

UGANDA / JUDGMENT

Nabaseruka & Another v Luninze (Civil Appeal 46 of 2023) [2024] UGHCLD 47 (26 February 2024) [2024] UGHCLD 47

COURT

HC: Land Division (Uganda)

BEFORE

Naluzze Aisha Batala, J

CASE / FILE NUMBER

Civil Appeal 46 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL No.046 OF 2023

(Appeal from The Chief Magistrates Court of Nabweru at Nabweru in Civil Suit No.166 of 2018)

1. NABASERUKA REGINA :::::::::::::::::::::::::::::::::: APPELLANTS 2. SSONKO WILLIAM

VERSUS

BASSI ANDREW LUNINZE :::::::::::::::::::::::::::::::::: RESPONDENT (Administrator of the Estate of
the late Semugooma Luninze Francis)

BEFORE; HON. LADY JUSTICE NALUZZE AISHA BATALA

JUDGEMENT

Introduction;

1. This appeal arises from the judgment and decree of His Worship Kibuuka Christian a Magistrate Grade one of The Chief Magistrates Court of Nabweru at Nabweru delivered on 09th February 2023.

Background;

2. In the lower court, the Respondent sued for trespass upon a piece of Kibanja (Customary holding) measuring approximately 80ft by

75ft at Kiyanja village, Kanyanya ward, Kawempe Division in Kampala district claiming that the Kibanja forms part of the estate of the late Semugooma Luninze Francis.

- 3. The Respondent prayed for;
- a. A declaration that the suit Kibanja measuring approximately 80ft by 75ft at Kiyanja village, Kanyanya ward, Kawempe Division in Kampala district is part/belongs to the estate of the late Semugooma Luninze Francis.
- b. A declaration that the continued occupation of the same Kibanja by the defendants is an act of trespass/ amounts to trespass.
- c. An eviction order against the defendants
- d. A permanent injunction restraining the defendants and their agents from further interference with the suit property.
- e. General damages and interest.
- 4. The Appellants in their written statement of defence contended that the Kibanja in dispute is situate on private registered land comprised in Kyadondo Block 206 plot 1974 at Kawempe and that the same forms part of the estate of the late Lukka Luninze which estate has never been distributed amongst the beneficiaries.
- 5. The trial court entered judgment in favor of the respondent with orders and declarations that;
- I. That the suit Kibanja measuring approximately 80ft by 75ft at Kiyanja village, Kanyanya ward, Kawempe Division in Kampala district belongs to the estate of the late Semugooma Luninze Francis
- II. The defendants are trespassers on the suit Kibanja
- III. Order of vacant possession against the defendants
- IV. A permanent injunction
- V. General damages of Ug shs 3,000,000 and costs of the suit.
- 6. Being dissatisfied with that decision, the appellants appealed on the following grounds, That;

- i) The learned trial Magistrate erred both in law and fact when he failed to properly evaluate the evidence on record thereby wrongly holding that the suit Kibanja of approximately 80ft by 75ft at Kiyanja village, Kanyanya ward, Kawempe Division in Kampala district belongs to the estate of the late Semugooma Luninze Francis.
- ii) The Learned Trial Magistrate erred both in law and fact when he failed to properly evaluate the evidence on record

thereby wrongly holding that the appellants are trespassers upon the suit Kibanja.

- iii) The learned trial Magistrate erred in both law and fact when he misapplied the law in regard to customary tenure interest to the suit Kibanja interest thereby wrongly holding that long stay on the suit Kibanja by the appellants is not enough proof of ownership.
- iv) The learned trial Magistrate erred in both law and fact when he partly based his decision on a judgment in Civil Suit No. 84 of 2008 in which the lawful owner of the suit Kibanja was never determined by Court and the suit was dismissed on a will construction technicality.
- v) The learned trial Magistrate erred in both law and fact when he held that the estate of the late Lukka Luninze was distributed to the beneficiaries.

Representation;

7. At the hearing of the appeal, the appellants were represented by Mr. Katongole Patrick of M/S Patrick Katongole & Co. advocates while there was no representation from the respondents.
8. The respondent did not file submissions opposing the appeal hence this appeal stands uncontested.

Duty of the appellate court;

- 9. This being a first appeal, this court is under an obligation to rehear the case by subjecting the evidence presented to the court below to a fresh scrutiny and re-appraisal before coming to its own conclusion. *(See*; *Nanensio Begumisa and three Others vs Eric Tiberaga SCCA 17 of 2000)*
- 10. It is a well-settled principle of law that on a first appeal, the parties are entitled to obtain from the appellate 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, the nature of this duty was put more appropriately in **Selle vs Associated Motor Boat Co. [1968] EA 123.**
- 11. An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled, briefly put they are; *that this Court must reconsider the evidence, evaluate it*

and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

12. In particular, this Court is not bound necessarily to follow the trial court's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. *(See; Abdul Hameed Saif*

Vs Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)

Power of the appellate court;

13. Section 80(i) of the Civil Procedure Act Cap.71 grants the high court appellate powers to determine a case to its finality, providing that subject to such conditions and limitations as may be prescribed in the appellate court shall have the power to determine a case finally. The appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the act on courts of original jurisdiction in respect of suits instituted in it.

Analysis and determination of the grounds of appeal;

The appellants raised five grounds of appeal before this Honourable Court which shall be resolved as below;

Ground one and five

- 14. It is Counsel for the appellants' submission that the suit Kibanja does not form part of the estate of the late Semugooma Luninze Francis and that Exhibit P2 clearly showed that the Late Semugooma Luninze Francis acknowledged that he had no interest in the suit kibanja and that the same belonged to the late Lukka Luninze.
- 15. The heading on Exhibit P2 read "OKUVA KU KIBANJA KY'OMUGENZI LUNINZE LUKKA" translated to "VACATING THE KIBANJA OF THE LATE LUNINZE LUKKA". That there was nowhere the late Semugooma Luninze Francis mentioned that the kibanja was his.
- 16. The respondent claims the kibanja as the heir and administrator to the estate of the late Semugooma Luninze Francis and that the same passed onto him by virtue of inheritance upon the death of the late Semugooma in 2015. That the learned Trial Magistrate ought to have considered the admissions in documents

and not the oral evidence given in the absence of an amended plaint.

- 17. This Court notes that the suit kibanja was property of the late Lukka Luninze whose estate is not administered to date. From the record of proceedings, among the witness that testified before the trial court, were children of the late Lukka Luninze to wit; Night Luninze (DW1). She testified to the effect that her late father's estate was shared amongst the beneficiaries who accordingly dealt with their shares as they pleased.
- 18. She further stated that Imelda Nambi (the mother to the appellants) also got her share while their parents were still alive and her children have since sold most of the land. Ssekimpi Richard (DW2) also informed the trial Court that Imelda Nambi only came back home after a failed marriage and that the Late Lukka Luninze allowed her to stay on the suit land.
- 19. It's the appellant's contention that the Respondent as a grandson could not inherit the suit kibanja when the direct beneficiaries such as DW1 were still alive yet the appellants are also grandchildren of the late Lukka Luninze and in that line they would have no claim of right as well.
- 20. This Court takes note of the fact that the estate of the late Lukka Luninze is not administered however the direct beneficiaries to the same agree to have received shares and dealt with them accordingly. I am inclined to believe that the disputed kibanja was a share entitled to the late Semugooma Luninze Francis despite the fact that Imelda Nambi the appellants' mother was allowed to settle on the same.
- 21. The contention in Court today is not amongst the children of the late Lukka Luninze but rather the children of Imelda Nambi and Ssemugooma Luninze Francis. This clearly shows that the children of the late Lukka Luninze are satisfied by the way their father's estate was distributed.
- 22. For those reasons, this Court upholds the findings of the trial Court that the kibanja in question does not form part of the estate of the late Lukka Luninze but rather that of Semugooma Luninze Francis. Therefore, grounds one and five of this appeal fail.

Ground two and three

23. Counsel for the appellants submitted that the kibanja doesnot form part of the estate of the late Semugooma Luninze Francis but rather that of the late Lukka Luninze which is not administered. That the Appellants' late mother Imelda Nambi resided on the land with the permission of the late Lukka Luninze the former owner until she passed on. That the house on the suit kibanja belonged to the late Imelda Nambi in which she stayed with the appellants for over 40 years and it's on that basis that the appellants claim interest in the kibanja. That the trial Magistrate erred when he declared them trespassers and that the respondent not being the administrator to the estate of the Late Lukka Luninze, he could not establish a claim in trespass against the appellants.

- 24. Having resolved ground one and five in the negative and upholding the decision of the trial Magistrate that the land forms part of the estate of the late Semugooma Luninze Francis I find these arguments to be a misconception.
- 25. As rightly put by the Trial Magistrate, mere occupancy of unregistered land, however long it is, isn't proof of a customary tenure.
- 26. Simply put, mere possession of land does not culminate to ownership neither does it confer any sort of interest in land. The late Imelda Nambi was simply a tenant at will whose tenancy was

terminated upon her death leaving the appellants with no claim whatsoever in the suit kibanja.

27. Having found the kibanja to form part of the estate of the late Semugooma Luninze Francis, the respondent in his capacity as an administrator had the locus to bring an action for trespass in that regard. It is clear that Nambi Imelda from who the appellants claim right over the suit land did not acquire any interest in the same and hence the appellants couldn't have obtained/ acquired that which their late mother did not have. Hence the Trial Court was correct to declare them trespassers.

Therefore, grounds two and three also fail.

Ground 4

- 28. Upon perusal of the record, it's clear that Civil Suit No. 84 of 2008 was dismissed on grounds that the will on which the appellants laid basis for their claim fell short of all requirements of a valid will as per the Succession Act as amended. It was neither signed, dated, did not indicate the address of the maker and the parties only adduced a photocopy before Court.
- 29. Counsel for the appellants argued that Court did not determine the question of ownership in Civil Suit No. 84 of 2008.
- 30. As earlier noted, the appellants laid their basis of claim from a will which fell short of a valid will under the enabling laws.
- 31. This is not the proper Court to discuss the validity and effect of the will in Civil Suit No. 84 in 2008 and since the same was dismissed the parties had the option of appealing hence the effect of the same cannot be discussed in this matter.
- 32. Owing to the above, I am satisfied that the trial court arrived at its decision and findings based on very sound and plausible legal principles and the learned trial magistrate arrived at his conclusions upon proper assessment of the evidence.
- 33. The judgment of the lower court is upheld and the appeal is hereby dismissed with no order as to costs.

I SO ORDER.

NALUZZE AISHA BATALA

JUDGE

26th /02/2024

12

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