

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

5 **CORAM:** ***HON. JUSTICE A.E. MPAGI-BAHIGEINE, JA.***
 HON. JUSTICE C.N.B.KITUMBA, JA.
 HON. JUSTICE C.K.BYAMUGISHA, JA.

CIVIL APPEAL No.76 OF 2005

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TADEO WOMUSI :::::::::::::::::::: APPELLANT

VERSUS

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S.M. WAMBALE :::::::::::::::::::: RESPONDENT

[Appeal from the Judgement of the High Court of Uganda held at Mbale (Muhanguzi, J), dated 28/08/2005 in HCCA No.28 of 2003]

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JUDGEMENT OF KITUMBA, JA.

This is a second appeal. The appeal is from the decision of the High Court which reversed the judgment of the trial Magistrate Grade I, dated 28/7/2003 in Civil Suit No.185 of 1995 (on retrial).

The following is the back ground to this appeal. The respondent filed civil appeal. No. M.M. 13 of 1995 at Buhungu Grade II Magistrate’s Court and lost the case to the appellant on 4/3/1996. He appealed to Mbale Chief Magistrate’s Court in Civil Appeal No.13 of 1996. The Chief Magistrate heard the appeal and on 11/06/98 ordered a retrial before Grade I Magistrate at Mbale. The respondent’s case in the Magistrate’s Court was that he bought the suit land from the late Stephen Gambwa in 1974. He enjoyed quiet possession

of the same until 1988 when the appellant trespassed on the land and cut down some trees. He sued for vacant possession and payment of compensation for the trees cut down by the appellant.

The appellant's case in the court below was that, he bought the suit land from Pascal
5 Madonda and the former county Chief of Budadiri, Andrea Wandui in 1980 and 1987 respectively.

By the time he bought the land, it was bare. He enjoyed quiet possession of the land until 1994, when the respondent sued him.

10 The retrial was conducted under civil suit No.185 of 1995 by His Worship G.M. Otto, Magistrate Grade I, who on 28/7/2003 decided in favour of the appellant.

The respondent was dissatisfied with the judgment and appealed to the High Court.

The learned appellate judge after considering the written submissions of both parties found
15 that the respondent had on balance of probabilities proved that he bought the suit land in 1974.

He set aside the judgment of the trial Magistrate and substituted it with one in favour of the respondent that the suit land belongs to him. He ordered that the boundaries be re-established along the same boundaries which the trial Magistrate's sketch map dated
20 7/1/2002 indicates as the boundary pointed over by the plaintiff (respondent).

That the appellant's survey marks cease having any effect as they were planted on the land, while there was already a dispute. The learned appellate judge dismissed the appellant's appeal with costs hence this appeal on the following grounds: -

25 **1. The learned trial judge erred in law and in fact when he failed to evaluate the evidence properly or at all as a result of which he arrived at a decision which cannot be supported having regard to the evidence and probabilities of the case.**

2. The learned trial judge erred in law and in fact in holding that the inconsistencies and contradictions if any were too minor to adversely affect the plaintiff's case.

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3. *The learned trial judge erred in law and fact in holding that the plaintiff had on a balance of probabilities proved that he purchased the disputed land from Gambwa and therefore he had a better and prior title to the defendant.*

5 4. *The decision of the learned trial judge has occasioned a miscarriage of justice.*

He prayed this Court to allow the appeal set aside the judgment and orders of the lower court and enter judgment for the appellant with costs in this Court and below.

Counsel for both parties filed written submissions of their respective arguments of the
10 grounds of appeal.

The appellant's written submissions were filed by M/s Mbale Law Chambers and those of the respondents by M/S Awori and Company Advocates.

In their written submission counsel for the both parties argued ground 1, 2 and 3 together and ground 4 separately in that order.

15 In this judgment, I shall handle the grounds of appeal in a similar manner.

Regarding grounds 1, 2 and 3 appellant's counsel complained that the learned judge did not properly re-evaluate the evidence. He argued the judge was wrong to hold that, exhibit P1, the sale agreement between the respondent and Gambwa was not subject to serious challenge. He submitted that the respondent did not know how Gambwa had acquired the
20 land. Besides, there was no local chief present, when the respondent was buying the land from Gambwa.

He argued that there were serious contradictions and inconsistencies in the evidence for the respondent's case but these were not addressed by the learned appellate judge.

25 Counsel criticized the judge for holding that because the respondent resisted the appellant occupation of the land that was evidence that he was the rightful owner of the land.

Counsel submitted that the judge was wrong to hold that appellant bought land in unclear circumstances.

In support of his submissions, he relied on **Muluta Joseph Vs Katama Sylvano, Civil Appeal No.11 of 1999 S C and John Okalebo Vs Eluluma S/o Abau and Petero Omoding [1978] HCB 200.**
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In reply, counsel for the respondent supported the judgement of the High Court. He submitted the learned appellate judge was alive to the duties of the first appellate court to re-appraise the evidence and make its own inferences of facts. Counsel argued that the judge relied on the authorities of **Pandya V R [1957] E.A. 336 and Williamson Diamonds Ltd and Another Vs Brown [1970] E.A.** and re-evaluated the evidence.

5 He submitted that counsel for the appellant had not in his arguments advanced any reasons to show how the first appellate court committed errors while drawing inferences of fact that led to the conclusions under which he allowed the appeal. Counsel submitted that it was a non issue that the respondent did not know how Gambwa acquired the land which he

10 bought from him.

He submitted that the case of **Muluta Joseph Vs Katama Syilvono** (supra) is distinguishable from the instant appeal because in that authority the Supreme Court made a decision concerning the dealings in land between the parties to the suit, but the proceedings

15 in the instant appeal concern encroachment on the customary land.

He further submitted that **Okalebo Vs Eluluma S/o Abau & Peter Omondung** (supra) is distinguishable from the instant appeal because it deals with the sale of customary land.

I have carefully perused the record of appeal, submissions by both counsel and the legal

20 authorities quoted.

The substance of the arguments in grounds 1, 2 and 3 is whether the learned appellate judge properly re-appraised the evidence on record and came to the right conclusion that the respondent had proved his case that he is the owner of the suit land.

25 We are a second appellant court and we do not have the duty to re-appraise the evidence unless the first appellate court failed in its duty to do so.

As stated by Oder, JSC (RIP) in **Kifamunte Henry Vs Uganda, Criminal Appeal No.10 of 1997 (SCU)**

30 *“It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like a first appellate Court. On second appeal*

it is sufficient to decide whether the first appellate court on approaching its task, applied or failed to apply such principle.

See D.R.Pandya Vs R [1957] E.A. (supra), Kairu Vs Uganda [1978] HCB 123.....

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This Court will no doubt consider the facts of the appeal to the extent of considering the relevant part of law or mixed law and fact raised in any appeal. If we re-evaluate the facts of each case whole-sale, we shall assume the duty of the first appellate court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal, as a first appellate court, the Court of Appeal misapplied or failed to apply the principles set out in such decisions as Pandya (supra), Ruwala (supra) and Kairu (supra).”

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15 In the appeal before us the issue of evaluation of evidence was raised by the respondent in his grounds 1, 2 and 3 of the appeal to the High Court. The three grounds of appeal read.

1. *Because the learned Trial Magistrate formed unbalanced view of the case and in the result reached a conclusion in supportable by the evidence on record.*

20 2. *Because the learned Trial Magistrate erred in law when he failed to appreciate the weight of bearing of the circumstances admitted or proved.*

3. *Because the learned Trial Magistrate erred in law when he held that the appellant’s case lacked equate proof.*

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In dealing with these grounds the learned appellate judge of the High Court relied on the principles laid down in **Pandya V R** (supra). He observed that he was not bound by the findings of the trial Magistrate but had to re- appraise the evidence and come to his own conclusion. The learned judge scrutinized the evidence of the respondent in which he stated
30 that he bought the suit land in 1974 from Gambwa. He found that his case was supported by his two witnesses namely; PW.2 William Wambewo and PW3 Gidudu Stephen who

wrote the sale agreement between Gambwa and respondent. This agreement was admitted in evidence as exhibit P1 without challenge from the appellant.

5 The judge considered some of what appeared as inconsistencies in the respondent's case and found them to be minor or to be no inconsistencies at all. For example whether the disputed land was 1¹/₂ acres or 2 acres the judge found it to be a personal estimation of the size of an surveyed land by the respondent who was a village resident and his witnesses William Wambewo who was of the same status. The respondent and his witness were over 60 years of age.

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The appellate judge also found that the respondent bought the disputed land at 650/=. He first paid a deposit of 200/= and the balance was paid later as endorsed on the sale agreement, exhibit P1.

15 On whether the respondent had two agreements of the sale of the disputed land the judge reappraised the evidence on record and concluded that the respondent had two pieces of land.

He bought one from Stephen Gambwa in 1974 and another from Saulo in 1972 and in cross examination clarified that he had only one agreement concerning the disputed land.

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The judge stated this at P.7 of his judgment.

At the end of his cross-examination he clarified: -

"I only have one agreement as regards the land in dispute"

25 ***"Rather than a calling it a contradiction, the above statement, in my view, is a clarification of the plaintiff's earlier evidence. It appears to me from the evidence on the whole on the record that though the plaintiff mentioned two pieces of land in his plaint and at the beginning of his evidence -in-chief, the dispute in this case concerned only one piece which he bought from Stephen Gambwa in 1974 and not the one he bought from Saulo Gibusibwa in 1972. This becomes more apparent when the land claimed by the plaintiff is claimed by the***

30 ***defendant (evidence of the defendant, DW.1 and DW.3) to have also been sold by***

the same Stephen Gambwa and eventually ended up being bought by the defendant on 12/8/80 and on 1/8/87 from DW.2 and from DW.3's father.”

With due respect to counsel, the learned judge did not solely rely on the appellant's complaint to the RCs and Grade II Court at Mutufu as proof of ownership of the disputed
5 land by the respondent. The judge took it as further evidence of his ownership.

The learned judge considered the evidence of the appellant and his witnesses and weighted it against that of the respondent. He found that according to the appellant's evidence, he bought the disputed land from Madanda, DW2, on 12/08/80. DW2 claimed to have bought
10 the land on 1/4/72 from Stephen Gambwa. However, DW2 did not bring to court evidence to prove his purchase.

Counsel for the appellant is complaint that the learned appellate judge was wrong to hold that the appellant bought land in very suspicious circumstances is not justified. The judge
15 considered the fact that the pieces of land the appellant bought were adjacent to the respondent's land. However, the respondent was not informed at the time of the alleged purchase of the land by the appellant and no inquiries were made from the respondent about the land.

The judge found that the respondent had bought the land prior to the appellant's alleged
20 purchase of the same. He found that the respondent had proved his case on balance of probabilities.

I am of the considered view that the judge properly re- appraised the evidence.

25 In view of my finds on grounds 1, 2, and 3, no miscarriage of justice was caused.
I would dismiss the appeal with costs to the respondent here and in the courts below.

Dated at Kampala this...20th ..day of...November...2009.

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C.N.B. Kitumba

JUSTICE COURT OF APPEAL

JUDGMENT OF A.E.N.MPAGI-BAHIGEINE, JA.

5 I have perused the judgment prepared by Kitumba, JA I agree with her evaluation of the evidence and conclusion.

The evidence on record clearly establishes the respondent's undoubted claim over the suit land.

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I would therefore dismiss the appeal with costs.

Since my Lord Byamugisha also agrees, the appeal stands be dismissed with cists here and below as proposed in the lead judgment.

15 Dated at Kampala this..20th ...day of ...**November**...2009

A.E.N.MPAGI-BAHIGEINE,
JUSTICE OF APPEAL

20 **JUDGEMENT OF C.K.BYAMUGISHA, JA.**

I have the advantage of reading in draft from the judgment that Kitumba JA prepared, I agree with the reasons she has given in dismissing the appeal. I have nothing useful to add.

25 Dated at Kampala this..20th ...day of ...**November**...2009

C.K.Byamugisha
Justice of Appeal