

UGANDA / JUDGMENT

Asimwe v Uganda (Criminal Appeal 132 of 2020) [2024] UGCA 144 (14 June 2024)

[2024] UGCA 144

COURT

Court of Appeal of Uganda

BEFORE

Kibeedi Mutangula, JA, Gashirabake, JA, Kihika, JA

CASE / FILE NUMBER

Criminal Appeal 132 of 2020

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KABALE**

ICoram: Kibeedi, Gashirabake A Kihika, JJAI CRIMINALAPPEALNO. 0132 of 2020

(Aising from the judgment of the High Court of Uganda [Dr. Flauian Zeija, J], in Ciminal Appeal No. 014 of2017 dated 2"d June 2020, aising from Mb-36-Co-¹32-20 1 5 of tle Chief Magistrates' Court at Mbarara)

ASIIMWE CLEOPHAS =====Appellant

\VERSUS

UGANDA = = = = <sup>=</sup>Respondent

JUDGMENT OF THE COURT**Introduction**

- [1]The appellant was charged in the Magistrates Court of Mbarara with the Offence of Intermeddling with the Estate of the late Bangirana James contrary to section I 1 of the Administrator General's Act. He is alieged to have taken possession of land forming part of the estate of the late Bangirana, located at Kirehe cell in Mbarara, without the authority of the Law or the Administrator General.

- nsatory Court, the conviction was confirmed, but the compe [2] On 14fr March 2014, the trial Chief Magistrate's Court convicted the appellant and imposed a fine of Ugx. 200, with a default imprisonment of two months. The court also ordered the appellant to pay ^a compensation of Ugx-300,000,000. However, on appeal to the High

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were vacated. The appellate court further ordered the appellant to vacate the land.

- [3] The appellant appealed against the decision of the 1st Appellate Court, raising three distinct grounds of appeal:
- That the leamed Justice of the High Court erred in Lana wlen he failed to subject tLrc evidence on record to fresh and exhaustiue scruting and eualuation, therebg coming to a urong decision of confirming the conuiction and sentence of the appellant when there uas ouerruhelming evidence on record that *E appellant had a genuine claim of ight on the land. I
- 1t That the learned Justice of tLLe High Court erred in Lau when he treated the appeal as a ciuil suit and came to tLre wrong decision of ordering the appellant to giue uacant possession o/ the land without ang basis.
- 111. That the leamed Justice of tLrc High Court ened in Law utlen le ordered the appellant to uacate tle suit land immediatelg, which euiction order did not form part of the judgment by tLe tial court, and tuhich euiction order was not subject to the appeal.
- [a] The respondent opposed the 1"t ground of appeal and contended that the learned justice of appeal corectly evaluated the evidence of the trial court as a whole and rightly confirmed the conviction and sentence. The respondent, however, conceded to grounds 2 and 3 of the appeal.

Submlssions

Appellant's Submiseione.

- [5] At the hearing of this appeal, Mr. Shwekyerera Philmon appeared for the appellant, while Ms. Nabagala Grace Ntege, Chief State At r v

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the Office of the Director of Public Prosecutions, appeared for the respondent.

- [6] Counsel for the appellant referred the Court to pages 746 and 147 of the appeal record and submitted that the estate's beneficiaries of the late Bangirana gave the appellant part of the land as consideration for helping the beneficiaries process a land title. The title exhibited as DE2 is referred to on pages 220 and 226 of the record of appeal. Counsel further referred to DE 1, a document showing that some beneficiaries chose to sell their shares while others retained them. The appellant is listed among those who retained shares.
- [7] Some beneficiaries contested the sale, the reason they turned their guns against the appellant, their paternal cousin. Counsel referred the court to pages 153 to 156 and 157, where the biological brothers of the complaint, Mbasu John and Namara James, testified in favor of the appellant. The appellant first constructed a semi-permanent house on his portion in 2008 and a permanent structure now rented by Indians in 2011. Some beneficiaries, including Kwatampora Josephat, Mbasu John, and Mujuni Simon, assisted the appellant while constructing it.
- [8] Counsel relied on Section 7 of the Penal Code Act to state that the evidence on record established that the appellant had a genuine claim of right, and a verdict of not guilty should have been made. Counsel also cited 11(1) of the Administrator General's Act and stated that the sole purpose of the appellant's taking over possession of the deceased's property was to preserve it and not to intermeddle.
- [9] The appellant's Counsel relied on the cases of Muhutezi Jackson Vs. Uganda, Criminal Appeal No. 749 of 2008 and Willington Allingo & anor Vs. the Republic TEAUI Criminal Appeal 34 of 2007.

I find,

the proposition that where there is a dispute on the ownership of property, it should be determined by a civil, not a criminal court.

[10] On grounds 2 and 3, the appellant faulted the appellate court for ordering eviction, which was not an issue at trial or the appellate court. Since the respondent conceded to these two grounds, I do not find it necessary to reproduce all the submissions.

Submissions for the respondent.

- [11] Counsel for the respondent submitted that the appellate judge correctly evaluated the evidence as a whole, leading to the conclusion that the appellant had neither genuine claim of right to the estate to claim the application of Section 7 of the Penal Code Act nor was he seeking to preserve the estate property to claim exception under Section 11(1) of the Administrator General Act. Counsel referred the court to pages 98 and 99 of the record of appeal, in which the learned judge of appeal found no evidence of a unanimous family meeting giving part of the estate land to the appellant in consideration of the appellant's services to procure a certificate of title over the estate.

- [12] Counsel further submitted that the learned trial judge rightly questioned the inclusion of the appellant DE 1, on the list of beneficiaries to the estate, when he is not. Counsel referred the Court to page 100 of the record of appeal, where the appellant excluded the complainant, a known legal heir to the estate, from the title and instead registered himself as a sole proprietor. Counsel relied on the authority of *Zachary Kataryeba & 3 others Vs. Uganda* [1997] KARL 37, where it was held that the defense of preservation of an estate of a deceased does not arise in cases of property grabbing from widows and orphans. This is because the person committing the crime of intermeddling is doing so for his benefit and to the of the property beneficiaries. The appellant took possessi exc slon

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benefit, registered the title in his name, and got income for himself, a clear case of intermeddling.

- [13] On grounds 2 and, 3, Counsel conceded that the appellate judge erred when he ordered eviction, yet it was not in issue at the trial court nor made a ground of appeal. By so doing, the appellate court handled the matter as if it were a civil dispute, whereas it was not. Counsel conceded that Section 11 of the Administrator General Act does not give the Court additional powers beyond the sentence to order eviction. The respondent also agreed with the Authority of *Muhuezl Jackson Vs. Uganda*, Criminal Appeal No. 149 of 2008, where the appellate court was faulted for handling the appeal as if it were a civil matter.

Court's consideration.

- [1a] This is a second appeal against the decision of the High Court exercising its appellate jurisdiction. Rule 32(2) of the Court of Appeal Rules (Directions-S J, Iilo 73-70, gives this court powers to appraise the inferences of fact drawn by the trial Court. In the case of *Kamga & 4 ors Vs. Uganda* [2015] UGSC 12, the Court noted that the second appellate court must determine whether the first appellate court correctly re-evaluated the evidence before coming to its conclusion.
- [15] Except in the clearest of cases where the first appellate court has not satisfactorily re-evaluated the evidence, the appellate court should not interfere with the trial court's decision. In the case of *Kfamunte Henry Ys. Uganda SC Criminal Appeal No. 70 of 1997*, it was held:-

questioning the findings of the trial Court. Provided that there was evidence to support the Court of Appeal is precluded from

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those findings, though it may be possible or even probable that it would not have come to the same conclusion, it can only interfere where it considers that there was no evidence to support the finding of fact." See also *Baluku Samuel & anor Vs. Uganda* [2018]UGSC 26.

[16] It is noted in the submissions of both parties that grounds \$2\$ and \$3\$ of the appeal are not contested. The effect of that concession is that the \$1^{st}\$ appellate court erred when it ordered the appellant to give vacant possession an issue that did not arise at the trial court and did not form a ground of appeal at the High Court. Grounds 2 and 3 of the appeal are therefore allowed by consent of the parties.

Ground 1

- [17] We have reviewed the evidence in light of the submissions by both parties. The main issue is whether the 1st appellate court failed to subject the evidence of the trial court to exhaustive scrutiny, thereby confirming the conviction and sentence in disregard of the apparent defense of the claim of right and the need to preserve the property.
- [18] Both the trial magistrate and the 1st appellate court dismissed both the appellant's defense of the claim of right and the claim that the appellant's actions were intended to preserve the estate. The trial Magistrate, in her judgment at page 110 of the appeal record, noted that there wasn't any family meeting after the death of Bangirana to determine how the estate would be managed. She described the alleged meeting reflected in DE1 as follows;

" This DE1 in brief was just a procedural document-outlining how the children who sold their land would get their money but which was drafted by a few people with selfish interest \$\ldots\$

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- [19] DE1 is a document dated 20fr April 2011 titled 'Familg Meeting of the Late Bangirana James led bg the uidotu Joana B.' The document reflects that two plots have been sold, and the proceeds will be shared among eight benehciaries, including Mbasu John Dw2. The document further lists 12 people whose shares are unsold, including Dw2, Pw1, and Pw5. Pw2 and Pw3's shares, though allegedly sold, did not get the proceeds of the sale. Pw1 did not participate in the meeting. Pw3 testified that in 2011, when the meeting occurred, he was 15 years old and in Primary seven. Though his name appears on the document, he did not participate or sign. Though admittedly not a beneficiaqz of the Estate, the appellant is listed among those with unsold shares.
- [20] On page 1 1 1 of the appeal record, the trial magistrate noted that DE1 excluded some beneficiaries the deceased had included in his will. Yet, it's the document the appellant purports gave him authority to deal in the estate. The 1st appellate court, while analyzing the efficacy of DE1, held in the judgment on page 99 of the appeal record that...

- uI found no other evidence indicating that the family as a whole sorted. In the meeting and unanimously agreed to give the appellant the Sultland in exchange for his services to Process a certificate of title over the estate of the deceased."

[21] The judge further held;

uI have looked at this exhibit, and it does not make mention of any authorization from the beneficiaries or alleged. DE7 is a copy of what appears to be a family meeting where some children of the deceased agreed to sell their shares . . . and the remaining beneficiaries who had not agreed to sell their shares are listed. Surprisingly, the appellant, though

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beneficiary, is included on the list . . . this exhibit did not confer any authority to the appellant as he claimed."

The judge faulted the appellant for including his name as a registered co-owner of the land forming the estate and noted that if, indeed, all beneficiaries had agreed to give him the land as compensation for his services in securing the title, he could have excluded the part gifted to him from the title.

- [22] We have addressed our minds to Section 7 of the Penal Code Act, which provides for the defense of the claim of right as raised by the appellant. The defense of the claim of right is not absolute. It must be qualified by honesty and lack of an intention to defraud. In this case, the appellant relied on the undisputed will. The will lists an heir (Pw1) and 19 other beneficiaries, all children of the deceased. The will does not include the appellant as one of the beneficiaries. The appellant, however, in titling the land, including his name, but excluded the undisputed heir to the estate-Pw1.
- [23] The appellant further participated in a meeting where part of the property was reported to have been sold. Again, the heir and other beneficiaries were excluded. Some beneficiaries whose shares were sold did not get the sale proceeds. DE 1 fell short of a family meeting. It appears to be a report of a decision the appellant and a few other beneficiaries had made regarding the estate. On page 146 of the appeal record, the appellant admitted that he has been occupying and earning rent from part of the estate despite objection from some beneficiaries. He also revealed that he was not a beneficiary. The appellant's dealings are devoid of honesty. The defense of the claim of right is not available to him
- [24] The appellant cannot claim to have acted to preserve the estate-the evidence on record points to the contrary. Part of the estate was sold without consulting the heir. Some listed beneficiary shares were

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and proceeds are undeclared to date. The appellant is also collecting rent from part of the estate without authority from either the Administrator General or his agent and the heir's consent. We agree with the conclusions of the trial and the 1st appellate court that the appellant intermeddled with the estate of the late Bangirana.

CONCLUSION

[25] In the premises, the appeal partially succeeds in the terms below:

- The Conviction and sentence imposed by the trial Magistrate and confirmed by the 1st appellate court is upheld. I
- II. The order of the 1st appellate court for the appellant to vacate the suit land or be evicted is vacated.

*- Dated at Kampala this ^r day of ... v-f- 2024.

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MUZA"IIIRU MUTAI{GULA KIBEEDI JUSTICE OF APPEAL

CHRISTOPHER GASHIRABAKE JUSTICE OF APPEAL

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