THE REPUBLIC OF UGANDA

IN THE HIGH COURTOF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO 013 OF 2022

(ARISING FROM ENTEBE CS NO. 120 OF 2O14)

JANE MBABAZI::APPELLANT

VERSUS

HALIMA GAYINAMUNGU::::::::::::::::::::::::::::RESPONDENT

JUDGEMENT

BEFORE JUSTICE TADEO ASIIMWE.

BACKGROUND

This appeal is against the judgement and orders of her worship Nakitende Juliet, the chief magistrate of Entebbe Chief Magistrates Court.

The respondent instituted a suit against the appellant for trespass on the suit land seeking for orders that the appellant is a trespasser, vacation of the suit land, general damages, interest and costs.

The facts giving rise to the respondent's case in the lower Court are that she purchased a suit land through a fore closure by the bank in 2014 and was registered on Title.

That however, when the agents of Bank of Uganda notified the Appellant who was in occupation of the suit land as a tenant about the sale, she refused to vacate the suit land claiming that she had purchased the suit land in 2001 from the original Registered Proprietors.

On the other hand, the Appellant denied the claims of the Respondent and raised a counter claim stating that, she purchased the suit land from a one Fred Kivumbi in 2001 and that the Respondent failed to do due diligence to find out the actual owners of the suit land before she purchased the same.

At the conclusion of the trial, the Chief Magistrate decided the matter in favour of the respondent and declared the Appellant a trespasser.

The appellants being dissatisfied with the judgement and orders of court appealed to this Honorable Court on the following grounds.

1. That the Learned Trial Chief Magistrate erred in law and fact when she held that the Appellant was a trespasser on the suit land. At the time when the Respondent purchased the same and refusal by the Appellant to vacate amounted to trespass.
2. That the Learned trial Chief Magistrate erred in law and fact when she held that the Appellant was a tenant on the suit land.
3. That the Learned Trial Chief Magistrate erred in law and in fact when she ignored all evidence of fraud adduced against the Respondent there by reaching an unjust decision.
4. That the Learned Trial Chief Magistrate erred in law and fact when she held that Ntagumbwa Jane was a different person from the Appellant.
5. That the Learned Trial Magistrate erred in law and fact when she completely failed to rule whether the Appellant was an adverse possessor on the suit land.
6. The learned Trial Chief Magistrate erred in law and in fact when she completely ignored the evidence with regard to substantial improvements effected on the suit land by the Appellant prior to the Respondent's purchase in 2014.

7. That the learned Trial Chief Magistrate erred in law and fact when she awarded excessive general damages thereby occasioning a miscarriage of Justice.
8. That the Learned Trial Chief Magistrate erred in law and in fact when she failed to properly evaluate the evidence on record and thereby arriving at a wrong conclusion.

At hearing, the appellant represented by Counsel Alunga Patrick while the Respondent was represented by Counsel Abbas Bukenya and Counsel Buyuni Josck.

Duty of the 1st Appellate court.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

"It is a well-settled principle that 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 neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

Resolution.

Both parties filed written submissions, which I shall consider in this judgement. Counsel for the Appellant abandoned grounds 3 & 8 argued ground 1, 2 & 4 together, grounds 5 & 6 together and ground 7 separately.

I shall resolve the above grounds in the same order.

GROUND 1,2&4;

1. That the Learned trial Chief Magistrate erred in law and fact when she held that the Appellant was a trespasser on the suit land. At the time when the Respondent purchased the same and refusal by the Appellant to vacate amounted to trespass.

2. That the Learned trial Chief Magistrate erred in law and fact when she held that the Appellant was a tenant on the suit land.

4. That the Learned trial Chief Magistrate erred in law and fact when she held that Ntagumbwa Jane was a different person from the Appellant.

On the above grounds, it was the appellant's submission that the appellant led sufficient evidence to show that she purchased the suit land in 2001from the representative of the registered owner who had powers of attorney, took possession and made improvements on the suit land and that therefore she could not have been a trespasser or tenant on her own legally purchased land. Further that the Trial Chief Magistrate relied on the issue of the appellant being the same as Mutagubya Jane and yet it was not an issue raised for trial. That the trial magistrate ignored the appellant's evidence to show that she is one and the same as Jane Mutagubya

In rely counsel for the respondent, disagreed with the appellant and argued that the appellant led insufficient evidence to show how she purchased the suit land as she denied the signatures on all documents supporting her witness statement. That her stay on the suit land was utter trespass. That the learned trial magistrate was right to hold that the appellant is not the same as mutagubya Jane. That the appellant in her evidence confirmed that she is Mbabazi Jane and that all documents signed by mutagubya Jane were not signed by her. That the appellant's counsel cannot turn around to state it differently.

From the pleadings of both parties and the lower Court record, the parties' claims are based on purchase from different sources.

The Respondent as the plaintiff in the trial court was under duty to prove that he purchased the suit land from a source with legal interest and obtained good Title. The Appellant was also under duty to show how she acquired the same on the balance of probabilities.

As already stated above, the Appellant's claim is that she purchased land from a one Fred Malokweza who had powers of Attorney of a one Viola Nakiwala Malokweza the original Registered Proprietor in 2001 and the she immediately took possession un interrupted to date.

On the other hand, the respondent's claim is that she bought the suit land vide a fore closure by Bank of Uganda through its agents SIL. That she emerged the best bidder after an advert in the newspapers and was finally registered on Title in 2014.

Given the above background, it is important for this Court to determine who of the parties obtained good Title from a person with legal interest in the suit land.

To prove her case as per the lower Court record, the Respondent adduced evidence through PW1 who confirmed that SIL on behalf of Bank of Uganda advertised the suit property which she bided for and emerged the best bidder thereafter she made payments and she was registered on Title as the Registered Proprietor.

She further confirmed that she carried out a search and found that Greenland Bank had registered a mortgage on the suit property in 1995 and therefore had a right to sale. That she also did a physical search on the suit property which she found the Appellant occupying and on inquiring both the Appellant and the LC1 Chairperson confirmed that the

suit property did not belong to the Appellant and that she was willing to vacate the suit property if the Respondent purchased it.

On page 4 of the lower court proceedings, she presented exhibits PEXB1-PEXB8 to substantiate a claim of purchase. Perusal of the above exhibits indeed confirms that the Respondent responded to the advert in the newspaper PEXB2 and expressed her interest in the suit land as per PEXB3, bided for the same property as per PEXB4 and appeared the best bidder as per PEXB4 and made payments as per PEX5 and PEXB6 and was registered on Title in 2014 as per PEXB7.

The question for Court to answer is whether Bank of Uganda through its agents SIL had a legal interest in the suit land and power to sell the same.

From the evidence on record as per PEXB7 the Certificate of Title for the suit land, it is clear that the Green land Bank registered a mortgage on the suit property in 1995 vide instrument number KLA 195338. Ideally as a mortgagee Greenland Bank had power to sell the suit land per the terms of the mortgage agreement under Sec.2 RTA, Sec. 8 of the Mortgage Act and regulation 25 of the Mortgage Regulations. The above position was emphasized in the case of ***Alhaji Yahya Ziraba Vs Development Finance Company Uganda Ltd CACA NO. 18 of 2000*** where Court held" **that a mortgagee is deemed as registered Proprietor with liberty to sell under a mortgage deed**. It would therefore appear that Green land bank /Bank of Uganda had a legal interest in the suit land and the powers to sell the same.

On the other hand, the Appellant lead evidence of four witnesses and she testified as DW1. The gist of their evidence is that the Appellant bought the suit land from a one Fred Malokweza who had Powers of Attorney from the registered Proprietor a one Viola Nakiwala Malokweza to sell the suit land. That she has enjoyed quiet possession uninterrupted up to date.

She tendered in exhibits DIA, DIB, D2, D3A, D3B, D3C, and D3D to substantiate her purchase. However, she did not produce the said Power of Attorney from the said Viola Nakiwala Malokweza authorizing the said Fred Malokweza to sell the suit property.

Further, she did not produce an agreement for purchase of the suit land between her and the said Fred Malokweza save for a variation agreement D3A whose signature she denied under cross examination page 16 of the Lower Court record. On page 18 and 17 of the Lower Court record, she denied all the signatures on the above exhibits.

Ideally, denying her signature on D3B, D3C and D3D substantially means that all her documents of ownership were not signed by her and in effect has no evidence of purchase. The above notwithstanding, it is clear from PEX7 that by the time the Appellant attempted to purchase the suit land in 2001, Greenland Bank was already the Registered Proprietor as a mortgagee and therefore no other person or entity other than Green land bank or Bank of Uganda had the authority to sell the suit land neither Fred Malokweza nor Viola Nakiwala Malokweza had a legal interest in the suit property to warrant the selling of the same.

Therefore, they could not pass good Title to the Appellants. The suit land was sold as per PEX1 –PEX8 by the Registered Proprietor Greenland Bank/Bank of Uganda through fore closure and the Respondent purchased the same.

I therefore find that the learned trial Chief Magistrate rightly found the Respondent the lawful owner of the suit land and the Appellant a trespasser of the suit land.

On the ground concerning the appellant's name, the appellant under cross examination stated that he name is Jane Mbabazi and not Ntagubwa Jane. She however stated that Ntagubwa was her husband name but separated

with him. She however went on to disown all documents that were signed under the name Ntagubwa jane. Although her evidence was supported by DW4 to confirm that her husband was Ntagubwa, there no marriage certificate produced at trial. Besides, the issue of name in this circumstance is irrelevant since she purchased from persons with no legal interest or Legal authority to sell the suit property. As a whole o find no merit in grounds 1, 2, and 4 which here by fail.

GROUND 5&6;

5. That the Learned Trial Magistrate erred in law and fact when she completely fail to rule whether the Appellant was an adverse possessor on the suit land.

6. The learned trial Chief Magistrate erred in law and in fact when she COMPLETELY ignored the evidence with regard to substantial improvements effected on the suit land by the Appellant prior to the Respondent's purchase in 2014.

On grounds 5 & 6, the appellant's counsel submitted that that in the alternative the appellant is an adverse possessor since she acquired the suit land in 2001and has been in occupation since then. That the appellant's adverse action can be seen from her physical occupation, completing the developments on the suit property and living thereon against the interest of the respondent and the entire world.

In reply counsel for the respondent disagreed with the appellant's argument and submitted that the appellant's claim that she was an adverse possessor is/was an afterthought since her initial claim is that she purchased the suit land. That the appellant cannot claim to be an adverse possessor and purchaser of the suit land at the same time. Further that no issue was raised at trial in regard to improvements done on the suit land.

Further that the appellant's claim that she was an adverse possessor is/was an afterthought since her initial claim is that she purchased the suit land. That the appellant cannot claim to be an adverse possessor and purchaser of the suit land at the same time.

"By adverse possession I understand to be meant possession by a person holding the land on his own behalf,[or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner." **Bejoy Chundra vs. Kally Posonno [1878] 4 Cal.327 at p. 329**;

The spirit of the definition above is similarly captured in provisions of **Section 16 of the Limitation Act** to the effect that at the expiration of the period of twelve years prescribed under **Section 5(supra)** for any person to bring an action to recover land the title of that person to the land shall be extinguished.

In **AIR 2008 SC 346 Annakili vs. A. Vedanayagam & Ors,** the Supreme Court of India gave the essential elements of adverse possession which were considered in light of the Limitation Act of India with provisions similar to the Uganda Limitation Act (Cap 80. It was held that;

"Claim by adverse possession has two elements: (1) ***the possession of the defendant should become adverse to the plaintiff;*** *and (2)* ***the defendant must continue to remain in possession for a period of 12 years thereafter.*** *Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now settled principle of law that that mere possession of land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to*

exist at the commencement of the possession. He must continue in the said capacity for the prescribed period under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title."

To begin with, the appellant did not plead that she was an adverse possessor in the lower court. He therefore cannot raise this issue on appeal.

That notwithstanding, the appellant's claim is that she purchased the suit land. However, there is no sufficient evidence as already found above that she purchased the suit land from the legal owner since the said Fred was not the registered proprietor of the suit land. Even then her intention was to acquire tittle legally and not being adverse to the owner's tittle. Whereas she testified that she improved the suit land, there is no evidence on the lower court record to show that the structures there on were not in existence before she occupied the suit property.

The appellant's evidence is that of a failed purchase which cannot support her claim of an adverse possessor. It therefore find that the learned trial chief magistrate rightly held that the appellant is/was not an adverse possessor.

Grounds 5&6 fail

Ground 7

That the learned Trial Chief Magistrate erred in law and fact when she awarded excessive general damages thereby occasioning a miscarriage of Justice.

In the case of **Luzinda v. Ssekamatte & 3 Ors (Civil suit -2017/366 [2020] UGHCCD** 20 (13 March 2020), *this court held that as far as damages are concerned, it is trite law that general damages be awarded in the discretion of court. Damages are awarded to compensate the*

aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the defendant's actions.

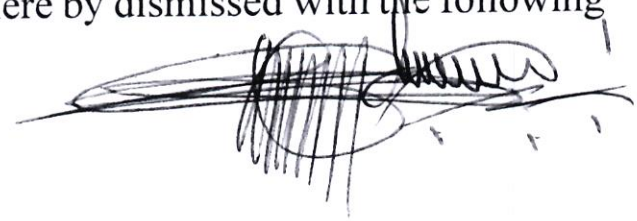
In this case as per page 12 the trial chief magistrate gave reasons for the award of damages to that tune. That she considered the fact that the respondent had been kept out of her land for 9 years while the appellant occupied two houses on the suit land.

Court in **Kilembe Mines Limited v David Bitegye (Civil Appeal No. 46 of 1971) [1971] EACA 14 (3 December 1971)** *stated that The principles which guide this court on appeal of this nature are well known and suffice it to say that before it can disturb the finding of the Court of first instance as to the quantum of damages it must be satisfied that the learned judge in assessing the damages "applied a wrong principle of law (as by taking into account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages" -* ***see Henry Hidaya Ilanga v Manyema Manyoka [1961] E.A. 705 at page 713 following Nance v British Colombia Electric Rly Co. Ltd (1951) A.C. 601.***

The appellant has not shown court that the learned chief magistrate applied a wrong principle of law in assessing the damages at ugx shs. 20,000,000/= (twenty million) nor do I consider this amount to be so inordinately high as to be wholly an erroneous estimate of the damages to which the respondent is entitled. I therefore find that the trial magistrate's award of damages to be reasonable in the circumstances.

Ground 7 too fails

In conclusion, this appeal fails and is here by dismissed with the following orders; -



1. The decision and orders of the trial magistrate in Civil Suit No. 120 of 2014 are upheld with an additional order for the appellant to immediately vacate the suit land or face eviction.
2. Costs of this appeal are granted to the respondent.

I so order

TADEO ASIIMWE

JUDGE

13/06/2023.