

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
CIVIL APPEAL NO. 003 OF 2018

(Arising from Mbale Land Suit No.18 of 2013)

NAMBOZO GLADYS ::: APPELLANT
VERSUS

1. MANANA GEORGE
2. GODFREY GIZAZA MANANA ::: RESPONDENTS

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

- [1] This is an appeal by the Appellant **Nambozo Gladys** against the whole decision/judgment/decreed/order of **H/W Nantaawo Agnes**, Magistrate Grade 1 Mbale, delivered on 18th/12/2017.
- [2] The brief facts of the appeal are that the plaintiff/Appellant sued both defendants/Respondents for a declaration that she is the rightful owner of the suit land and the house thereon situate at **Mirembe Cell, Nabuyonga Ward, Northern Division, Mbale Municipality**. She prayed for an order of vacant possession, permanent injunction, recovery of **Ugx 1,134,000/=** being the balance on compensation for materials used by the defendants, general damages for breach of agreement and costs of the suit.
- [3] The plaintiff/Appellant averred and contended that she purchased the suit land from a one **Magomu James** on 28th/Oct/2005 who had purchased the same from a one **Tabu Zaburoni**, who had also purchased it from **Magidu Kabuto**. That upon purchase of the land, she completed a house that had been commenced by **Magomu** and she has lived on the same since 2005 until 2011 when the defendants unlawfully and illegally entered the suit land and constructed a house thereon.

- [4] The plaintiff/Appellant further averred that she had building materials on the suit land which she had intended to use to construct a second house but the same was converted by the defendants/Respondents to construct their home and when she reported the matter to the L.CI chairman of the area, the 1st defendant/Respondent undertook to compensate for her building materials and out of **shs. 1,934,000/=**, he paid **shs. 800,000/=** leaving a balance of **shs. 1,134,000/=**. A compensation agreement to that effect was executed accordingly.
- [5] On the other hand, the defendants/Respondents denied the plaintiff's claim. The 1st defendant averred that he had never owned the disputed portion of land but was only entrusted with the same by the 2nd defendant while the 2nd defendant contended that he purchased the suit land from a one **Mr. Kirya Hassan** with financial assistance from her mother, **Manana Loyce** on 13/9/1994.
That upon purchase, he developed the suit land with a permanent structure and entrusted the 1st defendant, his uncle to take care of the land while he is at school.
- [6] The 1st defendant admitted offering to compensate the plaintiff's building materials on behalf of his nephew, the 2nd defendant she had illegally/unlawfully placed on the suit land and a compensation agreement of payment of **shs.1,934,000/=** was executed to that effect. He paid **shs. 800,000/=** leaving a balance of **shs. 1,134,000/=** which she, the plaintiff has returned to collect.
- [7] The trial magistrate, upon evaluation of the evidence before her found that the plaintiff's case was contradictory and improbable. As a result, that **Kakoto** (PW2) had no good title to the suit land to pass to anyone including **Tabu Zeburoni** and

Mugomu James from whom the plaintiff derived her interest. She consequently dismissed the plaintiff's case with costs save for shs. **1,134,000/=** she was entitled to as compensation by consent of both parties.

[8] The plaintiff Appellant was dissatisfied with the decision of the trial magistrate and filed the present appeal on the following grounds as contained in her memorandum of appeal;

1. *The Learned trial Magistrate erred in law and fact when she failed to properly evaluate evidence on record as a result she held that the appellant did not prove her case on the balance of probabilities.*
2. *The Learned trial Magistrate erred in law and fact when she held that the evidence of the witnesses of the plaintiff were full of grave inconsistencies.*
3. *The Learned trial Magistrate erred in law and fact when she treated a grave contradiction of the defendants regarding where the former path (Mutumba road) was as minor contradiction yet it was where the respondent's piece of land ended on the southern side as per their agreement.*
4. *The Learned trial Magistrate erred in law and fact when she failed to properly interpret the agreement produced by respondents regarding how they purchased the suit land which clearly showed that the land bought was in Kisenyi cell and not in Kikyafu cell (later Mirembe cell).*
5. *The Learned trial Magistrate erred in law and fact when she held that the inclusion of the disclaimer clause of "in case of any back fire on this land, **Tabu Zablon and Wabira Clement** are answerable" was an indication that the transaction was improper.*
6. *The Learned trial Magistrate erred in law and fact when she was not alive to the fact that the respondent's land purchased was in Kisenyi cell and neighboring Kampala road on southern*

side yet the suit land was in Kikyafu Cell and neighboring Kampala road on the North.

- 7. The decision of the Learned trial Magistrate erred in law and in fact when she ignored to find that the neighbors described by the respondents in their agreement are the same as the ones she found at the locus and are in Kisenyi cell and neighboring Kampala road on the southern side yet the suit land is after Kampala road in Mirembe cell (formerly Kikyafu cell).*
- 8. The Learned trial Magistrate erred in law and fact when she failed to find that the appellant's and the person who sold to her the land constructed a house on the suit land in 2005 but the respondents didn't take any action against them until until 2011.*
- 9. The Learned trial Magistrate erred in law and fact when she failed to find that the purported owner of the suit land (Hassan Kirya) didn't sell or authorize any person to sell any land to the respondents.*
- 10. The decision of the trial Magistrate has occasioned a miscarriage of justice.*

Counsel legal representation

[9] The Appellant was represented by **Counsel Mutebuli** of **M/s Mutembuli & Co Advocates, Mbale** while the Respondents were represented jointly by **Counsel Gyabi** of **M/s Gyabi & Co Advocates, Mbale** and **Counsel Habakurama** of **M/s Habakurama & Co Advocates, Jinja**. The Counsel filed their respective written submissions in support of their clients' case as permitted by court.

Duty of the 1st Appellate court

[10] The duty of the 1st Appellate court is to subject the entire evidence on record to exhaustive scrutiny, re-evaluate it and

come to its own conclusion. The Appellate court has to bear in mind the fact that it neither had the opportunity to see nor hear the witnesses testify, and has to make due allowances for that; **FR.NASENSIO BEGUMISA & ORS Vs ERIC TIBEBAGA S.C.C.A No.17 OF 2002 [2004] KALR 239** and **SELLE & ANOR Vs ASSOCIATED MOTOR BOATS CO LTD & ORS (1968) E.A 123.**

This being an appeal from the Grade 1 Magistrate Mbale, I shall determine it while bearing in mind the above principles.

Counsel submissions

[11] Counsel for the Appellant opted to argue **grounds 1-9** jointly and **ground 10** separately and I think correctly so because all the **grounds 1-9** relate to how the trial magistrate assessed and evaluated the entire evidence before her.

[12] In his written submissions, counsel for the Appellant submitted that the plaintiff/Appellant, **Nambozo Gladys** (PW1) testified that she bought the suit land in 2005 from a one **Magomu** at shs.2,200,000/= and that there was an incomplete house which she completed and people entered in it for rent. The agreement of sale of the land was duly executed before the L.CI of the area called **Kayole Abdu**. It was in 2011 that the plaintiff/Appellant found that the Respondents had built and finished a house in her purchased land using her building materials.

[13] Counsel contended that the plaintiff/Appellant's evidence was corroborated by that of **Magidu Kakoto** (PW2) who testified that he sold his plot situate in **Kikyafu Cell** in 2004 to a one **Tabu Zabuloni** who in turn sold the same plot to **Magomu James** (PW3) from whom it was purchased by the plaintiff/Appellant.

[14] Further, that **Kayole Abdu** (PW4), the area L.CI chairperson from 1997 to date (when he was testifying), authored the sale agreement between **Magomu James** (PW3) and the plaintiff/Appellant. That he is born of that area and knew that it was **Magidu Kakoto** (PW2) and his mother who used to utilize the suit land until they sold it to **Tabu**. That before PW2 and his mother, he never saw anyone else using it.

[15] Counsel submitted that on the other hand, the defendants/Respondents admit that the suit land is in **Kikyafu Cell** while the land the 2 defendants bought is in **Kisenyi Cell** as reflected in the sale agreement. That **Kibuzo Stephen** (DW1) confirmed to court that the suit land is located above the Kampala road in **Kikyafu Cell/Mirembe Cell** while the defendants' land is below the Kampala Road in **Kisenyi Cell**. He submitted further that this was confirmed by **Manana George** (DW2) who states that the suit land is partly in **Kisenyi Cell** and partly in **Mirembe Cell** as it is divided by Kampala Road. He clarified that the disputed portion is the upper part which is in **Mirembe Cell**.

[16] Counsel concluded that had the trial magistrate evaluated the evidence on record, she would have determined that the Respondents owned land adjacent to Kampala Road as per **D.Exh.2** and do not cross the road where the suit land is located. She would have found that the suit land belonged to the Appellant who explained how the suit land changed hands from **Magidu Kakoto** to **Tabu Zabuloni** to **Magomu James** and finally to the Appellant.

[17] On the other hand, counsel for the Respondents submitted that the learned trial magistrate properly and carefully evaluated the evidence on record; both in court and at locus in quo and arrived at the correct conclusion when she decided that the suit

real property belongs to the 1st Respondent with no adverse claim by the Appellant.

[18] Counsel contended that the sale agreement between **Magomu** (PW3) and the Appellant was a forgery that was perpetuated by **Abdu Kayole** (PW4), the chairman of **Kikyafu Cell** who made **Wandebe Issa Patrick** (DW4) sign as a witness to the agreement of sale of the suit land to **Magomu James** (PW3) who in turn sold to the Appellant. That the forgery is further evidenced by the fact that the 2 agreements (**P.Exh B & D**) relied on by the Appellant were all executed within a short period of time, that is to say on 9th/10/2004 and on the 27/12/2004.

[19] Lastly, that the learned trial magistrate was absolutely right when she made an inference of prior Knowledge of PW3 and PW4 that the suit land never belonged to **Tabu Zabuloni** by virtue of the clause in the agreement of sale between **Tabu Zabuloni** and **Magomu James** as per **P.Exh.D**:

“In case of any backfire on this land, Tabu Zabuloni and Wabira Clement are answerable.”

[20] That by the above, it was clear that at the time of purchase of the suit land by **Magomu James** from **Tabu Zabuloni, Abdu Kayole** (PW4) was fully aware that the land **Magomu James** (PW3) was buying did not belong to **Tabu Zabuloni** so as to earn good title to pass to the plaintiff/Appellant.

Consideration of the Appeal

[21] On her part, the learned trial magistrate upon evaluation of the entire evidence before her, at **page 7 of the typed judgment** observed thus;

*“PW2 **Kakoto Magidu’s** evidence had contradictions and inconsistencies. For example he told court that his grandmother had handed over to him the suit land*

at 10 years of age yet she (sic) stated that his grandfather had given him the suit land while he was young in the presence of clan members, though he stated later that he never saw his grandfather. He later added that the suit land had been in the care of his parents with whom he was cultivating on it until his mother handed it over to him."

[22] I am unable to appreciate the contradiction the learned trial magistrate was referring to. At **page 7 of the typed record, Magidu Kakoto (PW2)** testifies as follows;

*"The land was for my grandfather, he was cultivating on it. My grandfather's home was on the land. My grandfather passed away. Can't recall when he died. I was young. The land then remained in the hands of my father and mother. He kept the land until now that i have grown. He was called **Abudul**, he died in 1978. My mother was called Mastula. She died last year in May 2014. My grandmother handed the land to me, I was handed the land at 10 years. I started using the land together with my mother...At the time no one was claiming the land."*

[23] At page 9, the 1st line he stated

"The clan members were present when he gave me the land"

By "he" the witness was not referring to his "grandfather." He was referring to his "father" and impliedly his mother (parents) who were still alive because upon the passing of his grandfather, he explained that the land remained in the hands of his father and mother until he has grown.

[24] It is not true that **PW2** stated that his grandfather had a house on the suit land but it is **PW4** who stated that he was a born of the area and only knew of one house on the suit land constructed by **Tabu Zabuloni** which was grass thatched. The record shows at **p.7 of the typed proceedings** that **PW2** stated that his grandfather's home was on the land and at **p.15**, **PW4** stated that at the moment (at the time) when **Tabu Zabuloni** sold the suit land to **Magomu James** (**PW3**) when he authored the agreement, there was a grass thatched house of **Tabu Zabuloni**. This was not, therefore, to say that **PW2's** grandfather's house never at any one time existed on the suit land.

[25] The learned trial magistrate then faulted **Magomu James** (**PW3**) for stating that he stayed on the suit land for 1¹/₂ years before selling it to the plaintiff/Appellant yet this was contrary to the agreements he relied upon (**P.Exhs.C &D**)

[26] On my part, I don't see any contradictions. **Magomu James** (**PW3**) purchased the suit land from **Tabu Zabuloni** on the **27/12/2004** as per **P.Exh.D** and he sold the suit land to the plaintiff on **28/10/2005** as per **P.Exh.C**. This implies that he was on the suit land for close to a year. To state that he had been with the land therefore for about 1¹/₂ years is not a grave contradiction that goes to the root of the case so as to regard him a liar or that he intended to mislead court. It was such a minor inconsistency that court would be entitled to ignore.

[27] The law relating to contradictions and inconsistencies is well settled that when they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. If however, they are minor and capable of innocent explanation, they will not have that effect; **MAKAU NAIRUBA NABEL Vs CRANE BABK LTD H.C.C.S No. 380 OF 2009, ALFRED TARJA**

Vs UGANDA CRIM.APPEAL No.167 OF 1967(EACA). I find the instant inconsistencies capable of an innocent explanation.

[28] As regards the disclaimer;

“In case of any backfire on this land, Tabu Zabuloni and Wabira Clement are answerable,”

PW4 explained the disclaimer written in **P.Exh.D** and in any case, the disclaimer cannot be taken to be evidence that the vendor was not the rightful owner of the suit property.

Plaintiff/Appellant’s Agreements dated 9/10/2004, 27/12/2004 and 28/10/2005

[29] The above agreements were relied upon by the plaintiff/Appellant to prove her case in the lower court. They were exhibited as **P.Exhs. B, C & D**. They illustrate the background, origin of the suit land up to how the plaintiff/Appellant derived interest in the suit land. The suit land changed hands from **Magidu Kakoto** (PW2) to **Tabu Zabuloni** (P.Exh.B), then to **Magomu James** (P.Exh.D) and then finally to the Appellant (P.Exh.C).

[30] Counsel for the Respondents submitted that the sale agreement between **Tabu Zabuloni** and **Magomu James** (PW3) i.e, **P.Exh.D** was a forgery by virtue of the evidence of **Wandeba Issa Patrick** (DW4) who admitted that he endorsed it upon being requested to do so by the area L.CI chairman **Abdu Kayole** (PW4) when he knew that **Magidu Kakoto** (PW2) who had sold the suit land to **Tabu Zabuloni** was not the rightful owner.

[31] Forgery as fraud is a very serious allegation. For one to rely on it or on any misrepresentation, breach of trust, wilful defence or undue influence, he or she has to plead it with full particulars; **NAGAWA AGNES & ANOR Vs SEGAWA SAMUEL &**

ORS H.C.C.S.No.27/2012 (See also requirements of **0.6 r.3 of the CPR**)

[32] In the instant case, the defendants/Respondents did not plead any forgery or raise any counter claim based on forgery. The alleged forgery was never, during cross examination put to **Abdu Kayole** (PW4) or **Magomu James** (PW3) the purchaser of the suit property which was later sold to the plaintiff/Appellant under an agreement that was this time, authored by **PW4**. Again, forgery was never, during cross examination put to the plaintiff/Appellant who relied on it to prove the origin of her interest in the suit land.

[33] Instead on the other hand, I find **Wandebe Issa Patrick** (DW4) a very unreliable and therefore worthless witness. It is apparently clear that he is a self-confessed fraudster who had been compromised by the defendants/Respondents to testify on their behalf so as to defraud the plaintiff/Appellant. The 2 agreements (**P.Exhs. D and C**) were witnessed by PW4 who had been the L.CI chairman since 1997 and even before had been a committee member of mobilization in **Kikyafu Cell**, now **Mirembe Cell**. He, PW4 was a born of the area and knew very well the history of the suit property. His evidence stood essentially unchallenged during cross examination. He could not have therefore unduly influenced **DW4** (who claim to had been in charge of the suit property) to witness the sale of the same property to other people. The reality is that he knew that the suit property rightly belonged to **Magidu Kakoto** (PW2) who sold it to **Tabu Zabuloni** who in turn sold it to **Magomu James** (PW3) and finally, sold it to the plaintiff/Appellant.

[34] The claim by counsel for the Respondents that the agreements **P.Exhs.B and D** were executed within a short period of 9/10/2004 and 27/12/2004 could be evidence of dishonesty, I

don't agree. It would depend on the wishes and needs of the parties to the sale. No one can surely speculate on it. The vendor could have developed an urgent need for funds and therefore had to dispose of his land.

[35] In the premises, I find that the evidence of **PW1, PW2, PW3** and **PW4** were truthful and there is no reason whatsoever why the trial magistrate found it unreliable and contradictory.

Defendants' Agreement dated 13/4/1994

[36] The agreement was relied upon by the defendants/Respondents during trial and it was admitted as **D.Exh.3**.

[37] According to **Kizubo Stephen** (DW1) and **Manana George** (DW2), they purchased the suit property from **Mr and Mrs Hassan Kirya** in 1994 as per **D.Exh.3** on behalf of the 2nd defendant/Respondent. That however in 2004, they found when somebody unknown had raised an illegal structure on the suit land which was adjacent to their house. The illegal structure was later to be roofed by the plaintiff/Appellant. The matter was later referred to the L.CI and it was resolved that the 1st defendant compensates the plaintiff/Appellant **shs. 1,193,000/=** for her building materials converted by the 1st defendant/Respondent (**D.Exh.2**). In this suit, in the court below, Judgment was entered in favour for the Appellant for the sum compensation.

[38] I have looked at **D.Exh.2**. It had no provision that after the plaintiff/Appellant had been compensated, she, the plaintiff was to vacate the suit land. It was for payment of her building materials found on the suit land that were converted by the 1st defendant/Respondent.

[39] The Respondents' purchase agreement (**D.Exh.3**) referred to land situated in **Kisenyi Cell. Kutosi Tuma Wilson** (DW3) who

in 1994 was the General Secretary L.CI **Kisenyi Cell** and was the one who authored the sale agreement of the suit land between **Hassan Kirya** and the defendants/Respondents testified that the entire land/block was by then in **Kisenyi Cell** until **2001-2002 when construction** of Kampala Road dissected the land and placed the suit portion of land in **Mirembe Cell**. The other portion which is undisputed remained in the original **Kisenyi Cell**.

[40] **DW3** stated that the suit portion of land in **Mirembe Cell** was vacant land and that the 1st defendant had placed it under the care of **Nunu** (DW5) and **Wandeba** (DW4). **Nunu** and **Wandeba** nevertheless testified that they care took the suit portion of land in 1994-1998 and 1998-2002 respectively but not after the Kampala road construction that placed the land in **Mirembe Cell**.

[41] The above notwithstanding, DW3 insisted and emphasized that by 1994, **Kikyafu Cell** existed and it is different from **Mirembe Cell**.

[42] **Kizubo Stephen** (DW1) an attorney of the 2nd defendant testified during cross examination thus;

“The land is in Kikyafu Cell. The one I bought is in Kisenyi Cell...Mirembe Cell was established in 2001 from Kikyafu Cell.”

[43] The foregoing in my view, tend to support the plaintiff's/Appellant's case that the location of the suit portion of land is in **Kikyafu** now **Mirembe Cell**.

[44] **Manana George** (1st defendant/DW2), however conceded that it is **Magomu** (PW3) who constructed the house in the suit portion of land up to wall plate (beam) level and it is the plaintiff/Appellant who completed it by way of roofing. This was also the evidence of DW1. All these are events of

2004/2005. From 1994 when the defendants/Respondents claim to have purchased the suit land, they had not effected any development on the suit land portion save for placing **DW4** and **DW5** on the suit land as caretakers. **Magomu** (PW3) purchased it from **Tabu Zabuloni** and sold it to the plaintiff/Appellant under the nose of the care takers. DW4 endorsed on the purchase agreement between **Tabu Zabuloni** and **Magomu Samuel** (PW3) which was also witnessed by the area L.C.I chairperson, **PW4**. The distance from the defendants' house to the suit portion of land is about 500-700 metres (as per DW2 and locus evidence) and one wonders how the transaction on the suit land could therefore take place without defendants' notice and knowledge.

[45] It is my view that the above evidence overwhelmingly support the contention of the plaintiff/Appellant that she is the rightful owner of the suit portion of land. The defendants/Respondents did not give any explanation as to how **Magomu** (PW3) and the Appellant/plaintiff came to build a house in the suit land adjacent to their house up to completion in 2005 without their notice and knowledge. The defendants formed a view to grab the suit land upon the Appellant's settlement on it and this explains why they quickly utilized her building materials to put up a house in 2011, to cover their inertness on the land they claim to have purchased in 1994. Otherwise, there is no explanation as to how **PW2** and family would occupy and utilize the suit land, then, occupation by **Mugomu James** (PW3) who put up a house, and lastly the plaintiff's acts of completing the house in 2005 without any adverse claim from the defendants.

[46] The foregoing evidence and facts are inconsistent with the defendants' version of the case but support the plaintiff's/Appellant's case. The trial magistrate failed to live

by the facts of this case. Had she properly evaluated the evidence on record, she would have determined that the Respondents owned land in **Kisenyi Cell** as per **D.Exh 2** and not the plaintiff's/Appellant's land in **Mirembe Cell** across Kampala road. This was an error on the part of the trial magistrate entitling this court to interfere with her findings and orders. As a result, the relevant grounds of appeal are allowed.

[47] Having found that the trial magistrate disregarded the overwhelming evidence by the Appellant and her witnesses that she was the rightful owner of the suit property, it follows ground 10 is also allowed.

[48] As a result, the judgment and orders of the trial magistrate are set aside save for her entitled compensation balance of **Shs. 1,134,000/=** in respect of her building materials on the suit land that were converted by the defendants/Respondents. The entire appeal is therefore allowed with the following orders in favour of the plaintiff/Appellant;

- a) The plaintiff/Appellant is the rightful owner of the suit land situate at **Mirembe Cell (formerly Kikyafu Cell), Nabuyonga Ward, Northern Division, Mbale district.**
- b) An order of vacant possession/eviction order.
- c) Costs of the suit here and in the court below.

No order as to general damages for breach of contract and inconvenience for none were generally proved. There had never been a contract between the plaintiff/Appellant and the defendants/Respondents to warrant general damages for breach of contract.

BYARUHANGA JESSE RUGYEMA

JUDGE

7th /9/2021.