THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 03 OF 2023

(Formerly MSD Civil Appeal No.33 of 2017)
(Arising from Chief Magistrate's Court of Hoima at Hoima, C.S No. 006 Of 2014)

TIBENDA VINCENT :: APPELLANT

VERSUS

MUGISA MATHEW :: RESPONDENT

(Appeal from the Judgment and Decree of the Chief Magistrate's court of Hoima at Hoima before H/W Sayekwo Emmy Geoffrey, Chief Magistrate dated 31st day of May 2017, in Civil Suit No.06 of 2014)

Before: Hon. Justice Byaruhanga Jesse Rugyema

JUDGMENT

[1] The Appellant instituted a suit against the Respondent for recovery of **Ugx 40,000,000/=,** interest on the said amount, general damages and costs of the suit.

[2] The Respondent sold to the Appellant a piece of land and a house comprised in **Kiryatete West, Hoima Municipality**. However, after the sale, the Respondent failed to fulfil the promise of delivering vacant possession of the sold property claiming that he did not sell the said property to the Appellant, that he only borrowed from the Appellant **Ugx 3,000,000/=** at an interest of **5%** per month in order to pay his children's school fees. That he signed the agreement knowing and believing that it was a money lenders not, a sales agreement.

[3] The trial Magistrate on his part found that "once a mortgage always a mortgage." According to him, the transaction appeared to be a mortgage and as a result, settled it in favour of the defendant/Respondent frowning

the practice by a fraudulent money lender as a disguise and the transaction drafted as "sale" whereas not. However, that since the Defendant/Respondent acknowledged that the Plaintiff/Appellant is a known money lender, he was to pay back the loan. The Plaintiff/Appellant's claim was consequently dismissed with costs to the Defendant/Respondent.

[4] The Plaintiff/Appellant was dissatisfied with the judgment and orders of the Chief Magistrate, and lodged the present appeal on the following grounds:

1. *The learned Chief Magistrate erred in law and fact when he found and decided that the transaction between the Appellant and the Respondent was a mortgage and not a sale.*
2. *The learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence of record.*
3. *The learned Chief Magistrate erred in law when he made findings and made a decision contrary to the evidence on record.*

Counsel legal representation

[5] **Mr. Muhammed Mbabazi** represented the Appellant while **Mr. Irumba Robert** represented the Respondent. Both counsel filed their respective written submissions for consideration of this Appeal.

[6] It is a well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in 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, **Fr. Narsensio Begumisa & 3 Ors Vs Eric Tibebaga, SCCA No.17/2002.** This court is therefore to re-evaluate the evidence that was before the trial Magistrate by subjecting it to fresh scrutiny and re-appraisal before coming to its own conclusion.

[7] As rightly submitted by counsel for the Respondent, all the 3 grounds of appeal revolved around evaluation of evidence by the trial Magistrate, as a result, the 3 grounds shall be dealt with together.

[8] Counsel for the Respondent submitted that **S.91 of the Evidence Act** is to the effect that where the terms of a contract, grant or any other disposition of property have been reduced to the form of a document, no evidence shall be given in proof of terms of that contract but the document itself or secondary evidence of its contents.

[9] Relying on the case of **Kasifa Namusisi & 2 Ors Vs Francis M.K Ntabaazi, SCCA No.04/2005,** counsel argued that in the instant case, there is a written instrument in the form of a sale agreement between the Appellant and the Respondent and he (the Respondent) undertook to avail vacant possession of the land to the Appellant on the 31st December 2013. That the parties intended a sale and not a mortgage and therefore, the Respondent was estopped from denying the sale.

[10] Counsel concluded that in view of the sale agreement on court record, there is no other conclusion that can be drawn after reading the agreement and that the terms of the agreement are clear on the intentions of the parties which was for sale of land as opposed to a loan agreement as claimed by the Respondent, **Agaba Rogers Kyalisiima Vs Senfuka Bagenda, HC Land Cause No. 31 of 2017 [2017] UGHCLD 9.** That the Chief Magistrate therefore failed to properly evaluate the evidence on the court record thereby arrived at a wrong conclusion that the transaction between the Appellant and the Respondent was a mortgage and not a sale, a decision contrary to the evidence on record.

[11] Counsel for the Respondent on the other hand submitted that the transaction between the Appellant and the Respondent was a mortgage and not a sale transaction on the following reasons;

a) No witnesses witnessed exchange of money

That other than the Appellant and his lawyer, **Christopher Mwebaza** (PW3), none of the other witnesses produced by both parties as per the evidence on record confirmed seeing money changing hands from the Appellant.

I however find this contention not correct. **Byaruhanga John** (PW2) who had known both parties for a long time testified that while in the office of **Mr. Mwebaza Chris** (PW3),

"Both parties agreed on Shs. 40,000,000/= (Forty Million).

An agreement was written and Mugisa received money from Tibenda. I signed on the agreement. Mugisa counted the money and signed on the agreement."

Both **PW2** and **PW2's** evidence corroborated the evidence of the Appellant that **Ugx 40,000,000/=** exchanged hands upon execution of the sale agreement for the sale of the suit property. It is not clear from the submissions of counsel for the Respondent why, if it were **Ugx 3,000,000/=** which exchanged hands during the alleged lending transaction as he wants court to believe, none of the defendant's witnesses testified witnessing the said sum exchanging hands.

b) No evidence of withdraw or deposit of money on the parties' respective accounts

Counsel for the Respondent submitted arguing that if there was any payment made to the Respondent on the said date, then the same was not Ugx **40,000,000/=** because neither the Appellant nor the Respondent either withdrew or deposited some money on any of the parties' respective accounts. In my view, it is immaterial whether the Appellant withdrew the money from the bank or not for payment to the Respondent. This did not arise in evidence. It was not put to the Appellant during cross examination as to the source of the money or whether he withdrew the money from the bank for payment to the Respondent. Since it is the Respondent who claimed that the Appellant withdrew money from Centenary Bank Hoima Branch to pay him, the onus was on him to through court cause for the production of the bank statement of that day to prove that indeed, **Shs. 3,000,000/=** was the sum withdrawn by the Appellant from the bank and this is what was lent to him. The Respondent failed to discharge this onus. Besides, if it were true that indeed, the Appellant lent the Respondent **Ugx 3,000,000/=,** there would be evidence of the Respondent's receipt of the said sum and not an agreement of sale of land and property made before a lawyer. It is inconceivable that the Respondent would agree to part with security of land with a house for a mere sum of **Ugx 3,000,000/=.** Nowhere in the evidence of the L.C1 Chairman, **Swaibu Kisembo** (DW5), does he reveal that the Respondent told him that he borrowed **Ugx 3,000,000/=** from the Appellant and that the Appellant had dodged and or refused to receive back his money. This explains why **DW5** concluded his evidence thus:

"I don't know what the two are fighting for."

In the premises, I find that the failure by the Appellant to lead evidence of withdraw and deposit of the sum of **Ugx 40,000,000/=** is not evidence that the transaction in question was a mortgage.

c) That the Respondent was illiterate

There is no evidence to support the Respondent's claim that he was illiterate. In evidence, the Respondent claimed that he was not conversant with English, him being a mere primary six drop out. However, he claim to had borrowed the money for school fees of his children and in particular his daughter **Scovia Nsimire** (DW4) studying at Multech. **DW4** has got a certificate in Accountancy. She was around at the time as she was staying at her father's home. She is one of those who signed on the documents upon which her father got the money in question. One wonders why the Respondent who claim to had been illiterate entered the transaction without the aid of his educated daughter. During cross examination, the Respondent stated that he had been a business man for a long time but he does not explain why he signed the agreement without looking at the figures (of the money he was to receive). During cross examination, **PW3** stated that he was dealing with literates. I believe him.

d) Failure to cross examine Mugisa Violet (DW2) and Tinkasimire Evas (DW3)

I find that there was no need to cross examine **DW2** because she adduced evidence that she knew the Appellant and signed on his sale agreement. She does not explain why she had to sign a sale agreement of which she never knew the contents or about or the parties involved. Nowhere does she state in her evidence that she is an illiterate. It is the law that,

> *"an omission or neglect to challenge the evidence in chief on a material point by cross examination would lead to an inference that the evidence is accepted, subject to it being assailed as inherently incredible or probably untrue,"*

Habre International Ltd Vs Ibrahim Kassim & Ors, SCCA No.4/1999 as per Karokora JSC.

[12] In the instant case, though **DW3** denied knowing the transaction in question and signing any document before **PW3,** other available evidence; that of the lawyer who executed the documents **(PW3)** as corroborated by

that of the Respondent himself, **DW2, DW4** and **DW5,** point to the fact that the Agreement **(P.Exh.1)** and spousal consents, **P.Exhs.2 & 3** were accordingly executed. **DW3's** evidence is therefore inherently incredible or probably untrue. There is also nowhere in her evidence where she stated that she was an illiterate.

[13] In this case therefore, though counsel for the Respondent submitted, rather prolixly that **DW1-DW4** all confirmed in their uncontested evidence that they were illiterates and not conversant in English language, as I have found above, there is no evidence to support such a claim. As a result, I find that the **Illiterate Protection Act** is not applicable to the case at hand.

[14] Lastly, counsel for the Respondent submitted that the Respondent clearly through his evidence proved that the Appellant was a money lender bent on grabbing the Respondent's land and the developments thereon.

[15] I am unable to agree with counsel for the Respondent on this aspect. To the contrary, I find that there is evidence that in the first instance, the Respondent was toddling around putting up his property for sale. At **page 20 of the typed proceedings of the record,** he stated:

> *"On the 1st day of July 2013, I was required to pay school fees for my children. I did not have it. I decided to go to counsel Chris Mwebaza. I told him that I had a piece of land to sell."*

During cross examination at **page 21,** he stated thus:

> *"I sold the disputed land to Mr. Sewali. I did not tell the plaintiff about Sewali because I knew I was going to pay his money."*

If this excerpt is to be believed, it goes to show how insincere and fraudulent the Respondent was when he executed the transaction.

As per the evidence of the L.C1 Chairman **(DW5),** both parties appeared before him on the issue of Sale of the land with a house to the Appellant by the Respondent. The Respondent did not disclose to him anything to the contrary.

[16] As was held in **Fina Bank Ltd Vs Spares and Industries Ltd [2000] 1 EA 52** cited in **Agaba Vs Senfuka Bagenda (supra),**

> *"The function of court is to enforce what is agreed between the parties and not what the court thinks alright to have been*

fairly agreed between the parties."

In **Kasifa Namusisi & 2 Ors Vs F.M.K Ntabaazi (Supra),** it was held:

> *"a written instrument should be regarded as the most appropriate and only evidence of the terms of agreements between the parties thereto and that no other evidence of the transaction or instrument itself exists."*

[17] In this case, the parties entered into a sale agreement of the sale of land or the developments thereon **(P.Exh.1).** From the agreement, it is apparent that the parties intended a sale and not a mortgage. There is no evidence on record whatsoever suggesting otherwise. At **page 22 of the record of proceedings** during cross examination, the Respondent conceded that he knew the contents of the agreement after his lawyer had interpreted for him though, it is not clear which lawyer he meant. This was not clarified during re-examination.

[18] In view of the totality of the above, it appears pretty to me that from the sale agreement on record **(P.Exh.1),** there is no other conclusion that can be drawn other than finding that the intention of the parties upon entering into the transaction in question was for sale of land as opposed to a loan agreement as claimed by the Respondent. It was incumbent upon the Respondent to prove that the impugned transaction is a mortgage and not a sale which he failed to do.

[19] As a result of the above, I find that the learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby reached a wrong conclusion that the transaction between the parties was a mortgage and not a sale, a decision contrary to the evidence on record. There is no evidence whatsoever to support his findings.

[20] All in all, I would find that all the 3 grounds of appeal have merit and they accordingly succeed.

[21] In the premises, the appeal stand allowed with the following orders.

1. The judgment and the orders of the trial Chief Magistrate are set aside and substituted with the following orders:

a) There was a valid sale agreement of land and the developments thereon.
b) The Respondent shall refund to the Appellant **Ugx 40,000,000/=** as money had and received for the blotched Sale of land and the developments thereon under the impugned Agreement, with interest of **25%** from 31/12/2013 or **avail vacant possession of the suit land** and developments thereon together with its documents of ownership to the Appellant.
c) The Appellant is awarded costs of the appeal and the court below.

Dated at Hoima this **10th** day of **November, 2023.**

Byaruhanga Jesse Rugyema
JUDGE.