

# **THE REPUBLIC OF UGANDA**

## **IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

### **CIVIL APPEAL NO. 85 OF 2013**

*(Arising from Masaka Civil Suit No. 42 of 2011)*

5 **PAUL RUJURA ::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**NAYEBARE FRED KYAMUZIGITA ::::::::::::::::::: RESPONDENT**

**CORAM: HON. JUSTICE CHEBORION BARISHAKI, JA**

10 **HON. JUSTICE STEPHEN MUSOTA, JA**

**HON. JUSTICE CHRISTOPHER MADRAMA, JA**

### **JUDGMENT OF HON. JUSTICE STEPHEN MUSOTA, JA**

This is an appeal against the judgment and orders of F. V Kibuuka  
15 Musoke, J vide Masaka High Court Civil Suit No. 42 of 2011.

#### **Background**

The appellant's case is that in 1981, his late father, Katsizi Lazaro,  
bought the suit property, land comprised in Kasagama and Katebe,  
Lyantonde District from one Kalisti Kabenge, after which he was  
20 given a certificate of title and duly signed transfer forms. Lazaro  
Katsizi handed the title to the respondent's brother, Rwamashaka,  
for safe custody. When Rwamashaka became ill, the appellant's

father ordered that the said certificate of title and transfer forms be handed to the respondent for safe custody. That the appellant, his siblings and their father migrated from the suit land in the year 2000, in pursuit of one Nabbi Bushara in Luwero leaving the suit land under the charge of James Kyabatirimire, the appellant's uncle. The appellant's father passed on in 2003 and was buried at the said Nabbi Bushara's palace in Luwero. When the government closed Nabbi Bushara's establishment, the appellant and his siblings returned to the suit land and found that the respondent was in possession of the land.

The respondent's case is that Mr. Lazaro Katsizi, the appellant's father sold the suit land to the respondent's father, the late Lazaro Kyamuzingita, who at the time of the transaction was represented by his son Christopher Rwamashaka. The sale agreement was made in the presence of the LC11 Chairperson and vacant possession was given to the respondent after full payment of the purchase price.

The appellant sued the respondent in trespass and the trial Judge entered judgment in favour of the respondent. The appellant was dissatisfied with the decision of the trial Judge and filed this appeal on the following grounds;

1. The learned trial Judge erred in law and fact when he ignored the sharp contradictions in the respondent's witnesses' evidence regarding the sale and transfer of the suit land
2. The learned trial Judge made a grave error of judgment when he ignored the illegalities and inconsistencies surrounding the



sale and transfer of the suit land, thereby failing in his duty to exhaustively evaluate and scrutinize the evidence before him.

3. The learned trial made a grave error of judgment when he ignored to address his mind to the flaws surrounding transfer of proprietorship of the suit land.

4. The learned trial Judge erred in law and fact when he made a presumption of an oral contract when none had been pleaded thereby delving in conjecture and personal opinion, thus occasioning a miscarriage of justice.

5. The learned trial Judge erred in law when he condoned the illegality in the sale agreement so far as it was not compliant with the Illiterates Protection Act.

6. The learned trial Judge erred in law and fact when he held that the appellant was not entitled to benefit from S. 39, Land Act, 1998.

7. The learned trial Judge erred in law and fact when he ignored to make a finding on the elements of fraud pleaded by the appellant.

8. The learned trial Judge erred in law and fact when he granted the prayers in the respondent's counterclaim when none had been proved.

9. The learned trial Judge depicted bias in favour of the respondent when he ordered the appellant to vacate the suit land within 14 days from the date of judgment, thereby acting ultra vires.

## Appearances

At the hearing of the appeal, Mr. Allan Kyakuwa appeared on brief for Mr. Frank Kanduhlo representing the appellant while Mr. Namara Joshua appeared on brief for Mr. Buzibira Richard representing the respondent.

## Appellant's submissions

For the appellant, counsel argued that the learned trial Judge did not consider the Illiterates Protection Act with regard to exhibit D1. Counsel relied on sections 1, 2 and 3 of the Illiterates Protection Act and argued that at the time exhibit D1 was written, the purported seller, Lazaro Katsizi, could not read and write and DW4 testified to have read the document for him. Counsel relied on the Court of Appeal decision in **Stanbic Bank Uganda Ltd Vs Ssenyonjo Moses and another C.A.C.A No. 147 of 2015** in which it was held that where a statutory provision commands something to be done in mandatory language and makes it an offence to disregard the statutory command, breach of the command renders the act done in disregard of it.

Counsel argued that the alleged transaction was strangely made because neither the seller nor the alleged buyer appended their signature. Exhibit D1 is said to have been first executed on May 18<sup>th</sup> 1999 and the signatories included Rwomushana, Defence LC3 Kashagama, Namara Violet V/P LCIII Kashagama, Mpumwire Katsizi,



Katsizi Lazaro, Christopher Rwamashaka, Joyce Katsizi and Kyateka Damian Sebuliba who testified as DW4. That the alleged thumb mark of Lazaro Katsizi was not accorded protection as is required under sections 2 and 3 of the Illiterates Protection Act. Counsel submitted  
5 that there were a number of contradictions surrounding exhibit D1, which, if the learned trial Judge had evaluated, would have come to a different conclusion, that the respondent was only a caretaker of the suit land.

Counsel argued further that exhibit D1 did not conform to section 42  
10 of the Stamps Act which requires such instrument to be duly stamped. That exhibit D1 was tainted with fraud on the part of the appellants, which the learned trial Judge did not consider. Counsel relied on the decision in **Hotel International Vs The Administrator of the estate of Robert Kawuma C.A No. 3 of 1995** in which fraud  
15 was defined as the dishonest dealing in land intended to deprive the person of an interest in the land including unregistered interests.

It was contended for the appellant that the fact that the appellant did not offer his written consent to the purported sale, the sale would be vitiated under section 39 of the Land Act.

## 20 **Respondent's submissions**

Counsel submitted that the impugned agreement was written in Luganda language by the LC Chairman, whom the court found to be a truthful witness, read over to the parties, executed by the vendor using thumb prints and witnessed by the Chairman, the vendor's  
25 wife and children. That the vendor handed over both the title and

vacant possession of the suit land and after his death, his wife and daughter proceeded to live in Iganga.

Counsel argued that the appellant's contention that exhibit D1 offends the provisions of the Illiterates Protection Act is a flawed argument. That the appellant relied on the case of **Stanbic Bank Uganda Limited Vs Ssenyonjo Moses and another C.A.C.A No. 147** of 2014, which, according to the respondent, is distinguishable from the instant case. In Stanbic Bank case, the illiterates had executed a lease agreement with the bank and it was not disputed that the agreement was not translated to them and the bank admitted that they were not aware of the linguistic deficiencies of the respondents. In the instant case, the evidence of DW4 is that the document was read over to the illiterate with his instruction and in the presence of local leaders.

Counsel relied on **Section 59** of the **Registration of Titles Act** and submitted that the respondent is a holder of the certificate of title of the suit land and such certificate cannot be impeached on account of any informality in the proceedings previous to the registration of the certificate. Counsel submitted that there was oral evidence to support the existence of a contract of sale of land and such a contract that was freely entered into cannot be interfered with.

Counsel further relied on **Section 77** of the **Registration of Titles Act** which stipulates that for fraud to be a justification for setting aside a certificate of title, it must have been perpetuated by the registered owner. To impute fraud, the respondent must be shown to



have been involved in the process, the loss of transfer forms, instrument numbers yet it was not the duty of the respondent to keep the same but the Commissioner of Land Registration.

Regarding the issue of non-payment of stamp duty, counsel submitted that the appellant cannot raise such an issue that was not raised at the trial court. He relied on the Supreme Court decision in **Interfreight Forwarders Ltd Vs East African Development Bank S.C.C.A No. 33 of 1992** on the holding that it is a general proposition of the law that a party is bound by its pleadings.

#### **Consideration of the appeal**

This is a first appellate court and as such, the law enjoins it to review and re-evaluate the evidence as a whole, closely scrutinize it, draw its own inferences, and come to its conclusion on the matter. This duty is recognized in **Rule 30(1) (a)** of the Rules of this Court. The rule provides that:

*30. Power to reappraise evidence and to take additional evidence.*

*(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may—*

*(a) re-appraise the evidence and draw inferences of fact; and*

*(b) in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.*

The cases of **Pandya v R [1957] EA 336** and **Kifamunte Henry v Uganda SCCA No. 10 of 1997** have also succinctly re-stated this principle. I have borne these principles in mind in resolving this appeal.

5 Before I consider the merits of this appeal, I must note that some of the appellants' grounds of appeal are repetitive and argumentative and contravene Rule 86 of the Rules of this court which strictly speaking would have been fatal to this appeal. I will however invoke Rule 2(2) of the Rules of this court and frame issues for proper  
10 resolution of this appeal, so as to administer justice without regard to technicalities. The issues include:-

1. Whether the respondent legally purchased the suit land from the appellant's father.
2. Whether the appellant was entitled to benefit from Section 39 of  
15 the Land Act?
3. What remedies are available to the parties?

### **Issue one**

This issue entails an allegation by the appellant that exhibit D1, a sale agreement, did not conform to the provisions of the Illiterates  
20 Protection Act.

Exhibit D1 is the sale agreement upon which the respondents' father purportedly purchased the suit land from the appellant's father. The agreement was made in Luganda with an English translation and it states;



ENGLISH TRASLATION

LC3 OFFICE  
KASAGAMA S/C  
P. O BOX 10  
LYANTONDE  
18/05/99

AGREEMENT FOR SALE OF LAND MEASURING 162 ACRES

I, Mr. Katsizi of Kirinimula Kasqagama, Kisaluuko parish have sold to Mr. Rwamashaka C of Kagaga Buyenje, my land measuring 162 acres only. Its land situate at Kirinimula village, Kisaluuka Parish Block 15, Plot 5.

I have sold it to him at a consideration of shs. 4,000,000/= (Four million shillings only)

He has given me shs. 500,000 (Five hundred thousand only). There remains a balance of Ug Shs 3,500,000 (Three million, five hundred thousand shillings)

Ug. Shs. 2,000,000 (Two million shillings) is to be paid to me after he has given me the certificate of title for that land.

The people present at the time of mu making of this agreement

1. Rwomushana Defence LC3 Kasagama
2. Namara Violet V/P LC3 Kashagama
3. M. Mpumwire Katsizi
4. R.H.T MR. KATSIZI LAZAARO
5. I am Christopher Rwamashaka, the buyer

R.H.T Joice Katsizi

Undated kasagama LCIII Stamp and signature

On 23/5/1999 he has paid Shs. 1,500,000 (One million five hundred thousand shillings only)

*The 2,000,000 which is due will be paid upon giving him the certificate of title.*

*Signature*

*Chairperson LCIII*

*I have received Shs. 930,000 (Nine hundred and thirty thousand shillings) on 15/06/1999*

*Signature Katsizi*

*I am R.T.H Katsizi L*

*4-2000*

*I, Katsizi have received all my money, shs 810,000/= (eight hundred and ten thousand shillings) I have no further claim.*

*Thumbprint*

*Kasagama LCIII stamp dated*

*14/06/99*

*Signature, LCIII*

*24/09/99 I Katsizi, have received shs. 260,000/= (two hundred and sixty thousand shillings only), there remains a balance of 810,000/= (eight hundred and ten thousand shillings) only which I will get upon giving him a certificate of title.*

*I am R.H.T of Katsizi. L*

#### **CERTIFICATE OF TRANSLATION**

*I, Nassejje Getrude, a lawyer practicing with M/ S Kanduhho & Co. Advocates, do hereby certify that I am knowledgeable and fluent in English language and Luganda vernacular, the latter being my mother language, and I do hereby further certify that the Luganda vernacular agreement hereto attached dated 18<sup>th</sup> May*



1999, which, on the face of it, suggests to have been executed between Katsizi Lazaro and Rwamashaka Christopher, was translated from Luganda vernacular to English language by me, and I further certify that to the best of my knowledge its English translation is true and correct.

Dated this 27<sup>th</sup> day of June 2012

NASSEJJE GETRUDE”

The appellant alleges non-compliance with the provisions of the Illiterates Protection Act. The agreement was drafted in Luganda language by the LC III Chairman Kashagama Sub-county and he testified as DW4. DW4 testified that he wrote the agreement for the parties in on original copy and one carbon copy which carbon copy was filed in the sub-county file. He also testified that he knew that Katsizi was not competent in reading and writing and that he read the agreement for him.

**Sections 2 and 3 of the Illiterates Protection Act state:**

*2. Verification of signature of illiterates.*

*No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person who so writes the name of the illiterate shall also write on the document his or her own true and full name and address as witness, and his or her so doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, and that he or she was instructed so to write by the illiterate and that prior to the illiterate appending*

his or her mark, the document was read over and explained to the illiterate.

3. Verification of documents written for illiterates.

**Any person who shall write any document** for or at the request, on behalf or in the name of any illiterate **shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address**, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her. (Emphasis mine).

The above provisions of the Illiterates Protection Act make it a requirement for a person writing a document for an illiterate to indicate his or her full name and address in the certificate appended to the document for purposes of proof that he or she was instructed by the person for whom it is written.

The testimony of DW4 is that he was in office with his Vice Chairman and Defence Secretary when Rwamashaka, Katsizi, Mrs. Katsizi and the daughter called Mpumwire came and informed him that Katsizi had agreed to sell his land to the late Kyamuzingita. He was informed that Lazaro Kyamuzingita was sick and had commissioned his son Rwamashaka to handle the matter. Both parties had agreed on sale of 162 acres of land at 4,000,000/=. DW4 took the late Katsizi aside his office and asked him whether he had agreed to sell his land and



Katsizi said that he was willingly selling his land because he had nobody and his only son had joined Bushara's religion, which he was also embracing. DW1 then drafted an agreement in the interest of both parties and read it to them.

5 The Court of Appeal also held in **Namboowa Rashidah Vs Bavekuno Mafumu & Electoral Commission Court of Appeal Election Petition Appeal No. 69 of 2016**, that it is the act of stating in the certificate the full name and full address of the person who writes the document on behalf of an illiterate that implies that he or she  
10 received instructions from the illiterate person to do so and that the contents of the document were properly read over and explained to the illiterate.

The evidence of DW4 and the agreement itself, which was witnessed and stamped with the LC stamp, clearly shows that DW4 he had  
15 authority from the parties to write the agreement on their behalf. The essence of Section 3 of the Illiterates Protection Act is to show that the person who drafted the document had authority from the illiterate and the contents were read and translated for the illiterate. It is my considered view that the agreement, exhibit D1, fulfilled the  
20 provisions of sections 2 and 3 of the Illiterates Protection Act.

Regarding the issue of whether the respondent's father legally purchased the suit land, I have found the evidence of DW2, DW3 and DW4 pertinent in resolving this issue. DW2, the wife to the late Katsizi, testified that she got married to Katsizi in 1979. She testified  
25 that they purchased the suit land from one Kalisti who handed them

a certificate of title and by that time, she did not know the appellant. She got to know the appellant when her husband went for burial and came back with the appellant. She stated that they sold the land to Kyamuzingita at 4,000,000/=, they signed an agreement for sale of  
5 land and gave him the certificate of title. She testified that the appellant left for Bushara's religion before DW2 and her husband and he was not present when the sale took place.

DW3, a daughter to DW2 testified that she was present at the LC3's office when the sale took place and the agreement was drafted by the  
10 LC3. DW2 had the certificate of title which she handed over to the LC3 and later to Rwamashaka after the purchase price had been paid in full.

From the evidence on record, it is my considered view that the sale agreement was legally executed and the appellant's father voluntarily  
15 sold the suit land to the respondent's father. Issue one is therefore decided in the affirmative.

### **Issue two**

The appellant contends that the transaction of sale of the suit land was non-compliant with **Section 39** of the **Land Act**.

20 **Section 39** of the **Land Act** enacts that:

*39. Restrictions on transfer of land by family members.*

*(1) No person shall—*

*(a) sell, exchange, transfer, pledge, mortgage or lease any land;*



(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any land; or

(c) give away any land inter vivos, or enter into any other transaction in respect of land—

5 (i) in the case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance, except with the prior written consent of the spouse;

10 (ii) in the case of land on which a person ordinarily resides with his or her dependent children of majority age, except with the prior written consent of the dependent children of majority age;

(iii) in the case of land on which a person ordinarily resides with his or her children below the age of the majority, except with the prior written consent of the committee;

15 (iv) in the case of land on which ordinarily reside orphans below majority age with interest in inheritance of the land, except with the prior written consent of the committee.

(2) Subsection (1) shall not apply to any transfer of land by a mortgagee in exercise of powers under the mortgage.

20 (3) Where consent is required to be given by a person other than the committee under subsection (1), the consent shall be given to the committee by the person giving the consent.

(4) Where any transaction is entered into by a purchaser in good faith and for value without notice that subsection (1) has not been complied with, the transaction shall be void; but the purchaser

shall have the right to claim from any person with whom he or she entered into the transaction any money paid or any consideration given by him or her in respect of the transaction.

5 (5) A consent referred to in subsection (1) shall not be unreasonably withheld.

10 (6) Where the consent referred to in subsection (1) is withheld, a person aggrieved by the withholding of the consent may appeal to the land tribunal; and the tribunal shall require the spouse or children of majority age or the committee, as the case may be, to show cause why they cannot give consent and may, in its discretion, dispense with the consent.

15 (7) The spouse or children of majority age, not being the owners of any land to which subsection (1) applies, may lodge a caveat on the certificate of title or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent under subsection (1).

20 (8) The committee may, on behalf of the children below majority age or orphans below majority age and not being owners, take action similar to that described in subsection (7).

(9) In this section—

(a) “notice” means actual or constructive notice;



(b) “purchaser” means a grantee, lessee, sublessee, assignee, mortgagee, chargee or other person who acquires an estate or an interest or right in the land.

The above section requires written consent of family members before transfer of land is made. The appellant’s claim is that the sale was done without his written consent, being a son to the late Katsizi Lazaro. I do not agree with the appellants’ argument that written consent was not given before the suit land was sold to the respondent’s father.

At the sale, which took place at the LCIII Chairman’s office, the late Katsizi was there with his wife (DW2) and his daughter Mpumwire Margaret (DW3) who all consented to and signed the sale agreement. The wife to Katsizi is actually the one who handed over the certificate of title after the sale of the suit land to the LCIII and later to the respondent’s father after the purchase price was paid in full. I find no reason to interfere with the learned trial Judge’s findings.

I therefore find that the appellant’s argument that the sale was invalid by reason of not conforming to Section 39 of the Land Act Cap 227, void of merit and ought to be dismissed.

This appeal is hereby dismissed with costs to the respondent and I make the following orders;

1. An order of vacant possession against the appellant on the suit land.

2. A permanent injunction restraining the appellant from trespassing on the suit land.

3. An order against the appellant to pay general damages to the respondent to the tune of 5,000,000/=

5 4. Costs of this suit and the lower court.

I so order.

Dated this 8<sup>th</sup> day of Dec 2021

Signed

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**Stephen Musota**

**JUSTICE OF APPEAL**



THE REPUBLIC OF UGANDA,  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA  
(CORAM: CHEBORION, MUSOTA AND MADRAMA, JJA)

CIVIL APPEAL NO 85 OF 2013

PAUL RUJURA} ..... APPELLANT

VERSUS

NAYEBARE FRED KYAMUZIGITA} .....RESPONDENT

*(Appeal from the Judgment of the High Court at Masaka by Hon. Justice F. V. Musoke Kibuuka, in Civil Suit No. 42 of 2011 delivered on 5<sup>th</sup> April 2013)*

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Mr. Justice Stephen Musota, JA.

I agree with him that the appeal has no merit and ought to be dismissed for the reasons he has given and with the orders proposed and I have nothing useful to add.

Dated at Kampala the 8<sup>th</sup> <sup>Dec</sup> day of November 2021



Christopher Madrama

Justice of Appeal

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**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 85 OF 2013**

*(Coram: Cheborion Barishaki, Stephen Musota & Christopher Madrama, JJA)*

**PAUL RUJURA:.....APPELLANT**

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**VERSUS**

**NAYEBARE FRED KYAMUZIGITA:.....RESPONDENT**

*(Appeal from the Judgment of the High Court at Masaka by Hon. Justice F.V  
Musoke Kibuuka in Civil Suit No.42 of 2011 delivered on 5th April 2013)*

**JUDGMENT OF CHEBORION BARISHAKI, JA**

15 I have had the benefit of reading in draft the judgment of my learned brother  
Stephen Musota, JA and I agree with the analysis and conclusion that the appeal  
has no merit and ought to be dismissed for the reasons he has set out therein.

Since Madrama, JA also agrees, the appeal is dismissed with the following  
orders;

- 20 1. An order of vacant possession against the appellant on the suit land.
2. A permanent injunction restraining the appellant from trespassing on the  
suit land
3. An order against the appellant to pay general damages to the respondent  
to the tune of 5,000,000/=
- 25 4. Costs of the appeal and in the lower Court are awarded to the respondent.

It is so ordered.

Dated at Kampala this .....<sup>st</sup> day of .....<sup>Dec</sup> 2021

  
**Cheborion Barishaki**

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**JUSTICE OF APPEAL**