

UGANDA / JUDGMENT

Wakhasa & Another v Webanula (Civil Appeal 35 of 2021) [2024] UGHC 168 (10 April 2024)

[2024] UGHC 168

COURT

High Court of Uganda

BEFORE

Lubega, J

CASE / FILE NUMBER

Civil Appeal 35 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
CIVIL APPEAL NO. 35 OF 2021 (ARISING FROM CIVIL SUIT NO. 007 OF 2019) 1.
WAKHASA GODFREY 2. MUNIALO PATRICK ::::::::::::::::::::::::::::::::::

VERSUS

WEBANULA GODFREY MATEPE ::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON. JUSTICE LUBEGA FAROUQ JUDGMENT

1. Introduction

2. The Plaintiff (now referred to as the Respondent) sued the Defendants (now referred the Appellants) for the declaration that the plaintiff is the rightful owner of the suit land, permanent injunction be issued restraining the Defendants from using the suit land, vacant possession, general damages and costs of the suit.

3. Background

- 4. The Respondent's facts were that he acquired the suit land from his father PW2 (Michael Nabitiri) in 2010 as a gift. PW2 claimed to have purchased the suit land from late Clement Shuwuyo on 20th of January, 1986. His sale agreement was tendered in court as PEXH.1 (a) & (b) (the translation). The Respondent however claimed that the Appellants without a claim of right trespassed on the suit land by ploughing on it in 2019.

- 5. The Appellants facts on the other hand were that they purchased the suit land from the family of late Clement Shuwuyo in 2013 and 2005 respectively. Their purchase agreements were tendered in court as DEXH. \$1(1)\$ and DEXH. \$1(a)\$.
- 6. The Respondent called a total of 6 witnesses whereas the Appellants called 4 witnesses.

7. Issues for determination by the trial court

- i. Who is the rightful owner of the suit land?
- ii. Remedies available to the parties
- 8. The above issues were resolved in favour of the Respondent hence this Appeal.

9. Grounds of Appeal

The grounds of appeal are as follows-10.

- That the learned trial magistrate erred in law and fact when he \$(a)\$ declared that the suit land and property situate in Bunyitsa village, Bunamaliro Parish, Bukhalu Sub-county, Bulambuli District belongs to the Respondent;
- The learned trial magistrate erred in law and fact when he failed to \$(b)\$ give an exhaustive scrutiny and proper evaluation of the evidence and legal argument on the court record as a whole thus arriving at a wrong conclusion;
- That the learned trial magistrate erred in law and in fact when he \$(c)\$ considered the evidence of the Respondent in isolation of the Appellant's thus arriving at a wrong conclusion;
- The decision of the learned trial magistrate has occasioned a \$(d)\$ substantial miscarriage of justice.

11. Prayers

- The Appellants prayed that the appeal be allowed; \$(a)\$
- The judgment and decision entered in Civil Suit No. 07 of 2019 be \$(b)\$ set aside;
- The suit land and property be decreed to the Appellants; \$(c)\$
- The Appellants be awarded costs in this court and in the court \$(d)\$ below.

Legal Representation 12.

Counsel Nanguru Banabas who was present at the hearing on 4th of 13. December, 2023 intimated to court that he had communicated with counsel for the Respondent and they both agreed to proceed by way of written submissions. Court gave schedules on how to file submissions and counsel for the Appellants complied but counsel for the Respondent did not comply. This court will however proceed to write this judgment in lieu of the submissions of the Respondent.

14. Submissions by counsel for the Appellants

- Counsel for the Appellant argued all the grounds of appeal jointly as 15. below-
- He submitted that according to the evidence on the court record, it 16. is apparent that the entire suit land and property was originally owned and held by the now late Shuwuyo Clement who died intestate in 1987 and that by operation of the law, the suit land and property vested in his surviving widow and son as beneficial proprietor.
- Counsel argued that the evidence further confirms that the 17. beneficial proprietors continued to enjoy their rights over the suit land uninterrupted which land they used for crop farming for their substance. That upon the death of Shuwuyo Clement, the clan appointed Stephen Marofu as the caretaker of the land on behalf of the respective beneficial proprietors.

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- 18. Counsel contended that the Respondent did not lead any credible form of evidence to support his claim of title over the suit land. That in his testimony, the Respondent was not present at the point when his father purportedly purchased the suit land and he did not know the size of the land purchased.
- 19. He submitted that all of the Respondent's witnesses are his relatives. That none of them is a resident within Bunyisa Village where the suit land is situate. Counsel argued that they all reside in distant places and did not call any neighbor to the land or area local residents or area local leaders. He contended that PW2's sale agreement did not include any of the family member of late Shuwuyo Clement or even mention the immediate neighbors to the land.
- 20. Counsel submitted that the Respondent did not obtain any interest in the suit land and that is why none of the local area residents or leaders were called to testify in support of his case and could not even get any witness from the family of the late Shuwuyo Clement to confirm knowledge or the fact that the land was sold which creates doubt.
- 21. Counsel submitted that the trial magistrate premised his decision to nullify the land sale transactions in favour of the Applicant's on the lack of letters of administration. He argued that the said holding is premised upon the erroneous interpretation of section 180 of the Succession Act.

- 22. He submitted that it was erroneous for the trial magistrate to negate the interests of the beneficiaries and nullify the Appellant's land sale transactions. He contended that the beneficiaries rightly conveyed their respective interest and the Appellants equally acquired legitimate and lawful interest over the suit property.
- 23. Counsel cited Dr. Diana Kanzira V. Hebert Natukunda & Anor **Court of Appeal Civil Appeal No.81 of 2020**, where it was held that the legal position for the above assertion is as laid in volume 48 Halsbury's laws of England 4th edition, Butterworth's, London, 1984, page 349-350 thus; ... Power of alienation. "A beneficiary under a trust possesses the same power of alienation or disposition with respect to his equitable estate or interest under the trust as a legal owner has over his legal estate or interest in the property and he can exercise it by similar instruments".

24. Duty of the first Appellate Court

- 25. I am alive to the fact that being the first appellate court, I am under a duty to subject all the evidence on the court record to a fresh scrutiny considering the fact that I did not see the demeanor of witnesses. See **Fr. M. Begumisa & Ors Vs E. Tibegana SCCA No. 17 of 2003** and **Moses Bogere Vs Uganda SC Crim. App. No. 10 of 1997**

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26. Additional evidence

- 27. It should be noted that after hearing this appeal and preparing the judgment by this court, on the day before of its delivery, Counsel for the Appellant sought leave of this court through an application to adduce additional evidence which was allegedly not within their knowledge at the hearing of the suit in the lower court. The additional evidence sought to be adduced is a judgment allegedly indicating that the civil suit from which this appeal arises was res judicata. Following the guidance in **Attorney General V. Paul Kawanga Semwogerere Supreme Court Constitutional Application No. 2 of 2004**, this court allowed the additional evidence to be adduced on appeal in order to meet the ends of justice. However, this being a point of law, I will handle it first.
- 28. The judgment adduced as additional evidence arises from Civil Suit No. 41 of 2007 between Fungo Mary and Nabitiri Micheal delivered on 28th of June, 2012. In that judgment, the land which was claimed by PW2 (the Respondent's father) was allegedly for Fungo Mary who also received it as a gift from her father Khisa Paul in 2004. According to PW2 Magalwa Godfrey in that judgment, PW2 (the Respondent's father) left the land and Fungo Mary (the Plaintiff) occupied it.

- 29. In the instant appeal, the Respondent's father used the suit land since 1986 to 2010 when he gifted the same to his son the Respondent. This evidence was supported by the Appellants' witnesses who stated that they have ever seen the Respondent's father cultivating the land across.
- 30. It should be noted that whereas the judgment in the additional evidence talks about Fungo Mary's land which she took possession after the alleged civil suit, the land in the instant case belonged to Clement Shuwuyo. According to the evidence of the Respondent, his father purchased the suit land from Clement Shuwuyo whereas the Appellants' evidence indicate that they purchased the suit from Clement Shuwuyo's widow, son or Clement Shuwuyo's family whichever is applicable.
- 31. Therefore, the land which was adjudicated upon in Civil Suit No. 41 of 2007 belonged to Fungo Mary and the same was resolved in her favour and she took possession of the same. That land is however different from the land in the instant case.
- 32. Another point to note is that the land talked about in Civil Suit No. 41 of 2007 is situate at Bufukula village whereas the land in the instant case is found at Bunyitsa village. These two villages are different, which means the land talked about is also different.
- 33. It is also observed by this court that the judgment attached as additional evidence is incomplete. This is so because the contents of page 2 last line of the judgment do not connect with the contents at page 3 which has to a certain extent affected this court's analysis of the additional evidence.
- 34. I have considered the additional evidence as discussed above in relation with the facts in the instant appeal and found that the same is not res judicata and it is accordingly rejected. See: Halsbury's Laws of England, Volume 12 (2009) 5th Edition, Para and Boutique Shazim Ltd Vs Norattan Bhatia & another CA No. 36 of 2007.
- 35. I will now handle the grounds of appeal as outlined in the memorandum of appeal below.

36. Court Analysis

37. Ground No. 2 will be resolved first and other grounds will follow

Ground No.2: The learned trial magistrate erred in law and fact when he failed to give an exhaustive scrutiny and proper evaluation of the evidence and legal argument on the court record as a whole thus arriving at a wrong conclusion.

- 38. I have looked at all the evidence on the court record and noted that PW1 (the Respondent) was given the suit land by PW2 his father (Michael Nabutiri) who told court that he purchased the suit land in 1986 from late Clement Shuwuyo. PW2's evidence was buttressed by PW3, PW4 and PW6 who witnessed the sale of the suit land in 1986.

- 39. The \$2^{\text{nd}}\$ Appellant on the other hand who testified as DW1 told court that-

"I bought the land on 23/11/2005 from Soita Stephen and his mother called Wanyenya Margaret. I have been using 35 X 140m..... Clement Shuwuyo did not attend, though he was around, but when I was clearing the balance on 19/3/2013, his wife Margaret Shuwuyo was present...."

40. The 1st Appellant who testified as DW2 told court that;

".....the land I occupy now I first hired it in 2009, from the wife of the late Clement Shuwuyo called Margaret Wanyenya. Shuwuyo Clement died in 1997. I continued hiring it from 2009 to 2013 when I finally bought the land from Margaret Wanyenya (Wife to the late Shuwuyo) and Soita Stephen S/O Clement Shuwuyo at Ugx: 2,300,000/=..... the land I bought on 19/3/2013 was about 3 $\frac{1}{4}$ acres..... However when I was paying the balance of Ugx: 300,000/=-, Margaret Wanyenya added me $\frac{1}{4}$ an acre and I paid Ugx: 2, 200,000/- for it and an agreement was written..... saw the father of the plaintiff called Michael Nabitiri cultivating a certain piece of land across the suit land....."

In cross-examination DW2 said that- "..... Clement Shuwuyo the 41. suit land owner had died. So I bought the suit land from the family

of the late Clement Shuwuyo..... clement Shuwuyo died in 1997....."

DW3 Mandali Simon who witnessed the sales agreement of the 1st \$42.\$ and \$2^{\text{nd}}\$ Appellants told court that- "In 1997, we as Bunambutye Clan lost someone called Clement Shuwuyo. After three days of burial..... Shuwuyo's wife (widow) called Margaret Wanyenya went to Masindi in 1997, leaving Marofu Stephen Kissa in charge of the family land..... In 2005 Margaret Wanyenya and her son Soita Stephen returned from Masindi and asked Marofu Stephen to allow them sell a portion of the family land to meet costs of Soita Stephen who had just got married and they sold 140ft by 25 ft at Ugx: 275,000/= to Munialo Patrick. Patrick paid Ugx: 220,000/= and left a balance of Uax: 55 000/= which he paid in 2013....."

The 1st Defendant paid for a piece of land from Margaret Wanyenya after the family heir Marofu Stephen died, on hire in 2009 up to 2013 when he finally purchased the same land he was hiring from Margaret Wanyenya about 3 $\frac{1}{4}$ acres at Ugx: 2,300,000/=-. He paid Ugx: 2,000,000/= and paid the balance later in 2016."

- 43. DW4, DW5 and DW6s' evidence buttressed the evidence of DW1, DW2 and DW3 regarding the purchase of the land from late Clement Shuwuyo's widow.

- The defence witnesses however contradicted themselves regarding \$44.\$ the year of death of late Clement Shuwuyo and the size of the land purchased by the Appellants.

- Whereas DW3 said that the 1st Appellant purchase 3 ¹/₂ acres, DW4 45. and DW5 said he purchased 3 ¹/₂ acres. Regarding the 2nd Appellant, DW3 said he purchased 140 feet by 25feet and DW6 said he purchased 140 feet by 45feet.
- Regarding the year of death of late Clement Shuwuyo, whereas DW2 46. and DW3 said that he died in 1997, DW4 said that he died in 2017.
- In Uganda V. Kavuma Ismail CS No.0819 of 2016, His Lordship 47. Mubiru while citing the case of Alfred Tajar V. Uganda EACA Criminal Appeal No. 167 of 1969 noted that- "the gravity of the contradiction will depend on the centrality of the matter it relates to the determination of the key issues in the case". The question always is whether or not the contradictory elements are material, i.e. essential to the determination of the case.
- In the instant case, the evidence regarding the year of death to me 48. was very crucial in determining whether the suit land was sold during the life time of the original owner or not.

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- Secondly, the size of the land that each purchased was also equally 49. important to determine whether there was trespass or not.
- Following the above reasons, I find that the contradictions regarding 50. the year of death late Celement Shuwuyo and the size of the land purchased by each of the Appellants are major contradictions. Hence, that part of their evidence is rejected by this court.
- From the evidence of all the Appellants' witnesses, it is clear that the 51. land of late Clement Shuwuyo was sold by his son soita Stephen and his late wife. However, DEXH. 1(1) indicates that the 1st Appellant bought his land from the late Clement Shuwuyo's family.
- Counsel for the Appellant submitted that Clement died intestate in 52. the year 1987 and by operation of law, the suit land and property vested in his widow and son as beneficial proprietors and therefore, the trial magistrate erred to hold that the two defendants bought their respective portions of land from people who did not have locus standi to transact anything in connection to late Clement Shuwuyo's estate without first obtaining letters of administration.
- Counsel argued that it was erroneous for the trial magistrate to 53. negate the interests of the beneficiaries and nullify the Appellant's land sale transactions. He submitted that the beneficiaries rightly conveyed their respective interest and the Appellants equally acquired legitimate and lawful interests over the suit land.

54. Section 25 of the Succession Act Cap 162 provides that-

"All property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled *to the property under this Act."*

55. Section 191 of the same Act provides that-

"Except as hereafter provided, but subject to section 4 of the Administrator General's Act, no right to any part of the property of a person who has died intestate shall be established in any court of justice, unless letters of administration have first been granted *by a court of competent jurisdiction.*"

56. Section 180 of the Succession Act provides that-

"The executor or administrator, as the case may be, of a deceased person is his or her legal representative for all purposes, and all the property of the deceased person vests in him or her as such."

57. In the instant case, DEXH 1(a) and DEXH.1(1) which are the sale agreements indicate that the suit land was sold to the Appellants by their

alleged vendors in their individual capacities but not as the administrators of the estate of late Clement Shuwuyo.

- 58. The position of the law as above cited is very clear that no right to any part of the property of a person who has died intestate shall be established in any court of justice unless letters of administration have been obtained. This position was reinstated in the case of **John Nviri V. Pala John Olwoc** and 2 others Civil Suit No. 926 of 1998
- 59. Although it is noted that the suit land might have been sold to the Appellants by some of the beneficiaries to the estate, however, the drafters of the Succession Act were also alive to the existence of beneficiaries in every intestate's estate but they insisted in the Act that letters of administration must be obtained.
- 60. As you may observe from the evidence quoted above, the witnesses were not specific as to the number of children the late Clement Shuwuyo left or dependents. All I see in the testimonies is; Marofu Stephen Kissa (the heir), Soita Stephen (the son) and Margaret Wanyenya (the widow). There is however no evidence to prove that these were the only beneficiaries.
- 61. The essence of the provision of the law is to protect the deceased's estate from wastage and to ensure equal distribution. Therefore, if this court allows such conduct to continue in ignorance of the clear provisions of the law, it will be allowing wastage which the Act intended to cure.
- 62. I therefore do not agree with counsel for the Appellants when he submitted that the trial magistrate wrongly applied section 180 of the Succession Act.

- 63. In the circumstance, I find that the trial magistrate was right to find that the two Defendants bought their respective portions of land from people (though close family members) who did not have locus standi to transact anything in connection to the late Shuwuyo Clément's estate without first acquiring letters of administration.
- 64. It should however also be noted that the Respondent's father having purchased the suit land during the life time of late Shuwuyo Clement, it no longer formed part of late Shuwuyo Clément's estate and the alleged beneficiaries had no interest in it. For that reason, they could not pass on any interest in the suit land to the Appellants.
- 65. Ground No.2 is therefore, answered in the negative.
- 66. Ground No. 1: That the learned trial magistrate erred in law and in fact when he declared that the suit land and property situate in **Bukhalu** Sub-County. **Buyitsa** village, **Bunamailiro** Parish, Bulambuli District belongs to the Respondent.
- 67. According to the court record, PW2 told court that he purchased approximately 2 acres from the late Clement Shuwuyo in 1986. His evidence was supported by PW3, PW4 and PW6. PW2 also adduced in court his purchase agreement which was tendered in court as PEXH.1 (a) and (b) as further proof.
- 68. The above evidence was further supported by DW2 who told court that-..... I once saw the father of the plaintiff called Michael Nabitiri cultivating a certain piece of land across....."
- 69. That after purchase of the suit land, PW2 cultivated on it by planting different crops until 2010 when he gave the same to his son the Respondent as a gift.
- 70. The trial magistrate who visited the locus in quo on 29th of January, 2021 found that the suit land belonged to the Respondent who rightly acquired it from his late father who initially purchased the same from the late Clement Shuwuyo on 20th of January 1986.
- 71. I therefore have no reason to fault his findings.
- 72. Ground No. 1 is also answered in the negative
- 73. I will resolve ground No.3 and 4 together as below-
- 74. Ground No. 3: The learned trial magistrate erred in law and fact when he considered the evidence of the Respondent in Isolation of the Appellant's thus arriving at a wrong conclusion.
- 75. Ground No.4: The decision of the learned trial magistrate has occasioned a substantial miscarriage of justice

- 76. I have looked at the evidence on the court record together with the judgment of the trial magistrate and found that under paragraph 5 on page 6 of the judgment, the trial magistrate clearly indicated that he evaluated and analyzed all the evidence on the court record.
- 77. Following my resolutions in grounds No. 1 and 2, I have no doubt that the trial magistrate properly evaluated all the evidence on the court record and came to a proper conclusion.
- 78. In the final result, no miscarriage of justice was occasioned as claimed by the Appellants.
- 79. In the case of **Mbogo V. Shah (1968) EA 93**, it was held that;

"the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result, has arrived at a wrong decision or unless it is manifest from

the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there is a miscarriage of justice."

- 80. In light of the above authority, I am satisfied that the trial magistrate properly exercised his discretion and arrived at a proper decision.
- 81. This appeal is accordingly dismissed with costs awarded to the Respondent.

I so order. **LUBEGA FARQ JUDGE**. DATE: 10th/4/2024 $\frac{1}{\sqrt{2}}$

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Prepared on 14 October 2026 · Esheria