IN TH COURT OF APPEAL

AT MENGO

(CORAM: MANYINDO, V-P, LUBOGO, AG. J.A. & ODOKI J.A.)

CIVIL APPEAL NO. 4 OF 1987

BETWEEN

SHEIKH MOHAMMED LUBOWA:: APPELLANT

AND

KITARA ENTERPRISES LTD::: RESPONDENT

(Appeal from the judgment of the High Court (Kato J.) dated

19th day of June, 1986.

in

High Court Civil Suit No. 129 of 1986)

JUDGMENT OF MANYINDO, V-P

This is an appeal against the judgment of Kato, J. delivered on 12.6.86 in respect of a land dispute between the parties. The case has a somewhat chequered history and its facts are a little involved. The respondent company filed the suit in the High Court against the appellant and one NaKIBULE for an Injunction restraining the appellant and Nakibule from evicting the respondent from the land comprised in Block 245 Plot 212 situate ate Kisugu, Kampala which land was the subject matter of tne suit.

The respondent's case was that they had purchased the disputed land from Nakibule (who was then second defendant) while the appellant's defence was that he was the registered proprietor of the same and that the respondent was a trespasser as he was putting up houses on that land without the consent of the appellant. In his defence the appellant counterclaimed the eviction of the respondent as well as general damages for the alleged trespass.

The case was put before Karokora, J. for hearing. It is not clear when that was as the record of the proceedings before Karokora; J. was not made part of the record of this appeal. We were informed by counsel for the appellant at the nearing that the record of the proceedings before Karokora, J. disappeared after he had delivered his decision on 28.3.83 hence

appellant's inability to file same in this appeal.

That decision was entitled "Ruling". I must say I find that title not only this leading but quite improper. What actually happened was that Karokora; J. heard the suit on its merits. It is stated in his "Ruling" that when the case came up for hearing both counsel for plaintiff and the defendants "consented to calling no evidence." The only evidence relied on was the appellant's certificate of Title for the disputed land which certificate was put in evidence by counsel for the appellant with consent of the counsel for the respondent.

Thereafter the counsel made their submissions which were based almost entirely on law. It seems clear to me therefore that Karokora, J. should have delivered a judgment and not a Ruling.

To make matters worse, instead of deciding the issues that had been framed for determination, the learned judge, at his own behest, merely allowed the respondent to file a reply to the appellant's counterclaim, adding "at this juncture, there is no remedy available."

We were informed by counsel for the appellant from the bar that although some steps were taken by his client to appeal against that Ruling, the appeal was abandoned when the case file disappeared from the High Court so that it became impossible to prosecute the appeal.

As that Ruling had not decided the suit on its merit, the appellant, after abandoning the intended appeal, proceeded to defend the suit as filed by the respondent company.
As already pointed out it was heard by Kato, J. At the hearing before Karokora,J the respondent had withdrawn the suit against the second defendant - Nakibule so that at the trial before Kato, J the suit was between the parties to this appeal only.

At the hearing, the respondent company was not represented although its counsel as well as its Managing Director had been duly served with the hearing notice. Kato, J therefore granted

the appellant's request and dismissed the respondent's suit for non- prosecution under Order 9 rule 19 of the Civil Procedure Rules. The trial thus proceeded on the counterclaim only.

At the end of the trial Kato, J held that there was a valid agreement by the appellant to sell the disputed land to the respondent and that, therefore, the respondent company was on the disputed land lawfully (with appellant's consent) and not as a trespasser. He accordingly dismissed the appellant's counterclaim but without costs, as the respondent had not appeared at the trial.

Four grounds of appeal were filed and argued on behalf of the appellant by his counsel, Dr. Sempebwa.
They are stated thus:-

> "1. The learned trial judge erred in law when he held that the Respondent was not a trespasser on the disputed land contrary to the weight of evidence.
>
> 2. The learned trial judge erred both in law and fact when he held that the respondent was on the disputed land with the consent of the Appellant.
>
> 3. The learned trial judge erred in both law and fact in holding that there was a valid and executed agreement by the appellant to sell the disputed land to the Respondent.
>
> 4. The learned trial judge's decision was very much against the weight of evidence available on record."

I must confess my inability to appreciate the impact of the fourth ground of appeal. It is a "light-weight" ground that should normally be used as a "holding" ground of appeal to be filed in a provisional Memorandum of appeal whore an appellant or his counsel is unable for

one reason or another, to prepare specific grounds of appeal in time. They would then be filed later in the form of an amended memorandum of appeal.

As far as the first ground is concerned it seems clear to me that in order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land indeed belonged to him, that the respondent had entered upon that land and that that entry was unlawful in that it was made without his permission or that the respondent had no claim or right or interest in the land. In his judgment the learned trial judge easily found that e the appellant was the registered owner of the land. I should here perhaps point out that under section 56 of the Registration of Titles Act (Cap 205) a Certificate of registration is to be reared as conclusive evidence of title. That finding was therefore, in favour of the appellant.

Entry to the disputed land was not disputed by respondent. It was averred in their plaint that they had entered the disputed land, put up a fence thereon and proceeded to construct two houses on that land. The appellant led evidence, including that of Mr. Katende and Dr. Sempebwa whose firm was representing him, which clearly proved the entry. So the appellant also won on this point.

The real question was, therefore, whether the appellant had consented to his land being used by the respondent. There was of course also the question whether the respondent had acquired mo right or interest in that land. As far as trespass was concerned, the learned trial judge stated in his judgment that that issue would have been

> "probably simpler to resolve if both parties had been heard"

He then went on to consider the testimony of Dr. Sempebwa which showed that acting on the instructions of the appellant, his firm had written and sent a notice to the respondent asking them to quit the land. The latter had then offered to buy the land from the appellant but had failed to pay the agreed price or part thereof. The learned judge held that: -

> "The plaintiff's (respondent) presence on the land cannot therefore be said to have been wrongly or unlawful at after that agreement had been reached. The plaintiff having been permitted to stay on the land under the contract of sale, he (sic) cannot be referred to as a trespasser".

He was of the view that the only remedy open to the appellant would have been for him to sue the respondent for an order for specific performance of the contract - the payment of the contract sum. He said:-

> "So long as the contract is still subsisting the plaintiff cannot be properly called a trespasser."

With respect, I think the learned trial judge misdirected himself both on the facts and the law on this point. As far as consent was concerned the appellant had certainly not given it when the respondent moved on to the land and started to develop it. Even in their plaint the respondent company did not claim that they had entered the land pursuant to any Agreement they had entered into with the appellant.

The appellant testified that he never allowed the respondent to enter the land. Indeed in paragraph 4 of their plaint the respondent company claimed that they filed the suit because the appellant had threatened to "forcibly evict" there from the disputed land. In my opinion had the learned trial judge directed himself properly on this evidence he would have come to the conclusion that the entry was unlawful as it was not done with the consent of the appellant.
It is remarkable that although the respondent had entered the disputed land on the strength of a purported sale and transfer of same to thorn by Nakibule, they withdrew the case against him and then did not even bother to call him as a witness. It follows, therefore, that the respondent did not wish to rely on that purported transfer.

It is also significant that by the time the respondent approached counsel for the appellant for the purpose of negotiating a gale and purchase agreement of the disputed land, the respondent's suit was already in court. It is not reasonable then to assume that the respondent company entered the negotiations after realising that they had no claim of interest in the land.

As far as the law is concerned, the first question is whether the alleged agreement of sale and purchase would have validated the original entry which was clearly unlawful. In my opinion it could not. Assuming that there was a valid Agreement then the illegal occupation and, therefore, trespass would have ceased only at the signing of that agreement. The learned trial judge does not seem to have appreciated this point.

This brings me to the question whether there was in fact a legal contract of sale. This point is important because once it is proved that the original entry was unlawful (as was the case here) then trespass is complete and it continues until it can be shown that the trespasser has acquired a valid interest in the land which entitles him to continued occupation or possession of same.

The evidence of Prof. Sempebwa clearly showed that both parties were interest in effecting the proposed sale, but that the respondent did not pay the consideration the purchase price. It seems to true that the purported agreement was merely on attempt to regularise the illegal occupation on the part of the respondent. It was a case of a trespasser trying to obtain title under an agreement which failed for want of consideration.

In my judgment had the learned trial judge directed himself properly he would have held that there was no valid sale on even a contract of sale. He would thus have held that the respondent were trespassers throughout.

The learned trial judge did not bother to assess damages in view of his finding that there was no trespass. In my view it would have made matters much easier had he addressed the damages lest he was held to be wrong on the issue of trespass as it has turned out to be the case. As it is, I would allow this appeal, set aside de judgment of Kato, J substitute a finding

that the respondent were guilty of trespass and remit the case to the trial judge to assess the general damages. As for costs I would order that the appellant shall have the costs of the appeal as well as costs incurred in the suit in the lower court.
As both learned Justices of Apea1 agree it is ordered as proposed in this judgment.

Dated at Mengo this 3rd day of July 1987.

S.T. MANYINDO
VICE-PRESIDENT

Mr. E.F. Sempebwa counsel for the appellant.
Counsel for respondent absent, respondent absent.

I certify that this is a true copy of the original)
(R.I.S. OYOIT)
AG.REGISTRAR COURT OF APPEAL.

IN TH COURT OF APPEAL
AT MENGO
(CORAM: MANYINDO, V-P, LUBOGO, AG. J.A. & ODOKI J.A.)
CIVIL APPEAL NO. 4 OF 1987
BETWEEN
SHEIKH MOHAMMED LUBOWA:: APPELLANT
AND
KITARA ENTERPRISES LTD::: RESPONDENT
(Appeal from the judgment of the High Court (Kato J.) dated
19th day of June, 1986.
in

High Court Civil Suit No. 129 of 1986)

JUDGMENT OF LUBOGO. J.A

I have had the opportunity of reading in drift the judgment of Manyindo V-P.

I agree with it and I have nothing to add.

Sgd.

D.L.K. LUBOGO

AG JUSTICE OF APPEAL.

3/7/87

Mr. E.F. Sempebwa counsel for the appellant.

Counsel for respondent absent, respondent absent.

I certify that this is a true copy of the original)

S. OYOIT

AG.REGISTRAR COURT OF APPEAL.

IN TH COURT OF APPEAL

AT MENGO

(CORAM: MANYINDO, V-P, LUBOGO, AG. J.A. & ODOKI J.A.)

CIVIL APPEAL NO. 4 OF 1987

BETWEEN

SHEIKH MOHAMMED LUBOWA:: APPELLANT

AND

KITARA ENTERPRISES LTD::: RESPONDENT

(Appeal from the judgment of the High Court (Kato J.) dated

19th day of June, 1986.

in

High Court Civil Suit No. 129 of 1986)

JUDGMENT OF ODOKI J.

I had the benefit of reading in draft the judgment prepared by the learned Vice President and I agree with it and the orders proposed by him.

Dated at Mengo this 3rd day of July 1987.

Sgd:

B.J. ODOKI

JUSTICE OF APPEAL.

Mr. E.F. Sempebwa for Appellant

Counsel for respondent absent, respondent absent.

I certify that this is a true copy of the original.

R.I.S. OYOIT,

AG. REGISTRAR COURT OF APPEAL