

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL NO. 080 OF 2016
(ARISING FROM CIVIL SUIT NO. 039 OF 2015 MUKONO AT LUGAZI)

MUGAMBWA LAWRENCE.....APPELLANT

VERSUS

MWENGE ISAAC.....RESPONDENT

JUDGMENT ON APPEAL
BEFORE HON. LADY JUSTICE EVA K. LUSWATA

This is an appeal from the decision of Her Worship Martha Timugiibwa, Magistrate GDI, Mukono at Kayunga delivered on 20/06/2016.

Background

In the lower court, Mwenge Isaac the respondent sued Mugambwa Kiseka Lawrence the appellant in trespass in respect of a kibanja interest on land in Nsaalwa, Ngogwe Sub County, Buikwe District (hereinafter referred to as the suit land). Mwenge stated in his claim that he had received the suit land from his father in 1984 and lived there until 1995 when he shifted. That he agreed to sell the house on the suit land to the appellant Mugambwa, but the latter instead assumed ownership of the kibanja and refused to vacate it. Mugambwa contested the claim by stating in his defence that he had brought from Mwenge not only the house but the entire Kibanja interest on which he settled for a long time.

In her judgment, the trial magistrate found the agreement of sale presented by Mugambwa to have been forged. She then found that the intention of Mwenge was to

sell the building materials of the house on the suit land and not the land. She declared Mwenge the rightful owner of the suit land and therefore, Mugambwa was in trespass. *Inter alia*, she directed Mugambwa to demolish the house on the suit land and then give Mwenge vacant possession of it. Mugambwa being dissatisfied with that decision presented this appeal on four grounds that:-

- i.) The learned trial Magistrate erred in law and in fact when she failed to properly evaluate evidence on record regarding the sale agreement hence reaching an erroneous decision**
- ii.) The learned trial Magistrate erred in law and in fact when she misdirected herself by failing to apply the law hence occasioned a miscarriage of justice to the appellant.**
- iii.) The learned trial Magistrate erred in law and in fact when she engaged in speculation about the appellant's sale agreement to be a forgery without invoking services of a handwriting expert.**
- iv.) The learned trial Magistrate acted in total bias throughout the trial process against the appellant in holding that the plaintiff's witnesses and evidence appeared to be more truthful than those of the defendant and in so doing, occasioned a miscarriage of justice**
- v.) The learned trial Magistrate erred in law and in fact in holding that the plaintiff/respondent is the rightful owner of the property**

Asiimwe Anthony and subsequently Rose Nassiwa represented Mugambwa, while Mwenge was represented Adikini Esther. Both counsel filed written submissions as directed and which shall be considered in my decision.

Duty of the Court

My powers and limitations as a first appellate Court are now well settled. I am under duty to subject the entire evidence on record to fresh and exhaustive scrutiny and

make my own conclusions. In doing so, I am not bound necessarily to follow the trial Court's findings of fact if it appears that the court clearly failed in some way to take account of particular circumstances and probabilities. I hasten to add that my conclusions may be limited by the fact that I did not see or hear the witnesses to test their veracity and due allowance shall be made in that regard. See for example **Panyda Vrs R and Sanyu Lwanga Musoke Vrs Sam Galiwango SCCA No. 48/1995.**

Ms. Nassiwa chose to abandon the second ground and made no submissions on it. It was a correct decision because I find it too general and the ground of objection is not clear which offends Order 43 rr 1 (b) CPR. I would likewise not make any finding on it, and dismiss it summarily. I consider the 1st and 3rd grounds to be closely related. I will thus resolve them first and conclude with the 4th and 5th grounds concurrently.

Resolution of the grounds of appeal:-

Ground1

I disagree with the submission made for Mugambwa that the trial Magistrate did not properly evaluate the evidence regarding the sale agreement. In her decision, she considered both the oral and written evidence with regard to the alleged sale of the suit land. She spent some considerable time evaluating **DEX 1a** sale agreement stated to have been signed between Mugambwa and Mwenge for the purchase of the suit land and the fact that Mwenge denied ever signing it. She considered the document too "new" to have been made in the 1990's. She also found that Mugambwa and his wife DW3 contradicted each other on how the original was lost and on that collective basis, believed the testimony of Mwenge and his witnesses that no written agreement had ever been made by which he sold the suit land to Mugambwa. The trial Magistrate then concluded that the intention of the parties was for the sale of the building materials of the house on the suit land, and not the land itself.

I find no fault in the trial Magistrate's decision on that account. There appears to have been no contention that Mwenge received the suit land as a gift from his father Kiwanuka in 1984 and built a house on it. Kiwanuka and Nanyanga his wife confirmed that fact and Mugambwa did not dispute it. The only bone of contention then was whether the agreement between Mugambwa and Mwenge was for the sale of only the house on the suit land, or both the land and the house.

According to Mwenge, when he made the decision to relocate to Masaka in 1995, he agreed to sale the stones, doors, bricks and iron sheets to Mugamba for a sum of Shs. 80,000 the latter who would use them to build a toilet and kitchen for his home. He explained that Kiwanuka had earlier suggested he demolishes the house and take the material with him, but that he found that too cumbersome and costly. Mwenge continued that he received payment in two installments of Shs. 50,000 and 30,000 through another brother Mbwege after which he left Kiwanuka in charge of the suit land. Further that he was for some time concerned that Mugamba took long to remove the purchased items. That he was on 15/11/2014 informed by Kiwanuka that Mugambwa had with his family taken possession of the house and suit land, a fact he himself confirmed on 5/12/2014. He asserted that the agreement between them was oral and denied knowledge of or ever signing **DEX 1**, which he considered forged.

PW2 Kiwanuka, his wife Nanyanyaga (PW3) and their son Mbwege (PW6) supported much of that evidence. All three stated that they were present at the point of sale and insisted no sale agreement was ever written. They supported Mwenge's evidence that his intention was to sale the house and not the land. That the agreement was for Mugambwa to demolish the house and remove and take away the building materials. Kiwanuka admitted to have been the suit land's caretaker and was concerned when

Mugambwa took occupation of the house. He alerted Mwenge of that fact and later as part of the wider family, tried to resolve their dispute.

On the other hand, Mugambwa contended that he purchased one quarter of an acre with a house from Mwenge in 1981 for a collective sum of Shs. 80,000, and then took immediate possession. That at first Mwenge declined to reduce the agreement into writing, but agreed to do so after Mugambwa refused to make any payment. That Mwenge eventually agreed to sign the agreement in secret but the original copy was lost during a robbery. Both DW3 Nakabiri, (Mugambwa's wife) and DW2 Namugera claimed to have signed the sale agreement as witnesses. Citing reasons, the trial Magistrate believed the testimonies presented for Mwenge and rejected those of Mugambwa. I do find merit in that decision, and the following are my reasons.

PW2, 3 and 6, the parties' parents and brother respectively testified they were present when the sale was made. All three were strong on the point that there was no written agreement and that the intention was to sell building materials and not the land. Mwenge's concern that Mugambwa took too long to remove the material was supported by DW3 who testified that they took long to take possession of the suit land, and instead maintained tenants therein. Even then, that evidence was contradicted by Mugambwa who never mentioned any tenants and claimed to have obtained possession immediately after purchase of the land. In my view, the evidence of Mwenge and DW 3 would be more credible that Mugambwa did not take immediate possession and Kiwanuka as caretaker was concerned when Mugambwa took possession and spared no time in alerting Mwenge who in return, promptly came forward to contest it. Mugambwa did not explain why he took long to take possession of land he had purchased, which would lend credence to Mwenge's evidence that the land was not sold to him.

Again, it is strange that Mugambwa who admitted the presence of Kiwanuka his father when the sale was made, did not procure his signature as a witness. It is also strange that he did not ensure the intervention of the local council of the area to witness the sale since this was a kibanja. DW2 Namugera who claims to have been a witness of the agreement did not appear thereon as such and even admitted that he did not know whether Mwenge had ever signed it. Further, although Mugambwa and his wife claimed that the original copy of the agreement was lost during a robbery, Mugambwa admitted in cross examination that during an earlier interview with police, he had reported that he had kept it with someone who lived abroad. This was a serious unexplained contradiction that did not escape the Magistrate.

DEX1 was a photo copy of the purported sale agreement and by its nature, secondary evidence. Mwenge considered it a forged document and PW6 Mbwenga claimed that during October 2015, Mugambwa informed him he was going to forge an agreement in respect of the sale of the suit land. Under Section 64 Evidence, Act secondary evidence is permissible only in restricted circumstances. The agreement would have been permissible only if proved lost or if its contents were not contested by the makers or at least, there was satisfactory proof that they executed it. I have already stated that the circumstances under which Mugambwa claims to have lost the agreement were contradictory and thus suspect. In addition, he did not produce evidence to show that he had reported its loss to police or any other authority. In my view, that would discount it as secondary evidence.

Mugambwa's evidence that Mwenge only agreed to execute the agreement in "*secret*" was also suspect. No reasons were advanced why Mwenge would resort to such strange behavior and why Mugambwa would agree to it when this was land that once belonged to their father, the latter who knew about the sale. Mwenge and his witnesses were consistent that there was no written agreement for the sale of the

building material and none was signed by him, would thus have been the more credible version.

I would accordingly find no fault in the decision of the trial Magistrate, on this ground, and it fails.

Ground three

I do agree with the submissions made for Mugambwa that the trial Magistrate engaged in speculation when she considered the sale agreement forged without evidence of a handwriting expert. Her observations that the copy appeared “*new*” and “*too clean*” were unnecessary and could not be the basis of concluding that the agreement was forged. In my view, the agreement in its form should not have been admitted at all. The manner under which the original was lost was suspect, and Mwenge who is stated to have been one of its authors, had contested it. At the least, it would have remained an identification document until Mwenge’s signature was verified and proved or disproved by a handwriting expert.

That said, it was incumbent upon Mugamba and not Mwenge to prove that document. Mwenge’s claim is that he sold movable items on the land and not the land and thus, Mugamba by taking possession of the suit land, was in trespass. On the contrary, Mugambwa claimed to have bought the land and the developments on it and adduced a written agreement to prove it. Once he did so, he was bound to prove the existence and authenticity of that agreement. Thus under Section 101 Evidence Act, the burden of proof shifted to him to prove the agreement by any means necessary, including adducing expert evidence to prove those who had executed it. No evidence was adduced by either party to that effect and thus under Section 102 Evidence Act, he failed to discharge the burden of proof.

Thus although the trial Magistrate was correct to hold that the agreement was inadmissible, the reasons for that decision were wrong. The third ground would thus succeed only in part.

Grounds 4 and 5

Having read the judgment carefully, I found no bias given by the trial Magistrate in favour of Mwenge and his witnesses. She gave equal attention to evidence on both sides, and evaluated it before finding Mwenge and his witnesses more credible. Only then did she make a finding that the sale agreement could not be relied on to prove the intention of the parties at the time of the sale. She then formed the opinion that the intention of the sale was in regard to the building materials of the house and not the suit land/kibanja, after which, she declared Mugambwa a trespasser thereon. Her decision albeit with some error on law, was based on an impartial and well balanced evaluation of the evidence adduced for both parties. I would thus find no fault in her conclusion that Mwenge is the rightful owner of the suit land.

Grounds 4 and 5 accordingly fail.

In conclusion, the grounds of appeal have substantially failed. I find no merit in the appeal which is dismissed. Mwenge Isaac the respondent shall have the costs here and of the Court below.

I so order.

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EVA K. LUSWATA
JUDGE

02/12/2020