

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO. 079 OF 2019

(ARISING OUT OF CIVIL SUIT NO. 82 OF 2016 OF THE CHIEF MAGISTRATE'S COURT OF
ENTEBBE AT ENTEBBE)

SEMAKULA JULIUS

*Through his Attorney Sarah Nassozi
Sewanyana).....APPELLANT*

VERSUS

KITAKA LAWRENCE.....RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

JUDGMENT

Introduction:

The plaintiff filed the suit before the Chief Magistrate's Court at Entebbe, claiming to have bought a *kibanja* on 27th November, 2015 from Mr. Aloysius Kibuuka; that he immediately took possession; erected a fence wall; and utilizing it since then. He claimed that the said Aloysius Kibuuka had acquired the said *kibanja* from his late mother, who had acquired it in 1998.

However that the defendant had showed up later and through one Sarah Nassozi Ssewanyana his attorney started claiming ownership of the said *kibanja*, threatening to demolish the his wall fence unless the plaintiff paid the defendant a sum of **Ugx 30,000,000/=**

The said attorney having failed to honor the promise to produce the documents as agreed, namely, the power of attorney, a certified copy of the defendant's passport; details of the telephone's number and email address which were the pre-condition for the payment, the said



agreement could not be effected. The threats of demolition of his wall continued however which prompted the defendant to file this suit.

The plaintiff sought a declaration therefore that he had lawfully acquired the *kibanja* interest on land comprised in **Block 379, plot 1338** land at Katale; a permanent injunction ; and costs

5 The defendant as the current registered owner of the suit land claimed to have bought the land from one Lawrence Kibuuka, a brother to Aloysius Kibuuka on 10th July, 2015, free from encumbrances, and after carrying out a thorough search on the land. He thereafter got registered onto the title on 26th April, 2016.

10 He claimed further that when the plaintiff was approached he had conceded to regularize his purported interest upon payment of **Ugx 30,000,000/=**, and had even made an initial deposit of **Ugx 10,000,000/=** as per the terms of that consent but thereafter defaulted on payment of the balance.

15 In his counterclaim therefore he asked court to declare the plaintiff a trespasser on the land; sought a demolition order; a permanent injunction; general and punitive damages and dismissal of the suit.

Issues at the trial:

At the trial, the issues were:

20 **1) Whether the plaintiff has a *kibanja* interest on the land comprised in block 397 plot 1338;**

2) Whether the plaintiff is a trespasser on the suit land comprised in block 397 plot 1338;

3) Remedies available.

25 The trial court however ruled in the favour of the plaintiff. Dissatisfied with the decision, the defendant, filed this appeal raising two grounds of appeal:

1. That the learned trial magistrate erred in law and fact when she failed in her duty to subject the whole evidence to exhaustive scrutiny.

30 **2. That the learned trial magistrate erred in law and fact when she held that the respondent had lawfully obtained a *kibanja* interest on the suit land yet did not obtain the consent of the registered owner.**



I will consider both grounds of appeal jointly.

The appellant asked the appellate court to set aside the judgment and orders of the trial court and grant costs to him.

Representation:

- 5 The appellant was represented in court by his attorney, Ms Sarah Nassozi Sewanyana. The powers of Attorney were granted to her on 28th July, 2016, in respect of handling transactions relating to **plot 1338, block 379 land at Katale. (DExh 2).**

Evaluation of the evidence:

- 10 This being a first appeal the appellate court is required to subject the evidence to a fresh and exhaustive scrutiny and then draw its own conclusions, bearing in mind that it never observed the witnesses under cross-examination. (**See: Sanyu Lwanga v Sam Galiwanga SCCA No.48/1995**). This court has the duty to re-evaluate the evidence to avoid miscarriage of justice as it mindfully arrives at its own conclusion.

- 15 The law on trespass is well articulated in **Justine E.M.N. Lutaaya vs. Stirling Civil Engineering Co. Civil Appeal No. 11 of 2002 (SC)** where it was held that the act of trespass occurs when a person makes an authorized entry upon land, and thereby interferes or portends to interfere with another person's lawful possession of that land. The burden lies on the plaintiff to prove that the defendant illegally entered on to the suit land.

- 20 A plaintiff has the burden to prove the facts as alleged by him/her; and is deemed to discharge that burden if he adduces evidence sufficient to raise a mere presumption that what he asserts is true, enough to persuade court to rule in his/her favour.

- 25 But that burden may shift to the defendant, requiring him/her to adduce evidence sufficient to support a rebuttal of that presumption against him/her. (**See also: S. 101, S. 102 and S. 103 of the Evidence Act Cap 6 and Mudiima & 5 Ors Vs. Kayanja & 2 Ors (Civil Suit 232 of 2009) [2014] UGHCLD 34**).

- 30 To prove ownership, the respondent/plaintiff Mr. Kitaka Lawrence relied on the evidence of two witnesses and a sale agreement **PExh1** which is dated 27th November, 2015. The appellant/defendant on his part relied on the evidence of five witnesses and among his documents is a sale agreement dated 10th July, 2015, (**DExh D**) between him and Raymond Nanseera, who testified as (**Dw1**). It was not in dispute that he was the registered owner of the land comprised in **Block 379, plot 1338**.

In the said agreement, **Dw1** was the duly appointed agent by Lawrence Kibuuka, the person who had sold land to the appellant. **Dw1** in that respect held powers of attorney, **DExh C**, dated 12th June, 2015.

In the same transaction the appellant as the purchaser had been represented by Sarah Nassozi. Ssewanyana who testified as **Dw2** having been granted with powers of attorney in 2016, about a year after the sale agreement was concluded.

One would therefore be right to assume that at the time the said agreement was made, Nassozi had no powers to transact on the appellant's behalf, thus bringing to doubt the validity of the sale transaction between the said Julius Ssemakula (appellant) and Lawrence Kibuuka.

It is also not in dispute that on 20th December, 2016, a consent agreement had been entered between the said Sarah Nassozi this time as a duly appointed attorney for the appellant and Lawrence Kitaka, the respondent; and in the presence of counsel the respondent's counsel.

The appellant's claim was that the respondent had by that consent conceded that he had not rightfully acquired the *kibanja*.

The trial court in dealing with this consent had this to say:

Since the parties decided to proceed with the hearing and the plaintiff had earlier on contested the earlier agreement as having been entered by duress, and the defendant had decided not to contest that application, it goes without saying that the earlier agreement was rendered unenforceable. Parties are therefore at liberty to enter into fresh negotiations if they so wish. The Ugx 10,000,000/= which was later to be deposited as security for costs should now be returned to the plaintiff by the defendant since the plaintiff has won this suit.

It was the respondent's contention that he had only entered into the consent to save his property the plaintiff agreed to pay the said sum. He attributed the failure to honor the consent on the failure by Sarah Nassozi, the attorney for the defendant/appellant to present the documents necessary for the transfer, which included the power of attorney, a certified copy of the defendant's passport; details of the telephone's number and email address which were.

These requirements or conditions were not spelt out in the consent itself but as in all transactions, were absolutely relevant to the transaction before purchasing the land, as an act of due diligence.

Pw2, John Sekitooleko was a witness to the agreement dated 27th November, 2015, between the plaintiff/respondent and Aloysius Kibuuka which from the contents of that agreement was a share from his father's estate. (**PExh 1**).

The agreement read as follows:



I Kibuka Aloysius of Katale Mayanja have sold to Mr. Lawrence Kitaka of Kisasi Zone my kibanja plot on my titled land which I got from my late father Kibuuka Emmanuel.

DExh B was another document which the parties did not dispute. This was Memorandum of Understanding (M.O. U) dated 14th January, 2016. By this document the three siblings, Veronica, Aloysius and Lawrence as beneficiaries of the estate of their late father Emmanuel Kibuuka had agreed that their elder brother Lawrence was to get 37 decimals and between the two siblings Veronica and Aloysius they would share 62 decimals.

The land to be shared was subdivided to create several plots, that is: **plots 1336 to 1341 Busiro**. The disputed *kibanja* was on **plot No.1338** and from the MOU, its size was 12 decimals. On page 2 of the MOU, it is indicated that Lawrence Kibuuka had interests in plots **1337, 1339, 1340 and 134**, as agreed upon by the three siblings.

The total area apportioned to Lawrence Kibuuka under the M.O.U however appeared to exceed the 37 decimals that had been agreed upon. Be that as it may, from that M.O.U, he obviously held no interest in **plot 1338**, which he sold to the appellant and which is the subject of this appeal. The appellant did not offer any explanation as to how under those circumstances he subsequently became the registered proprietor of **plot 1338**.

Counsel for the appellant's argument was that the trial court failed to scrutinize the context of the M.O. U on how the land had been shared and forgot that the plaintiff/respondent was allocated a different *kibanja* not the one in dispute. He did not elaborate.

The argument was not only misleading but was also not supported by any evidence since in any case, the respondent had not been a party to the M.O.U. It was acknowledgment though that the respondent did indeed acquire a *kibanja* out of the same area and this, from someone who had also acquired a share in the property.

Furthermore, counsel argued that the person who sold to him (respondent) admitted to have sold what did not belong to him. These were assertions made by **Dw3** Det. Constable Eslat. Neither the investigation report nor the statement of admission attributed to Aloysius Kibuuka were however availed in court.

Dw3 also admitted that he never recorded any statement from the respondent. The case against Aloysius Kibuuka was never followed up. This court therefore found it hard to attach any weight or value to **Dw3's** evidence.

Court also noted that as per the sale agreement dated 10th July, 2015, the transaction between the appellant and Lawrence Kibuuka was for 12.5 decimals which was to be surveyed off from the entire piece of land.



As the agreement **PExh 1** indicates, unlike the portion purported to have been bought by the appellant on 10th July, 2015, (**DExh D**), the *kibanja* sold to the respondent on 27th November, 2015 had very specific dimensions.

5 This was the land located adjacent to the road, in the corner. The measurements were clearly indicated. However the land bought by the appellant was vaguely described in the agreement as *12.5 decimals to be surveyed from the land comprised in **block 397, plot 920** measuring one acre.*

10 It is clear from the record that at the time the sale was concluded however, no such survey had ever taken place to determine the actual size, location and positioning of the land sold to the appellant. If it did, no such evidence was on record.

The possibility could not therefore be ruled out that what the appellant purchased as *kibanja* may not have been the same as what was eventually registered on the title in his names following the conclusion of the M.O.U.

15 **Section 35 (8) of the Land Act, Cap. 227** is clear. *A change of ownership of title effected by the owner by sale, grant and succession or otherwise shall not in any way affect the existing lawful interests or bona fide occupant and the new owner shall be obliged to respect the existing interest.*

20 That section is applicable to this case to the extent that when the title was finally registered on 28th April, 2016 in the names of the appellant for **plot 1338**, the existing equitable interests acquired by the respondent from Aloysius Kibuuka on 27th November, 2015, who was the undisputed owner of **plot 1338**, as per the MOU were not considered.

The appellant had no equitable interest in the portion he bought on 10th July, 2015 since as established earlier by this court, he had not by that time duly authorized Sarah Nassozi to handle the matters concerning this land. The said transaction could not therefore be considered as valid.

25 But even more intriguing was the fact that what is mentioned in that sale agreement is **block 397, plot No. 920**. The block number however for the disputed land was **block 379**, while the plot number was plot: **1338**.

The same block number, **block No. 397** also featured in Sarah Nassozi's evidence at cross examination, which confirmed that this is what she had sold to the appellant. (*refer to page 29 of the record of proceedings*). Land being what it is, these were completely different locations.

30 In the event that this was an error then it ought to have been brought to the attention of the court for correction. Such discrepancies in plot numbers and block numbers had to be explained and ironed out by way of an area schedule and survey report. It was in the appellant's interest to avail that information.



The trial court also correctly noted that Lawrence Kibuuka himself was registered on the title on 5th November, 2015 at the time when there were still misunderstandings between the siblings. These were settled under the MOU and as rightly pointed out, he did nothing to challenge the distribution under the MOU, signed in January, 2016 or successfully challenge his brother's authority to sell the *kibanja* to the respondent or other disputed actions by him.

The burden shifted to the appellant to prove also that by the time he got his title in April, 2016, Aloysius Kibuuka had not acquired any such interest as alleged. That he had no share in **plot 1338** to pass on to the respondent.

He was left to at least prove to court that the respondent was occupying land which was allocated to Lawrence Kibuuka, the appellant's predecessor in title, as per the MOU. The appellant did not discharge that burden or provide evidence which would have proved his counterclaim that the respondent was indeed a mere trespasser on **plot 1338**.

All in all, the claim therefore made by the appellant that the respondent did not conduct a search; secure the consent of the registered owner; or even bother to establish who the registered owner was, did not arise under those circumstances.

After the conclusion of that M.O.U, and as a matter of fact, it was the appellant who before securing the title had to seek prior consent of Aloysius Kibuuka as the legal owner of **plot 1338**, taking into account the prior interest of the respondent who had lawfully acquired the *kibanja* from him. As rightly noted by court and in submissions, the MOU was never disputed, challenged or set aside.

It was also besides, not enough for the appellant to report the respondent's questioned possession on the land to Police without challenging him in court. (**Ref. DExh E**). This court noted that it was not in fact until the respondent filed the case against the appellant that he (the appellant) had woken up to pursue his purported interest concerning this land.

It is the conclusion by this court therefore that Lawrence Kibuuka had made a transfer of the mailo interest in land comprised in **plot 1338**, to the appellant, land that did not belong to him.

Against that backdrop, this court would have no basis to justify the setting aside the decision arrived at by the trial court. The two grounds of appeal are accordingly dismissed.

Costs of this appeal and of the lower court awarded against the appellant.


Alexandra Nkonge Rugadya

Judge

19th January, 2023

Delivered by email
19/1/2023