

UGANDA / JUDGMENT

Kasaali v Lukyamuzi (Civil Appeal 103 of 2017) [2018]

UGHCLD 87 (6 September 2018)

[2018] UGHCLD 87

COURT

HC: Land Division (Uganda)

BEFORE

Kawesa, J

CASE / FILE NUMBER

Civil Appeal 103 of 2017

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA [LAND DIVISION] CIVIL APPEAL No. 103 OF 2017

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(ARISING FROM MISC. APPLICATION No. 86 OF 2017) (ARISING FROM CIVIL SUIT No.68 OF 2014)

MZEE G. W. KASAALI:.....: HIRE APPELLANT

VWERUS

LUKYAMUZI FRED:: RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I KAWESA

JUDGEMENT

This is an appeal against the Ruling of His Worship Kiirya Martins given at the Chief Magistrates Court of Wakiso on the 14th day of September 2017. The background to this appeal is that the Appellant sued the Respondent under Civil Suit No. 68 of 2014 seeking orders for:

- a) declaration that he has a claim of legal right in a plot of land at Kinawa zone LC1 Busiro Kasenge - Nsangi Wakiso district.
- b) an order that the Defendant is a trespasser on the suit land.

- c) an injunctive order against the Defendant.
- d) damages and costs.

The parties settled the claim by a partial consent Judgment, leaving only the question of costs for Court's determination. When the \$_{Page | 2}\$ Appellant moved on to have the consent Judgment executed, the Respondent filed Misc. Application No. 86 of 2017, which sought a review of the consent Judgment. The application was determined and the trial Magistrate varied the execution orders as prayed in the said application, hence this application.

The grounds of this appeal are that;

- 1. The Learned Trial Magistrate erred in law and fact when he failed to evaluate the evidence as a whole, thus arriving at an erroneous decision
- 2. The Learned Trial Magistrate erred in law and fact in holding that the Appellant is bound by the 1992 agreement whereby he *was not a party.*
- 3. The Learned Trial Magistrate erred in law and fact when he ignored the fact that by the time the purported agreement was entered in 1992, the Respondent was not the owner of the sad land.
- 4. The Learned Trial Magistrate erred in law and fact in that he ignored the evidence of Jane Nabuuma; the Administrix of the estate of the late George Edward Senyondo, thereby arriving at *a wrong decision.*

The Applicant argued all the above grounds together. The Respondents also followed a similar trend. The duty of the first Appellate Court was well articulated in the case of Banco Arabe Espanol versus Bank of Uganda; Civil Appeal No. 8 of 1998, where Page | 3 Court, referring to the case of Kifamunte Henry versus Uganda Criminal Appeal No. 10/1997 held that;

"The first Appellate Court is entitled to have the Appellate Courts' own considerations and views of the evidence as a whole and its own decision thereon, the Appellate Court must then make its own mind, notwithstanding the Judgment appealed *from, but carefully weighing and considering it...."*

The duty entails re-evaluating the evidence and coming up with its own conclusion on the evidence, but bearing in mind that it did not observe the witnesses.

Having the above in mind, I will now determine the appeal as follows:'

The Counsel for the Appellant argues that there was never any sale transaction in 1992 between the Appellant and the Respondent. The Appellant also argues that the trial Magistrate ignored the Applicant's objection to the sale agreement of 1992. He further argues that the evidence of the Jane Nabuuma was ignored yet it showed that she got Letters of Administration in 2008, and distributed the land in 2009

It was the contention of Counsel for the Appellant that when he filed Civil Suit No. 68/2014, he referred to the land annexed to the plaint as Annexure 'A' as the basis of the claim which led to the consent Judgment where both parties were represented by Counsel before it was executed. It was with the above facts in mind that he referred to the Magistrate's Ruling and its findings at page 2. to argue that the Learned Trial Magistrate reached a wrong conclusion that the two blocks of shops had different owners, whereas not. It to rely on the agreement of 1992, yet the true agreement is the one executed in 2013; the Respondent having received his share out of the estate of his late father from Jane Nabuuma in 2009. He prayed that Court upholds the appeal.

In response, Counsel for the Respondents in his submissions averred that when the Appellant filed Civil Suit No. 68/2014, it was clear to both parties that the piece of land in dispute was that in respect of which the Appellant's biological son; one, Kasaali George agreed to take from the Respondent in 1992, in order to build for him three shops in one.

Counsel argued that house 'A' containing the three shops belonged Respondent. He argued that the Appellant was to the unscrupulously, trying to claim the said house, giving rise to Misc. Civil Appeal No. 86/2017, which in the end was determined in favour of the Respondent.

I have looked at the pleadings and proceedings under Civil Suit No. 68 of 2014. The file proceedings confirming that the matter was determined following a consent entered into on 18th April 2016.

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I also note from the record that Misc. Application No. 86/2017 was filed on 18th April 2016, for orders that execution of the consent decree in Civil Suit No. 86/2014, be annulled, cancelled and set aside. This matter was duly heard interparties. The Court then visited locus. The trial Magistrate then found that there are two separate houses with different owners, contrary to what the Appellant had applied for in execution. He then varied it, hence this appeal.

An Appellate Court must re-evaluate the evidence. In this matter, it is important to note that there was no formal trial conducted where evidence was evaluated. In Civil Suit No. 68/2014 which is the root from which Misc. Application No. 86/2017 is based, the matter was determined by the parties filing a consent Judgment. The problem only arose during execution whereupon the application No. 86/2017 was filed. This application was not heard in open Court. The record shows that parties went on **locus**, whereafter submissions were filed.

The record of proceedings at the locus show that Court heard some oral evidence from the residents. The said testimonies are however not coherently captured on Court record. There is however an affidavit in reply by Mzee Kasaali dated 19th June 2017, opposing the application. I also note that the Applicant Lukyamuzi Fred filed

an affidavit undated in support with annextures 'A', 'B', 'C' and 'D'.... From the above, I notice that in his wisdom, the learned Trial Magistrate found that the best way to resolve the misunderstanding surrounding the execution was a fact finding visit to the *locus* which Page he did.

Reading the Ruling of the learned Trial Magistrate, in view of the Applicant Lukyamuzi's affidavit in paragraphs 5,6,7,8,9 and 10 and annextures 'A', 'B' and 'C' alongside paragraphs 6,7,8,9 and 10 of Mzee Kasaali's affidavit in reply, the Court took into consideration the following at page 2 of his Ruling that:

"the issue in controversy is what exactly is the so called suit property portrayed in the agreement by the phrase 'I have sold you land where his shops are situate' as admitted to by the Respondent".

The evidence gathered on locus, indicated that there are 2 separate houses with rental rooms. House 'A' had three rooms and house 'B' had 4 rooms. It was in my view clear that it is the Respondent who facilitated the building of all these separate houses. This however, premised on the agreement that the Applicant was the registered proprietor.

I have found that going by the facts and evidence on this file, the Respondent had consented to the plaint in Civil Suit No.86/2017. They however in Misc. No.86/2017 show that their consent was in respect of land whose subject is contained in documents referred to

in Annextures 'A' and 'B' in the affidavit in support of Lukyamuzi Fred.

I again notice that there was no clarity on the consent Judgment \$_{Page}\$ regarding the suit lands since it merely referred to 'land where his shops are situate'. The only way Court could resolve this dilemma, given the review proceedings under Misc. Application No.86/2017;

as rightly brought decided by the Learned Trial Magistrate, brought light to the fact that there were earlier dealings between the Appellant and the Respondent vide the agreement of 1992. This came to light through oral evidence taken down at the locus which both the Appellant and the Respondent referred to in their submissions.

The Learned Trial Magistrate also referred to the same testimonies in his Ruling. The effect of the said evidence shows that the Respondent had a kibanja interest in 1992 over which he transacted with the Appellant and his son before he acquired a mailo interest. The evidence by Nabuuma Jane; the Administrix was not formally received though it is part of the witness statements under Civil Suit No.68 of 2014. It is important to draw a distinction between what Court was considering under Misc. Application No. 86/2017 and under Civil Suit No. 68/2014. The application was by affidavit evidence in Court and oral evidence at locus. This evidence did not include Nabuuma's evidence. I however note that Counsel for the Respondent drew Court's attention to the fact that this

evidence was not denied by the Respondent and hence it was never in issue. He shows that the said evidence was further proof that she distributed the estate, whereafter the Respondent acquired title thereto.

From the evidence on the record therefore and the oral evidence on record as recorded by the Learned Trial Magistrate at the locus, I am satisfied that the Learned Trial Magistrate evaluated carefully the evidence before him and reached right conclusions thereon. From the wording of the consent Judgment under Civil Suit No.68/2014, it was difficult to clearly understand which property was executable. However, Misc. Application No. 86/2014, enabled Court to scrutinize the agreement from the findings of the Learned Trial Magistrate to conclude that the consent Judgment was in respect of house marked 'B'.

I finally do find no merit in the appeal and it is not proved.

I do hold.

JUDGE

Mr. Lubega Matovu for the Appellant.

Mr. Rubanganise for the Respondent.

Parties present.

Clerk: Grace.

Judgment delivered in chambers. Court:

Before me:

Samuel Emokor DEPUTY REGISTRAR 06/09/2018

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