

UGANDA / JUDGMENT

Businge & Anor v Katabarwa (HCT-01-CV-LD-CA-0013 of 2016) [2016] UGHCLD 20 (22 September 2016) [2016] UGHCLD 20

COURT

HC: Land Division (Uganda)

BEFORE

Ojok, J

CASE / FILE NUMBER

HCT-01-CV-LD-CA-0013 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-CV-LD-CA-0013 OF 2016

1. JANE BUSINGE
2. TADEO KIIZA APPELLANTS/APPLICANTS

VERSUS

BENON KATABARWA..... RESPONDENT

BEFORE HON. MR. JUSTICE OYUKO. ANTHONY OJOK

RULING

This is an appeal against the decision and order of His Worship Mr. Kwizera Vian in the **FPT-00-CS-LD-NO. 56/2016** which was delivered on the 8th March 2015.

Background

The plaintiff filed this suit against the defendant seeking for an order for declaration of the suit land, eviction order, and costs of the suit. The defendants in their written statement of defence denied the allegation and prayed for the suit land to be dismissed with costs. The matter proceeded *ex parte* against the defendants. Both parties were unrepresented.

The plaintiff raised the following issues for determination;

1. Whether the suit land belongs to the plaintiff.

2. Whether the defendants are trespassers.
3. What are the available remedies.

Upon proceeding *ex parte*, visiting the locus in quo and evaluating evidence, the learned trial Magistrate His Worship Kwizera Vian ruled in favour of the plaintiff and declared the defendants trespassers and ordered that each party bears its own costs.

The Appellants being dissatisfied with the decision of His Worship Kwizera Vian where Judgment was delivered on the 8th December, 2015 and lodged a memorandum of Appeal to this honouable court whose grounds are;

1. That the learned trial Magistrate erred in law and fact when he failed to answer that the second defendant was a minor and he ought to have been sued through the guardian ad litem.
2. That the learned trial Magistrate erred in law and fact when he failed to consider that the plaintiff did not adduce any agreement in court to prove that he had bought the suit land.
3. That the learned trial Magistrate erred in law and fact when he failed to consider that the handover agreement adduced by the plaintiff was never witnessed to form a basis of the plaintiff's evidence.
4. The trial Magistrate erred in law and fact when he wrongly stated that the chairperson of the area was present at the time court visited locus in quo.
1. That the learned trial Magistrate erred in law and facts when he failed to consider and/or state and/or include in the evidence from the neighbors and/or the people around the locus in quo.
2. That learned Magistrate erred in law and fact when he failed to consider that the plaintiff has never raised any issue and/or complained in regard to the suit land until last year 2015.
3. That the learned trial Magistrate erred in law and fact when he failed to consider the evidence given by the defendants.
4. That the learned trial magistrate erred in law and fact when he failed to consider and evaluate whether the plaintiff had proved his case on the balance of probability.

The appellants were represented by Thomas Guma while James Ahabwe appeared for the respondent.

Before proceeding with the appeal, court advised the appellants to first argue Misc. Application No. 007/2016 regarding appointment of guardian ad litem before proceeding with the appeal and as such both parties agreed to submit orally.

Counsel for the appellants: the matter coming up today is an application filed on the 15th March 2016. It was brought under O.52 r.1 CPR S.98 of CPA, order 33 r.2,4 CPR.

This is an application seeking an appointment of guardian ad litem. The minor and his mother are in court. The minor is by the names of Kiiza Tadeo, the mother is called Jane Businge. The same application is supported by the affidavit of Thomas Guma.

The basis of this application is that the minor was a defendant in civil suit No. 56/2015. He was sued jointly with his mother and Judgment was entered against them by Magistrate's court. However the minor intends to appeal. Besides that the minor raised a pertinent issue in his defence.

The issue was that; at that time he was sued as a minor in his own capacity and he proceeded as a minor in the same proceedings. There is a birth certificate on record indicating and showing that the minor was born on the 15th Nov 1988, Baptism Card also indicating the same.

The minor cannot proceed in other subsequent proceeding without being represented by not applying for Guardian ad litem. We tend to rectify the same error that was in the trial Magistrate.

In the same application, being the applicant, I am a person of sound mind, I have attained majority age, my interest in all these matters are not adverse to those of the minor. I have a consent agreement by the minor to be a guardian ad litem. It is for the minor welfare that the applicant be appointed as guardian. In addition irreparable damage is likely to be suffered by the minor if the application is not granted.

This application satisfies all the requirements under Order 33 r 2, 3 & 4 CPR.

In conclusion, we argue that this court do invoke S. 98 CPA to grant orders as prayed by the application. I do pray.

James: I oppose the application as stated in the affidavit in reply. I would like to point out the following;

1. The so called minor has already appealed see Memorandum of Appeal Civil Appeal No. 13/2016 dated 15th March 2015 filed & drawn by Ngaruye Ruhindi appealing through guardian ad litem Thomas Guma. He was not guardian ad litem Thomas Guma by then.

This appeal was against a judgment of a Grade I Magistrate which he delivered on the 8th December 2015 and an appeal filed. In March by the so called minor unauthorized guardian ad litem and this appeal was out of time, 4 months down the road, this contravenes S. 79 of CPA provides for limitation of appeal i.e 30 days from the time of delivering judgment. The effect of this, is that there is no appeal in court.

The one of No. 13/2016 was made out of time. Pray that this appeal be struck out with costs to the Respondent. Now that the appeal is out of time, the application of Thomas Guma is now redundant and should as well be struck out to the Respondent costs to Thomas Guma.

The application itself is full of falsehoods, attached a baptism card, consent agreement, birth certificate. It is clear that a minor cannot enter into an agreement because he has no capacity. Kiiza Tadeo in his mind he knows that he was an adult by the time he entered into this consent.

Paragraph 4 of the Respondent's affidavit in reply states that I Benon Katarwa is aware that Kiiza Tadeo is aging 23 years currently because he was born in 1993. According to baptism certificate attached to the affidavit of Thomas Guma is marked KT 6. In this affidavit, it indicated that Kiiza Tadeo was baptized on 3rd December 1998, indicating his father George Rwabambari baptism certificate No. 6038 when the respondent was served with this application, went to Kyetamba Church of Uganda where Tadeo Kiiza claims to be baptized from.

At Kyetamba Church of Uganda there is baptism registration book, he approached the church leader Mr. Moses perused the book and discovered that Tadeo Kiiza who was baptized under No. 6038 which is reflected on the baptism card, was baptized on 3rd April 1998, not 3rd December 1988.

That Tadeo kiiza is the son of Gabayamba not George R. this baptism card is forged by one Tadeo Kiiza and I believe jointly with the applicant.

We maintain that Tadeo Kiiza is of majority age, this application be dismissed with costs and so the appeal.

Rejoinder

I have heard and would have to respond as follows; the appeal is ongoing in court.

When this application came up for hearing, there was another application to file for leave to file out of time. Court directed me to change the application.

The application before me was initially an application No. 10/2015, an application for leave to file an appeal No. 7/2015. You change the application.

On the issue of forgery; there is nothing on record to prove that Tadeo Kiiza forged nor any person before court to rebut this assertion. They have not challenged the birth certificate apart from the baptism card. They are not challenging other documents. This proves that the minor was born on the 6th November 1998, there this court should not be dragged on mere speculation but evidence brought before this court. I pray that the same application be allowed.

Ruling; Having carefully and attentively listened to both Counsel's submission, looked at the different laws, all documentations attached to the application, given the fact that both parties agreed to submit orally, allow me to give my considered opinion;

1. The law quoted by the applicant is not applicable apart from O. 52 r 1 CPR and S. 98 CPA, O. 33 R (2) (3) & (4) talks about paupers not guardian ad litem. Be it as it may, it does not matter whether the applicant has quoted the right law or not because Court can always guide.
2. The fact that there is a memorandum of appeal dated 12th February, 2016 under the heading
1. Jane Businge
2. Tadeo Kiiza Applicants

Versus

Benon Katabarwa.....Respondent

Appealing through guardian ad litem Thomas Guma. Legally means that Thomas Guma is already guardian ad litem, which is not the case since by that time, he had not applied and been granted permission. In fact he would have applied first and then appealed later. On the issue of the age of the minor, the Respondent argued that according to the Baptism card, there was Kiiza Tadeo with different fathers on the Baptism registration book, but he never labored to bring the book nor somebody from the church to testify on it to clarify whether Kiiza Tadeo is a minor or not. He also never attacked the birth certificate leaving court in doubt. Prudently counsel of the Respondent would have brought proof. In absence of that, court cannot tell the exact age of Kiiza.

Be it as it may, the fact that Kiiza Tadeo entered into an agreement not for necessities, implying that he has the capacity and therefore he is above 18 years.

There is nothing on the lower court that Tadeo Kiiza ever applied for guardian ad litem, meaning that the proceedings in the lower court proceeded as if he was a person of age, there is nothing therefore for court not to believe that Tadeo Kiiza is of age.

You cannot appeal using Thomas Guma as guardian ad litem who is self appointed, put in your memorandum of Appeal reading so, I tend to agree that the Memorandum of Appeal is premature, incompetent and therefore should be struck off with costs. Both the application and the appeal is therefore dismissed with costs.

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OYUKO ANTHONY OJOK

JUDGE

22 September, 2016.

Delivered in the presence of;

1. Guma Thomas for applicants/Appellant.
2. James Ahabwe for the Respondent
3. Court clerk Precious present.

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