the legitimate holder of ownership. That it was sold to the appellant on the 12th day of March 2013 by DW 2. That the appellant carried out all due diligence to confirm ownership from the immediate neighbours. All these neighbours confirmed the land belonged to DW 2. That when the respondent purchased he did not appear to do a proper due diligence which can be seen by failure to produce the LC I chairman who allegedly confirmed to him that the land belonged to PW2. He did not produce any of the persons who attended the area land committee meeting when he made an application for the lease offer. These persons would confirmed to court why they believed the respondent was the rightful owner of the suit land.

From the foregoing it is my finding that the appellant has, on a balance of probabilities, proved his ownership of the land.

For these reasons the following Grounds of appeal succeed: 1, 2, 3, 5 and 6.

Ground 4

> **The trail magistrates erred in law and fact when he failed to conduct the locus in quo proceedings in accordance to the law and thereby occasioned a miscarriage of justice**

The complaint here is that the trial magistrate did not conduct the locus in quo proceedings according to the law. That he took fresh evidence from the witnesses during the site visit. That he used this evidence to fill in the gaps in the plaintiff's case.

I have considered the evidence at locus and looked at the authorities which are,

Waibi Yeseri V E. L. Byandala (1982) HCB 28

Acar Vs Acar (1982) HCB 60

Omwero Vs Zabuloni H.C.C.S 31/2010.

From the record, this court cannot fault the procedure adopted by the trial court at the locus in quo. The site visit was conducted in accordance with the law. It was some of the witnesses who had testified in Court who again testified at the locus and there was substantially no new evidence elicited from them.

This ground of appeal fails.

As the major grounds of appeal have succeeded, the judgement of the lower court is set aside and this appeal is allowed with costs.

Dated at Jinja this 28th day of January 2019

Michael Elubu

Judge

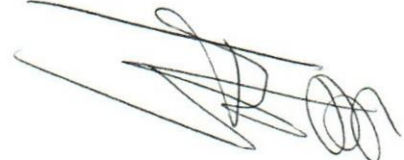
7/2/19

Parties present.

No counsel present.

Mirio: clerk.

Court: Judgment delivered in the presence of the above.



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