THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(CIVIL DIVISION)

CIVIL APPEAL NO. 28 OF 2016

(ARISING OUT OF NAKAWA CHIEF MAGISTRATES COURT CIVIL SUIT NO. 525 OF 2008)

SEKISAMBU EDWARD ---------- APPELLANT

VERSUS

MUKASA SILVER……. RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The facts giving rise to this appeal are that the appellant sold a portion of land to the respondent whose sole purpose was to enlarge his compound at a price of 900,000/=. The said purchase price was paid in several instalments and upon payment of the last instalment an acknowledgement for full and final payment was made between the appellant and the respondent in 2004.

The respondent filed a suit in 2008 against the appellant demanding for specific performance of the said contract, general damages and costs of the suit. The trial court found that the appellant was in breach of contract and ordered specific performance of the contract.

Being dissatisfied with the Judgment, the appellant appealed to this court and set out 7 grounds of appeal as hereunder;

The grounds of appeal as they appeared in the Memorandum of Appeal were;

1. The learned trial Chief Magistrate erred in law and fact when she held that the Appellant breached the contract of sale of land between himself and the respondent.

2. The learned trial Chief Magistrate erred in law and fact when she held that the appellant was expected to survey the land sold to the respondent.

3. The learned Chief Magistrate erred in law and fact when she held conducted the proceedings at the locus in quo the way she did and in particular she erred when she reached conclusions about the locus in quo visit conclusions were not based on evidence on the record.

4. The learned trial Chief Magistrate erred in law and fact when she held that the appellant made no attempts to survey the land sold.

5. The learned trial Chief Magistrate erred in law and fact when she ordered payment of costs of the suit against the appellant.

6. The learned trial Chief Magistrate erred in law and fact when she ignored the conclusions of the Court of Appeal in its judgment in Civil Appeal No. 55 of 2014 Nyanzi Evaristo, Kimera Augustine & Christine Nalongo vs Mukasa Silver Which Judgement had a bearing on the case before her and which judgment was availed to her before the Judgment.

7. The learned trial Chief Magistrate erred in law and fact when she failed to evaluate the evidence and thereby came to the wrong conclusions.

The appellant prayed for the appeal to be allowed, the judgment of the lower court be set aside and substituted with an order dismissing the suit with costs to the appellant.

At the hearing of the appeal, the appellant was represented by Learned Counsel Kwizera Denis and the respondent was represented Learned Counsel Arthur Kirumira. In the interest of time the court directed that the matter proceeds by way of written submissions.

Counsel for the appellant argued grounds 1,2,3 and 4 together and or jointly. He submitted that the learned trial Chief Magistrate found that there was a breach because the appellant did not sign mutation forms and transfer forms in favour of the respondent.

The appellant contends that it was responsibility of the respondent to take the mutation forms and transfer forms to the appellant. He asserts that a survey of the portion of land sold to the respondent was carried out and the respondent was aware of it.

The respondent argued that the he accomplished his obligations under the contract and requested for the documents to vest the purchased land into his names but the appellant refused to hand over the documents.

The respondent contends that for the last 14 years the appellant has not effected transfer of the land and therefore he is in automatic breach. The learned trial Chief magistrate was right to find for the respondent.

It is true that the duty of this Court as first appellate court is to re-evaluate evidence and come up with its own conclusion.

This position was reiterate by the Supreme in the case of ***Kifamunte Henry v Uganda SCCA No. 10 of 1997***, where it was held that;

> "*The first appellate court has a duty to review the evidence the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it*."

I have taken the above principles into account as I consider the Appeal. I have considered the record of proceedings and the lower Court and have considered the written submissions of both parties.

The learned trial Chief Magistrate properly evaluated the evidence in her judgment by noting the different reasons advanced as to why the appellant did not sign the necessary documents;

a) That the defendant had fenced off the access road which was adjacent to the land that was sold.
b) That he had always been willing to survey the land but plaintiff had denied him and his agents access to the land.
c) That the plaintiff had not availed him with transfer forms and mutation forms
d) That the certificate of title had taken by officials of the Northern by pass.

"*The court found that even though the parties did not execute a written agreement, it was pertinent term of the oral contract that he would sign transfer and mutation forms to complete the process*."

I agree with the learned trial Chief magistrate that it was upon the appellant to first of all ascertain the size of the land sold to the respondent and later hand over the necessary documents of title i.e the transfer forms, mutation forms and the original certificate of title to facilitate the subdivision.

Indeed this is what the appellant did to the other buyer of another piece of land. He states; " *He was expected to bring a surveyor to survey the land. He did not bring any surveyor. I am the one who brought the surveyor. I brought the surveyor because the plaintiff had not bothered to bring one yet I had sold a neighbouring portion to one roger who wanted to survey off his portion. Roger is a neighbour to Mukasa. Roger's plot was also to be got from the same title as Mukasa. I have no document to show that I caused survey of the land.*"

It can be deduced from the above testimony that it was the appellant who caused a survey of the land in order to facilitate the other buyer of a portion of the land in order to facilitate the transfer of the land. Once land is to be sub-divided or mutated from one title, it is the duty of the seller to avail the mutation forms to the buyer in order to facilitate the whole exercise.

During cross examination of the appellant, he stated that in the first transaction with the respondent he stated; "*I signed mutation and transfer forms in favour of the plaintiff.*"

I find the reason advanced by the appellant that the respondent was supposed to avail the mutation forms and transfer forms very incredible.

The appellant also in his testimony stated that he could not transfer the land because the certificate of title was taken by the officials of the northern by pass. This could have been true but it was incumbent upon the appellant to inform the respondent that he was not in possession of the land title since it was with officials of Northern by pass but this was never communicated to the respondent even when his advocates wrote a letter demanding for the same. It is also clear, that this important fact for failure effect transfer was never pleaded in the written statement of defence.

The learned trial Chief magistrate was right to reject it since it was a departure from the pleadings and more so an afterthought.

The appellant's defence for the failure to conclude the transaction was that; "we did not agree on any time frame within which to transfer the land" Even if there was specific time frame to effect transfer, it would be expected that the transfer would be concluded within a reasonable time. Reasonable time is a question of fact depending on the circumstances of each case.

In the present case, the parties concluded the transaction in 2004 and by the time it went to court in 2008 over 4 years had lapsed. Or in the alternative about 3 years since the respondent demanded through his lawyers. Before the trial of the case on 31st January 2013, the appellant stated in court at page 13 of the record of proceedings; "*I am ready to deliver the title plus the transfer forms and four passport photographs*." It is not clear why this was never done and this matter continued to drag on in court.

It appears that the main dispute between the appellant and the respondent is about the access road that the appellant claims was fenced off by the respondent. The appellant in his pleadings (WSD) contends that… "the plaintiff did take

possession of the parcel of land sold but went ahead and fenced off the access road which was adjacent to the part that was sold"

The respondent on the other hand contended in his reply to defence that " the only survey in compliance and boundary opening was intended to cause the existence of an access road in his home that never existed before to the benefit of the defendant not a survey in compliance with the purchased portion of land the subject of the sales contract"

The respondent testified that after the sale of the land to him by the appellant, he came and planted empanyi " *the defendant came and planted 'empanyi' to demarcate off this portion. I went ahead and erected a wire mesh around the whole of my land but in conformity with 'empanyi'……I have never fenced off any access road nor has he ever raised the issue with me or to any other authority. By the time I bought the second portion of land, I was the only one dwelling on that land. I had no neighbours beyond my home…….i found at KCC that they were attempting to make prints showing that there was an access road through my compound…..I lodged a caveat to stop the creation of an access road within my home. The blue print to my title block 216 plot 2082 does not show provision for an access road. However there is another print dated 9/3/2010 which indicates an access road in respect to plot 2982…..The creation of purported access would necessitate demolishing my perimeter wall. Originally I had a chain linked fence which I erected in 2000. I constructed the perimeter wall in 2009-2010 after seeing threats from my neighbours. The purported access road has always been a footpath which they now want to turn into the access road*."

It appears, the effect of the subdivision of the land into several plots 3872,3896 and 3895 was the creation of an access road that ends up eating into the respondent's land/compound and it would later lead to the demolition of his perimeter wall.

The appellant during cross examination confirmed that; "*its true I am the one who put boundary marks (empanyi') in the portion which he bought"*.

During the locus in quo visit page 40 ; the defendant attempted to change the evidence by denying ever planting 'empanyi'; *At the time I sold, there were no 'mpanyi' I am not the one who planted them. The plaintiff went beyond the portion that I sold. At the time I sold, there was no road".*

Observation by Court

Road not visible, appears to be a footpath and outside the fence.

The court while at the locus further observed that the disputed land/access road appears to part of the plaintiff's compound and fully enclosed in a fence. Mpanyi appear to be over 10 years old.

This observation is also buttressed by the finding of the ***Court of Appeal in Court of Appeal Civil Appeal No. 55 of 2014 Nyanzi Evaristo, Kimera Augustine and Christine Nalongo vs Mukasa Silver*** at page 14 of the judgment;

> "*Evidence shows that the first respondent's father had planted vegetative boundary marks (locally called 'empaanyi') on the disputed land which were fully grown and visible*"

The appellant according to DW3 that he never told him that he had sold land to the plaintiff. All the land in issue belonged to the appellant.

It appears the appellant sold land to respondent and realised later that he needed an access road to other plots which he attempted to create through the subdivisions.

PW1 stated; " *In 2006, when the defendant came to my home, I pleaded with him to give me my title so that anyone who wanted to create an access road would come and negotiate with me directly. The defendant refused….."*

The purported access road from the above facts clearly falls within the land that belongs to the respondent. Indeed the Court of appeal also confirmed that.

The lower court properly and exhaustively evaluated the evidence on record before arriving at the conclusion made in favour of the respondent.

I agree with the finding of the learned trial chief magistrate that the defendant now appellant did not avail any justifiable reason as to why he did not sign the mutation and transfer forms in favour of the plaintiff/respondent. He was in breach of contract of sale between himself and the defendant.

The appellant also faults the learned trial chief magistrate in ground of Appeal No.6.

The learned trial Chief Magistrate erred in law and fact when she ignored the conclusions of the Court of Appeal in its judgment in Civil Appeal No. 55 of 2014 Nyanzi Evaristo, Kimera Augustine & Christine Nalongo vs Mukasa Silver Which Judgement had a bearing on the case before her and which judgment was availed to her before the Judgment.

This case was quite different in respect of the cause of action and it was decided on the evidence that was produced. The court was at liberty to make findings of fact based on the evidence that was produced before it.

In that case, it was an action for trespass to land by the present respondent suing the appellant's sons and daughter for entering his land. The court found that the respondent's wife had authorised the appellant's sons and daughter to enter on the land and therefore they were did not trespass on the land.

In the same case, the appellant's sons and daughters in that matter had contended that the respondent is not the lawful owner as the registered owner was the respondent.

The Court of Appeal found;

> *" There is undisputed evidence on record that the respondent purchased the land from the 1ST appellant's father and completed payments. Simply because the respondent has not yet processed a certificate of title regarding the land in dispute into his names does not dispossess him of his land he purchased. What is important in this matter is not the passing of title but in whose possession was the land said to have been trespassed upon. It was*

the respondent who was said to be in possession of the suit land for several years."

The decision of that court confirms the respondent as the owner of the said land even if the same was not registered in his names. Simply put, he is an equitable owner who is yet to have his interest converted into a legal interest with a certificate of title.

In the final result for the reasons stated herein above this appeal fails and is dismissed with costs in this court and in the court below.

It is so ordered.

SSEKAANA MUSA
JUDGE
16th /08/2018