

UGANDA / JUDGMENT

Yiga v Kalega (Civil Appeal No. 53 of 2017) [2018] UGHCLD 8 (9 February 2018)

[2018] UGHCLD 8

COURT

HC: Land Division (Uganda)

BEFORE

Masalu Musene, J

CASE / FILE NUMBER

Civil Appeal No. 53 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT MPIGI

CIVIL APPEAL NO. 53 OF 2017

Arising from civil suit No. 121 of 2015 of the chief Magistrate's Court of Mpigi

SADIQ YIGA:::APPELLANT

VERSUS

ROBERT KALEGA:::RESPONDENT

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

JUDGMENT

The Appellant, **Sadiq Yiga**, being dissatisfied with the decision of Grade one Magistrate Mpigi, His worship Imalingat Robert appealed to this court. The Respondent was **Robert Kalega**.

The grounds of appeal were:

1. That the trial Magistrate erred in law and fact to hold that I was a trespasser on the suit land/ Kibanja.
2. That the trial Magistrate failed to evaluate all the evidence produced before it.
3. That the trial Magistrate failed to properly record all the evidence presented before it.
4. That the trial Magistrate failed to consider all the evidence on all agreements.

5. That the trial Magistrate failed to analyze the rights/interests of the kibanja owner.
6. That the trial Magistrate's orders were severely harsh and excessive.
7. Remedies available to the Appellant.

The Appellant was not represented, while the Respondent was represented by M/S Musoke Suleiman & Co. Advocates.

Both sides filed written submissions which are on record. I shall consider the grounds of appeal one by one.

However, before I do so, wish to re instate the law with regard to the duty of the first Appellate Court.

It is now settled law that the duty of this Court, as a first Appellate Court is to re-evaluate the evidence in the lower court and subject it to a fresh and exhaustive scrutiny and draw its own inferences and conclusions. However, it has to bear in mind that it neither saw or heard witnesses testify, and due allowance has to be given in that respect. The case in point in **Banco Arabe Espanel vs Bank of Uganda SCCA NO. 8 of 1998**.

On the first ground of appeal, the Appellant, **Sadiq Yiga** submitted that his late father, Suleiman Seguya gave him the suit kibanja in 1991.

He added that his uncle, the late Muhamadi Sematimba produced a written agreement to confirm that he was bequeathed the land by his father.

The Appellant concluded that the learned trial Magistrate did not consider his father's agreement of 1991 as he was misled by the Respondent and erroneously held appellant was a trespasser. The Appellant wondered how he could become a trespasser on his own land.

In reply, counsel for the Respondent submitted that whereas the appellant stated during examination in chief in the lower court that his father bought the Kibanja from one Mubanja webanja, that he did not produce any agreement or document in Court. Counsel also submitted that in his defence in the lower court (written statement of Defence), the appellant stated that he obtained the Kibanja from one Ahmad Sekalega in 2001. Counsel for the Respondent submitted that Ahmed Sekalega admitted having sold the kibanja in dispute wrongfully to the Appellant as it belonged to Asa Namagembe.

Counsel for the respondent also submitted that the Appellant was neither a bonafide occupant as his father was a caretaker.

It was further stated that both the Appellant and his father had no evidence of any busuulu payment and that the Appellant entered on the suit land without the consent of the land owner. Counsel for the Respondent concluded that since the Respondent is the registered proprietor of the suit land, he is protected under Section 59 of the Registration of titles Act.

I have considered the submissions on both sides as far as the 1st ground of appeal is concerned. I have also studied the record of proceedings and Judgment of the lower court.

The Respondent now was plaintiff in the lower court. He testified as PWI and told court how he bought the land in dispute from Assa Namagembe who was the registered proprietor PWI, Robert Kalega added that **“*The village authorities (LCI) were present and the chairman L. C I endorsed his stamp. Assa Namagembe and people present assured us that the land was vacant. No one occupied it. They were Sekalega Ahamad, Galiwango, and others confirmed that the land was free of any occupation. We inspected the land and we were with Kyeyune Edward and counsel Shamim Nalubega. We saw some food on the land; cassava, coffee , eucalyptus trees and banana plants. They belonged to a “Mutuuze” who was not identified to me. There was no house. I was assured that there was no one using it. I brought prisoners to slash the land. Whoever we cleared the place, the defendant would plant maize. The Defendant claims two (two) acres out of six (6) I bought. I reported to Kibibi Police, a case of criminal trespass. I was advised to report to Mpigi Police Station. When we contacted him, he told us he knew Sekalega who sold him the land/kibanja. Sekalega told us he was willing to give the defendant a portion on his land because he sold what was not his.”***

The Appellant’s case was supported by PWII, Assa Namagembe who confirmed that she sold to Appellant at UGX 25.000.000/=, free of any encumbrance.

During cross examination, PW2 confirmed that the house of the appellant was on Sekalega’s land. PW3 was Sekalega Ahamad testified that he was present when Assa Namagembe sold the land in dispute to the appellant, and that Assa Namagembe is her elder sister.

Similar testimony was given by PW4, Abdul Rahman Galiwango who confirmed that there were no tenants on the land of Assa, and that Ssekalega sold the kibanja which was not on his land.

The Appellant (Defendant in lower court) on the other hand testified as DW1 that it was his father who bought the kibanja in 1940 although he had no agreement of purchase. The Appellant also stated that he did not know the landlord. And the Appellant did not produce any evidence of busuulu payment, an indication that he entered on the land in dispute without the consent of the land owner. And the Appellant’s case was made worse by his sister, DW2, who alleged that she was born in 1963 on the land in dispute. The question to be asked is why did the appellant then buy the same kibanja at UgX 3,000,000/= from Sekalenga. And the Appellant even contradicted his case when he testified that his father gave him the kibanja in dispute in 1991. Given such contradictions in the Appellant’s case in the lower court , as opposed to the clear and straight forward case of Respondent who bought from a registered proprietor, then the appellant failed to prove his case on the balance of probabilities. The Respondent was also protected under the provisions of Section 59 of the Registration of titles Act.

I therefore agree with the finding and holding of the trial Magistrate that the Respondent is the rightful owner of the suit land. So ground No. 1 of Appeal is hereby rejected.

Ground 2. That the trial Magistrate failed to evaluate all the evidence produced.

According to the Appellant, the trial Magistrate did not talk about the Respondent destroying his house. However, and as counsel for the Respondent correctly submitted, the issue of damage to the house was not part of the matters to be resolved at the trial. It was not stated in the appellant's defence or counter-claim.

What was in issue in the lower court was trespass. And that was addressed by the trial Magistrate on page 5 of his judgment when he held that from evidence of PW4, the Appellant's father (Defendant's) was merely a caretaker and licence on the kibanja which he even left. Even the mother of the appellant is said to have left and re-located, which was not disputed by Appellant.

In the absence of any payment of Busuulu by the Appellant's father the trial Magistrate correctly held that the appellant's father had no interest to pass on to appellant.

Furthermore, the trial Magistrate addressed the purchase of appellant from one Sekalega in 2001. Sekalega is on record admitting that he had no ownership of the suit kibanja purportedly sold to the appellant in 2001. He did not have the authority or any interest to pass on to the Appellant as the property did not belong to Sekalega Ahammed.

The trial Magistrate also properly held, in my view, that the actions of the Appellant of continuously planting crops on the disputed land despite warnings that the Respondent had purchased the same from Assa Namagembe, was continuous use without authority of the owner, and therefore trespass. And the appellant could not be a bonafide or lawful occupant under Section 29 of the land Act as he did not enter the land with the consent of the Registered owner, including the Respondent who had purchased from the Registered proprietor.

In the premises, I find and hold that the trial Magistrate properly evaluated the evidence before him. So ground No. 2 of appeal fails.

Ground 3:

That the trial Magistrate failed to properly record all the evidence recorded.

The Appellant submitted that court failed to properly record his evidence to favour the Respondent. He insisted his parents occupied the disputed Kibanja since 1940. The Appellant also complained about failure to record payment of Busuulu and Envujo.

Counsel for the Respondent on the other hand submitted that the trial Magistrate recorded all the evidence which was adduced during trial. And whereas the Appellant stated in his submission that the trial Magistrate did not consider the agreement of his father done in 1991, that is not true. She added that the trial Magistrate in his judgment on page 3 paragraph 3 paragraph 2 clearly stated that "the Defendant on the other hand contended that the land in dispute is part of the kibanja he inherited from his father who bought it way back in 1940. He contended that there was an agreement to the effect which he never unfortunately produced in court for inspection." Were the words of the Magistrate and all that shows that the trial Magistrate properly recorded the evidence and there is no way to consider an agreement which was not produced in Court.

Counsel for the Respondent went on to add that the appellant did not produce any document in court in respect of his father giving him the purported kibanja nor did he produce any document to prove that the father owned the said kibanja. And that he did not even adduce any busuulu tickets paid by the father.

I have carefully studied the record of proceedings of the Lower Court. The Defendant (now appellant's case) started on page 15-20, and the Defendant's testimony and that of his witnesses was all recorded.

Failure by the Appellant to produce busuulu and envunyo tickets from his father could not be faulted on the trial Magistrate. And the same applied to any agreement or documentary evidence which should have been produced at the trial. I therefore find and hold that this ground of appeal is baseless and is hereby rejected.

Ground 4.

That the trial Magistrate failed to consider all the evidence on agreements.

The Appellant submitted as follows:

“*it is very clear the learned trial Court failed to consider all the evidence on all agreement produced before it because it insisted only on Ssekalega's agreement yet I clearly explained to it that Ssekalega ahamada re-sold to me e kibanja which was for my father because my uncle Muhamadi Sematimba gave me all my father's agreement after paying money to Ssekalega Ahamada in 2001. It was very wrong for the learned trial court to refuse to consider the agreement which was done by my father in 1991. It was a very big mistake for the learned trial court to declare that I was a trespasser because my parents occupied the suit kibanja since 1940 and there was clear evidence to prove the same because there was a residential house, coffee plantation, eucalyptus trees, pine trees which were all destroyed by the Respondent on 28/10/2015 with the help of guns from Kabasanda police and prison without any court order. Photographs of all are attached behind as an annexure 'C.'”*

In reply , Counsel for the Respondent submitted that:

“*The trial Magistrate did consider all the evidence on all the agreements which were adduced in court The Appellant adduced his sale agreement between him and Ssekalega . and that Ssekalega when brought to court admitted that he had no ownership of the suit kibanja he purportedly sold to the appellant in 2001. He did not have the authority, ownership and even interest to pass onto the appellant, property that was no this. Counsel maintained that all this was stated in the judgment of the trial Magistrate on page 5 of the judgment the last paragraph. All this shows that the trial Magistrate considered the evidence of the appellant's agreement but unfortunately the person who sold to him sold him air. There is no way the trial Magistrate would reply on such agreement.”*

I have considered the above submissions with regard to ground 4 of appeal. My findings are that ground 4 has more or less been covered with ground 2 and 3 of appeal. Never the less, I hold that the trial Magistrate considered all the evidence on agreements. And that is why he considered the sale agreement of the Respondent which was adduced in court to hold that the Respondent was the rightful owner of the suit land as he was a bonafide purchaser from the registered proprietor. I therefore dismiss this ground of appeal.

Ground 5

That the trial Magistrate failed to analyse the rights/interests of the kibanja owner.

The arguments of the Appellant were repetitive of what he had stated in respect of ground 1. I shall therefore not waste much time re-writing the same. However, I entirely agree with the brief submissions of counsel for the Respondent that the rights and interests of the kibanja owner were considered by the trial Magistrate on pages 5 and 6 of his judgment.

He outlined who a lawful and bona fide occupant is and correctly concluded that the Appellant was not a lawful or bona fide occupant within the meaning or as defined under section 29 of the land Act.

So ground 5 of appeal equally fails.

Ground 6

That the learned trial Magistrates' orders were severally harsh and excessive.

I have studied the record of the lower court. The trial Magistrate ordered for the eviction of the Appellant and costs. Since the trial Magistrate correctly held that the Appellant was a trespasser, then he correctly ordered for his eviction from the disputed land. And Ssekalega Ahmed, who was a witness in the lower Court confirmed that he had wrongfully sold land to the Appellant which did not belong to Ssekalega. Ssekalega offered to give alternative piece of land to the appellant which should be followed up by the Appellant. As for the order of costs, whereas a successful party is entitled to costs as correctly submitted by Counsel for the Respondent, I exercise this Court's discretion under Section 27 (2) of the civil Procedure Act to exempt the appellant from payment of costs.

It has clearly emerged that he was a poor man who could not even afford the services of an advocate.

So ground 6 of appeal partly succeeds in that the appellant is exempted from payment of costs.

Ground 7

Remedies available.

In view of the findings and holdings in the grounds of appeal No 1-5 which this Court has rejected, then the conclusion of this Court is that the appeal is hereby dismissed. The judgment and orders of the trial Magistrate are hereby upheld except that the Appellant shall not be penalized in costs here and below. This is the exercise of this Court's sympathy with the Appellant who is apparently very poor and that was why he could not afford services of an advocate.

So each party to meet their own costs.

W. Masalu Musene

Judge

09/02/2018

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