THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL No. 139 OF 2014

(Arising from High Court Civil Appeal No. 31 of 2008)

(CORAM: MUZAMIRU M. KIBEEDI, C. GASHIRABAKE & O. J. KIHIKA, JJA)

1. BAGULA JOSEPH
2. KATO ROBERT } **:::::::::::::::::::::::::::::::::: APPELLANTS**
3. NALONGO KASULE

VERSUS

LUBEGA GEORGE WILLIAM :::::::::::::::::::::::::::::::::: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Land Division) before Hon. Justice Rubby Opio Aweri dated 28th June 2011 in High Court Civil Appeal No. 31 of 2008)

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

1] **Introduction**

This is a second appeal from the decision of the High Court of Uganda at Kampala (Land Division) delivered by Hon. Justice Rubby Opio Aweri (RIP) on 28th June 2011 in which the learned judge *(as then was)* dismissed the appeal filed by the Appellants herein and upheld the order of the trial Magistrate Grade One, Nakasongola in Civil Suit No. 31 of 2007 dividing the suit land. The Appellants being aggrieved by the judgement and orders of the 1st appellate Court preferred a second appeal to this court seeking to have the judgment of the High Court set aside and the orders of the Magistrate Grade One be submitted with a declaration that the appellants are the rightful owners of the suit land and a permanent

injunction restraining the Respondent from interfering with the Appellant's quiet enjoyment and possession of the suit land.

2] **Background**

The facts giving rise to this appeal are notable from the pleadings of the parties on record, the judgments of the trial court and the 1st appellant court. The Appellants herein filed Civil Suit No. 31 of 2007 against the Respondent in the Chief Magistrate's Court of Nakasongola claiming ownership of a piece of land at Migyera measuring 80 feet x 360 feet. According to the case presented before the trial magistrate, the Appellants claimed to have inherited the suit land from their late father, Didas Kasule who acquired it under a lease offer granted by Uganda Land Commission for 0.2 hectares of land at Migera Buruli under minute ULC. Min. 8/3/84(a) (471) of February 1984 which was communicated in the offer letter dated 21st February 1984.

3] According to the Appellants they sought to develop the suit land in 2002 but were blocked by the Respondent who claimed the suit land belonged to him which prompted the Appellants to file a complaint before the Nakasongola District Land Tribunal in 2004. Following the phasing out the District Land Tribunals, the claim was transferred to the Chief Magistrate's Court of Nakasongola.

4] The Respondent in his claim and defence before the trial court contended that he acquired the suit land in 1972 and donated half of the land to wit; 40 feet x 360 feet to the late Didas Kasule, his friend then and the father of the 1st and 2nd Appellants as well as the husband of the 3rd Appellant. The Respondent also contended that he built on the disputed land and lived on it until the building collapsed but he continued to use the land as family property. The Respondent

further contended that following the death of Didas Kasule he entered into an agreement dated 15th January 1991 with Mukasa John a son of the Late Didas Kasule in which they agreed to share equally with each party taking a portion measuring 40 feet x 360 feet. However, during the trial Mukasa John who testified on 15th July 2008 as DW5 told the trial Magistrate that he had been forced to sign the agreement on behalf of his other siblings and that the agreement was signed after he had been threatened, it was never his intention to sign as the land belonged to Didas Kasule *(whom he referred to as Mzee)*

5] In his judgment dated 4th November 2008 the trial Magistrate, His Worship Lubowa Daniel decided the matter in favour of the Respondent and ordered that the land should be divided along the line of what had been decided in the agreement the Respondent executed with Mukasa John. The Appellants being dissatisfied with the decision of the trial Magistrate filed an appeal in the High Court of Uganda at Kampala (Land Division) which was heard and decided on 28th June 2011. In his judgment, Rubby Opio Aweri (RIP), J., *(as he then was)* dismissed the appeal and upheld the order of the trial Magistrate dividing the land and ordered each party to bear its own costs.

6] The Appellants being dissatisfied with the decision of the High Court on appeal preferred a second appeal to this Court on the following grounds: -

1. ***The Learned judge failed in his bounden duty as the first appellate court to properly or at all, evaluate the evidence on record, particularly relating to ownership of the suit land thereby wrongly upholding the trial magistrate's decision on division of the suit land between the Respondent and a one Mukasa John***

2. ***The Learned judge having found that the agreement dated 15th January 1991 was null and void contracted himself when he upheld the subdivision of the suit land under the same void agreement.***

7] **Legal Representation**

During the hearing of this appeal, the Appellants were represented by Allan Tumwesigye of Messrs. Lubega & Co. Advocates. The Court record indicates that the Respondent was represented by Wamimbi Emmanuel of Messrs. E. Wamimbi & Co. Advocates.

Court directed the lawyers of the parties to this appeal to file written submissions and address us on the issues in this appeal and the grounds on which it is premised which they accordingly adhered to.

8] **Preliminary Objection**

In his written submissions, Counsel for the Respondent raised a preliminary objection. Before I consider the submissions on the grounds of this appeal, it is pertinent that I first deal with the preliminary point of law that was raised by Counsel for the Respondent. I am a live to the fact that a party can raise a preliminary point of law at any stage of the proceeding before court has delivered its judgment.

9] Law JA., in **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] 1 EA 696** held that, *"a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...."*

10] In **Major General D. Tinyefuza v Attorney General Constitutional Appeal No. 1 of 1997** Justice Joseph Mulenga (RIP), JSC held that the usefulness of decisively disposing of a suit on a legal point, where appropriate, without going through a lengthy trial, cannot be gain said where such a point is raised , it is of course desirable that the court makes a decision on it before embarking on the trial even if the case is to continue.

11] The preliminary objection raised by Counsel is to the effect that on a second appeal, such as this one, court is only required to decide matters of law and not to re-evaluate the evidence. He cited **Kifamunte Henry v Uganda SCCA No. 10 of 1997** where the Supreme Court held that;

> *"Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the court of first appellate Court has wrongly held that the trial Court correctly directed itself, yet, if the Court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view R. Mohamed All Hasham vs. R (1941) 8 E.A.C.A. 93."*

12] Counsel submitted that this matter was originally filed in Nakasongola District Land Tribunal as Claim No. 15 of 2004, it was later transferred to Nakasongola Chief Magistrates' Court vide Civil Suit No. 15 of 2004 when government phased out Land Tribunals. The matter was heard on its merits and Judgement was delivered by His Worship Lubowa Daniel, Magistrate Grade One on 4th November 2008 in favour of the Defendant/ the Respondent (herein).

13] He submitted that the Appellants filed a first appeal in High Court of Uganda at Kampala Vide Civil Appeal No 31 of 2008, the Appeal was determined on its merits and judgement was delivered on 28th June 2011 by Justice Rubby Opio Aweri dismissing the Appeal. He argued that the appeal before this Court is a second Appeal and that it is trite law that on a second appeal, such as this one, court is only required to decide on matters of law. The Second Appellate Court is not required to re-evaluate the evidence but may do so if it is necessary.

14] Counsel argued that on a second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law. He cited **R v Hassan bin Said [1942] 9 E.A.C.A, 62** to support this argument.

15] Counsel contended that whenever a question arises as to whether a judgment can be supported on facts as found by the trial court and the first appellate court, such a question may be resolved by the second appellant court purely as a question of law. He submitted that, looking at the grounds of appeal formulated by the Appellants, they don't raise any point of law, they are rather mixed law and fact, which is wrong. He then asked this Court to uphold his objection and consequently dismiss this Appeal with costs to the Respondent.

16] In reply to the preliminary objection Counsel for the Appellants submitted that this kind of objection should have been brought by way of application under

Rule 82 of the Court of appeal Rules or at the time of conferencing. He cited **Rule 102 (b) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** which provides that;

> *"At the hearing of the Appeal, the Respondent shall not, without the leave of Court, raise any objection as to the competence of the Appeal which might have been raised by application under rule 82 of these rules."*

17] Counsel argued that the conferencing in this case was completed on 23rd April 2015 and the Respondent never raised this objection and that no application was filed by the Respondent as required by Rule 82 of the Court of Appeal Rules. He contended that no leave was sought to argue or raise this kind of objection contrary to Rule 102 (b) of the Court of Appeal Rules and asked this Court to overrule the preliminary objection.

18] In further reply to the substance of the preliminary objection, Counsel submitted that the grounds as raised bring out points of law such as the validity of relying on an agreement dated 15th January 1991 having been found to be null and void. He contended that this is a point of law which cannot be argued without evaluating the evidence on record or this Court appraising the inferences of fact drawn by the trial court. He cited Rule 32 (2) of the Court of Appeal Rules in support of his submissions.

19] Counsel relied on **Kifamunte Henry v Uganda (Supra) and Rule 66 (2) of the Court of Appeal Rules** to argue that on a second appeal, the memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative, the grounds of objection to the decision appealed

against, specifying, in the case of a first appeal the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law or mixed law and fact, which are alleged to have been wrongly decided.

20] He contended that in this case, the memorandum of appeal which was filed on 15th August 2014 raises grounds of mixed law and fact as required by Rule 66 (2) of Court of Appeal Rules. He argued that the point of law raised in the memorandum of appeal is whether the agreement having been found to be null and void can be relied upon to accord interest in land to the Respondent? He concluded with a view that this appeal is not barred by law and referred this Court to the decision in **Lubanga Jamada v Dr. Ddumba Edward C.A.C.A No. 10 Of 2011**.

21] As noted by both Counsel, this is a second appeal, the role of the Court of Appeal as a second appellate Court is set out under Rules **32 (2) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** which stipulates that;

> ***"On any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court but shall not have discretion to hear additional evidence."***

22] The Court of Appeal is accordingly required to appraise the inferences of fact drawn by the trial court. **Section 72 of the Civil Procedure Act**, provides that

> ***(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that-***
>
> ***a) the decision is contrary to law or to some usage having the force of law;***

b) the decision has failed to determine some material issue of law or usage having the force of law;

c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision. of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

23] The effect of the above provision is to prohibit second appeals from being filed on matters of fact or matters of mixed fact and law. The duty of a second appellate court is entangled with the duty of a first appellate court although the two can be distinguished. The Supreme Court distinguished clearly the duties cast on each court in **Kifamunte Henry v Uganda SCCA No. 10 of 1997**. The Supreme Court had this to say;

"We agree that on first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957)

E.A. 336 and Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire vs Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 331(i) of the Criminal Procedure Act.' It does not seem to us that except in clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied, or failed to apply such principles: See P.R. Pandya vs. R. (1957) E.A. (supra) Kairu vs. Uganda (1978) FI.C.B. 123."

24] In the instant appeal, the contention of Counsel for the Respondent is that the grounds raised in this appeal are not premised on a point of law which is contrary to the rules governing second appeals in this honourable Court.

25] The settled position of the law is that **Rule 86 of the Court of Appeal Rules** regulates the contents of a memorandum of appeal in civil appeals on a first and second appeal. The application of **Rule 86 of the Court of Appeal Rules** must be in strict compliance with **Sections 72 (1) and 74 of the Civil Procedure Act**. The cited provisions of the Civil Procedure Act mandatorily provide that second appeals must be based upon grounds of law and not of facts or mixed law and fact.

26] The above position has been held by both the Supreme Court and Court of Appeal to be the correct position of the law in several Court decisions. The Supreme Court in **Mitwalo Magyengo v Medadi Mutyaba, SCCA No. 11 of 1996** ,[1998]UGSC 3 which was a second civil appeal involving a dispute over a "kibanja" held that Section 74(1) [now Section 72(1)] of the Civil Procedure Act

precludes second appeals that are not based on grounds of points of law but are rather based on findings of fact or mixed law and fact.

27] In **Beatrice Kobusingye v Fiona Nyakana & Anor 2005 UGSC 3,** the Supreme Court considered in detail Sections 74 (1) and 75 [now 72 (1) and 74] of the Civil Procedure Act and held that the same applied to Civil Proceedings before the Court of Appeal and vested in court jurisdiction as regards second appeals of a civil nature. The Court observed that second appeals to the Court of Appeal had to be on points of law and not on matters of fact or mixed law and fact.

28] Justice Remmy Kasule JA., in **Lubanga Jamada v Ddumba Edward CACA No. 10 of 2011** observed that;

> ***"An appeal on a point of law arises when the Court, whose decision is being appealed against, made a finding on the case before it, but got the relevant law wrong or applied it wrongly in arriving at that finding. The Court reaches a conclusion on the facts, which is outside the range that the said Court would have arrived at, had that Court properly directed itself as to the applicable law. The error must be as a result of misapplication or misapprehension of the law. A manifest disregard of the law is an error of law. A question of law is about what the correct legal test is, as contrasted with a question of fact, which is concerned with what actually took place between the parties to the dispute. When the issue is whether the facts satisfy the legal test, then a question of mixed law and fact arises.***
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> ***Where on a second appeal in a Civil Cause, the grounds of appeal are not of law but are of findings of fact or mixed law and fact, and then such grounds are wrong in law and are either abandoned by the appellant or are struck out by Court: See: Mitwalo Magyengo v Medad Mutyaba, SCCA No. 11 of 1996 and the Kenya case of MAINA VS MUGIRIA [1983] KLR 78."***

29] I have reviewed the memorandum of appeal filed in this honourable Court on 15th August 2014 and the two grounds contained therein assert that the learned judge failed to re-evaluate the evidence on record relating to ownership of the disputed land. Where the High Court ,as a first appellate court ,failed to properly re-evaluate the evidence before it is a point of law and as such ground one passes the test. The second ground ,that the Judge having found the agreement dated 15th January 1991 null and void, he contradicted himself when he upheld the division of the disputed land under the same void agreement does not qualify as a point of law.

30] I agree with Counsel for the Respondent that it is the settled position of the law that on a second appeal the grounds of appeal must be premised on points of law only as I have articulated above.

31] In **John Kafeero Sentongo vs. Peterson Sozi CACA No. 173 of 2012** my learned brother Stephen Musota, JA., held that, *"Therefore, the duty of a second appellate court is to examine whether the principles which a first appellate court should have applied were properly applied and if it did not, for it to proceed and apply the said principles."*

32] **WRITTEN SUBMISSIONS**

On the re-evaluation of evidence by the first appellate Court, Counsel for the Appellant submitted that this Court being a second appellant court, it does not have the duty to re-appraise the evidence unless the first appellate court failed in its duty to do so. He cited the holding of Oder, JSC (RIP) in **Kifamunte Henry vs Uganda, Criminal Appeal No. 10 of 1997** where the learned justice noted that: -

> *"... It does not seem to us that except in clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied*

or failed to apply such principles: See P.R. Pandya vs. R. (1957) E.A. (supra) Kairu vs. Uganda (1978) FI.C.B. 123...."

33] Counsel for the Appellant argued that the Learned Judge failed in his duty as the first appellant court when he noted at Pages 13-14 Lines 23-25 of the Record of Appeal that there is overwhelming evidence to prove that the land in dispute was owned by both the Respondent and the late Kasule who was the father of the 1st and 2nd Appellant and husband of the 3rd Appellant.

34] He submitted that the Appellants' claim is that the suit land (80ft X 360ft) belonged to their late father Mr. Kasule Didas who had obtained a Lease offer from Uganda Land Commission by then in his own names without the Respondent. He argued that the dispute which the parties had related to the agreement dividing the suit land into half, and it was between the Respondent and one Mukasa-a brother of the Appellants who during the trial at page 68 of the Record of Appeal between lines 25-30 stated:

"...I was threatened by Lubega's son (the late) and this happened several times. I was forced to divide the plot and to accept that the plot belongs to both parties, and I was forced to sign on behalf of my other siblings. It was divided after being threatened but it was never my intention as the land belonged to Mzee."

35] He submitted that with the above piece of evidence, there was no interest the Respondent could derive from the suit land when his basis was on a disputed and illegal agreement which the Learned Judge found to have been obtained or made under duress and undue influence.

36] Counsel for the Appellant also faulted the Learned Judge for the finding that the Respondent built on part of the suit land, and he lived on the same as per page 14 between lines 3 to 5 of the Record of Appeal. He argued that there was no evidence at the trial to prove the above fact which could have accorded the Respondent interest in the suit land, and it was a serious error made by the Appellate court. He submitted that according to the evidence presented at the trial it can be seen that Respondent had never built on part of the suit land nor even settled there.

37] According to Counsel for the Appellant, the only evidence which links the Respondent to have stayed on the suit land is that of DW4 which was not corroborated, and which is highly doubtable as she had to testify to support her uncle-the Respondent. Even D.W3, Kabanda Sulaman was only called to witness the agreement between Mukasa and the Respondent and as the L.C.1 Committee, they did not know the Plot's history in as far as ownership was concerned. P.W.5 & P.W.6 were only witnesses to a purported settlement which was disputed by the Appellants because they had interest in the suit land and had been staying there before the Late Kasule passed away and are still staying on the same to date.

38] Counsel for the Appellant further submitted that the land in question was disputed but the dispute was not between the Late Kasule Didas before his death and the Respondent, but it was between the Children of the Late Kasule Didas and the Respondent especially regarding the agreement which had been procured under duress and undue influence, which was void. The dispute was that the Respondent was trying to take possession of the suit land using the said illegal agreement, but the said action was resisted by the Appellants as the person with whom the

Respondent shared the land, one Mukasa John was not authorized to have the Appellants' land divided. That is why the Appellants took the matter to Nakasongola Land Tribunal which was subsequently transferred to Nakasongola Chief Magistrate's Court after land tribunals were phased out.

39] Counsel for the Appellant argued that the first Appellate Court never addressed its mind on proper evaluation of evidence relating to ownership of the suit land thereby making an error of law especially regarding the rights and interests of the parties in respect of the suit land in as far as the Appellants are customary tenants on the suit land. He referred to the evidence Kato Robert who testified at PW2 and the evidence of P.W.4 regarding the Appellant's family having been in occupation at the time in 1970's and/or 1980's and what was on the disputed land. He contended that this was corroborated by the evidence of D.W.3 at confirming that the Appellant's brother (Mukasa) was occupying the land before this dispute arose. He also argued that Mukasa, the son of late Kasule couldn't represent the whole family in as far as parcelling the disputed land was concerned.

40] Counsel for the Appellant further argued that the evidence of lease offer dated 21st September 1984 of the record of Appeal does not indicate anywhere that the Respondent co-owned the suit land with the late Kasule Didas, so oral evidence brought by the Respondent to contract this written document is prohibited by Sections 90 & 91 of the Evidence Act, which codifies the parole evidence rule. He cited the case of **Kasifa Namusisi & 2 Ors vs. Francis M.K Ntabaazi ,SCCA No. 4 of 2005** where the Supreme Court observed the import of Sections 90 and 91 of the Evidence Act. Section 90 is to the effect that when the terms of a contract

have been reduced to the form of a document, no evidence shall be given in proof of such terms except the document itself.

41] Counsel submitted that Section 91 of the Evidence Act excludes oral evidence to contradict a written contract and prayed that this issue be answered in the affirmative.

42] Counsel submitted that at Page 12 lines 11 to 21 of the Record of Appeal the Learned Judge found that the agreement dated 15/01/1991 was made under duress and undue influence. He argued that the learned judge arrived at this conclusion by relying on the evidence of Mukasa John a son to the late Kasule and 3rd Appellant and a brother to the 1st & 2nd Appellants at Page 68 of the Record of Appeal where he testified that he was threatened by the Respondent's son who was a soldier who forced him to divide the plot and accept that the land in dispute belonged to both parties. Counsel submitted that Mukasa clearly stated that he was forced to sign on behalf of his siblings, but it was never his intention to do so since the land belonged to his father and not the Respondent.

43] Counsel also referred this Court to Page 60 lines 30-32 of the Record of Appeal where Alice Namuddu Nalongo who testified as PW3 told Court that after the death of her husband the Late Kasule, the Respondent came with his son and threatened to kill her if the Appellants do not vacate the suit land. Counsel argued that it is clear that all threats to life of the occupants on the suit land were being meted out against the occupants of the suit land by the Respondent and his sons.

44] He submitted that at Common law, a contract or agreement obtained through use of force, threat of force, undue persuasion is avoidable because there is no consent on the part of the victim or party threatened. He cited the case of **Hassanali Issa & Co v Jeraj Produce Store [1967] 1 EA 555** where the defunct Court of Appeal for East Africa held that undue influence arises in contract where one of the parties is in position to dominate the will of the other and uses that position to obtain unfair advantage.

45] Counsel submitted that the Learned Judge rightly found that the agreement dated 15th Jan, 1991 was devoid of any legal effect but at Page 15 lines 1 to 3 of Record of Appeal upheld the order of the trial Magistrate dividing the suit land and yet the said division was based on an illegal agreement because there was no evidence to show that the land was co-owned or had been divided before the death of the late Kasule. He argued that this was a serious contradiction and error which occasioned a miscarriage of justice. He then prayed that this issue is resolved affirmatively, the appeal be allowed and the Judgment of the High Court be partly set aside and the orders of the lower court be substituted with the orders as prayed in the memorandum of Appeal with costs in this court and the lower court.

46] In reply Counsel for the Respondent opted to argue grounds 1 & 2 of the appeal jointly. He submitted that the Learned Trial Judge agreed with Learned Trial Magistrate's finding in respect to the agreement dated 15th January 1991 as being voidable, but both the Trial Judge and Trial Magistrate didn't entirely base their decision on the said voidable agreement but rather relied on other pieces of evidence to rightfully come up with the correct decision.

47] Counsel opted to associate with the Learned Judge reasoning that there was overwhelming evidence to prove that the land in dispute was owned by both the Respondent and the Late Kasule who was the father and husband of the Appellant. He referred to Page 5 of Judgment of the High Court, where Judge on appeal noted that the four had a dispute over ownership of the same which the local authorities resolved and parcelled between the two equally getting 40 X 360 ft way back in 1991. The learned judge also stated that the Respondent built a house on part of the suit land which he lived on but fled during the war of 1980's.

48] Counsel argued that the Respondent's evidence was buttressed by that of Erinasani Mulindwa who testified as DW2 and told Court that he was one of those who sat in the dispute between the Late Kasule and the Respondent about the suit land thereby the land was divided between the two. He also referred to the evidence of Getrude Birungi who testified as DW4 and told Court that the Plot in question belonged to Kasule and the Respondent. That the Respondent built a muzigo on the same and called her to take care of it during the war.

49] He submitted that the Respondent's evidence of having interest in the disputed land was surprisingly supported by the evidence of one of the Appellants' witnesses, Abubakar Mukasa who testified as PW5 and told Court that in 1991, he was Secretary LC1 Migera when a dispute arose over the disputed property between the Respondent and the people who were claiming interest from the late Kasule. PW5 also stated that Mr. Mukasa who was one of the warring parties decided to settle the matter by dividing the disputed land. However, the rest of the claimant never accepted the settlement.

50] Counsel submitted that the Learned Trial Judge properly subjected the whole evidence to exhaustive appraisal and arrived at the correct Decision and requested this Court to dismiss the appeal, uphold the judgment of the lower court and award costs in this court and the lower court to the Respondent.

51] Counsel for the Appellant in a rejoinder submitted that upon finding the agreement dated 15th January 1991 void, the judge relied on evidence which had contradictions such as Erinasani Mulindwa who testified as DW2 claimed that he sat in a dispute between the late Kasule and the Respondent, which was not true because the late Kasule died in the 80's according to the evidence of P.W.3, Alice Namuddu Nalongo at Page 60 lines 25 to 30 of the Record of appeal.

52] Counsel also pointed out that DW3 and DW4's story was a accepted by Court to contradict what was written in the lease offer contrary to Sections 90 and 91 of the Evidence Act. He argued that Mr. Mukasa whom the Respondent claimed sat in a meeting and agreed to divide the land had no power or authority to interfere in the late Kasule's estate without consent of others and without valid letters of administration. He contended that the dispute to the suit land started after the agreement was made in 1991 and not before. He further submitted that the Respondent did not adduce any other evidence to prove interest in the suit land apart from the impugned agreement to show that the land was shared.

53] He then requested this honourable Court to disregard the submissions by Counsel for the Respondent, allow the appeal and award costs of the appeal and in the lower court to the Appellants.

54] **DECISION**

The duty of the first appellate Court is well settled by the Supreme Court in **Henry Kifamunte v Uganda (Supra)** is to re-evaluate the evidence and reconsider the materials before the trial judge.

55] In the judgment of the first appellate Court at page 3, the learned High Court judge held that the learned trial magistrate erred in law and fact when he misdirected himself on the effect of an agreement said to have been obtained under duress. The Learned judge noted that at common law a contract or agreement obtained through use of force, threat of force, undue persuasion is avoidable because there is no consent on the part of the victim/party threatened. On page 4 of the judgment, the learned judge held that;

> ***".....In the instant case the trial magistrate rightly found that there was duress in making the agreement devoid of any legal effect, but he relied on the same contract to decide that the suit land be divided along the lines of what had been in the agreement. That was a very serious contradiction and error."***

56] However, after making such a clear finding, the learned Judge did not give his conclusion or result on ground one though finding as quoted above leads to inference that ground one of the appeal as presented in the first appellate was allowed.

The learned trial Judge proceeded to consider ground two to wit; *"The trial magistrate erred in law and fact when he failed to evaluate evidence regarding the rights of the parties to the suit land thereby coming to a wrong conclusion."*

57] On Page 4 of the judgment, the learned judge noted that there was overwhelming evidence to prove that the land in dispute was owned by both the Respondent and the late Kasule who was the father of the 1st and 2nd Appellants and the 3rd Appellant. The learned judge went on to state as follows;

"..... The four had a dispute over ownership of the same which the local authorities resolved and parcelled between the two equally each getting 40' x 360 ft way back in 1991. I also agree with the Respondent that he built a house on part of the suit land which he lived on but fled during the war of 1980s. The Respondent's evidence was buttressed by that of Erinasani Mulindwa Dw2 who testified that he was one of those, who sat in the dispute between the late Kasule and the Respondent about the suit land whereby the land was divided between the two. Peter Bukenya Dw3 corroborated Mulindwa's story. The next important evidence in favour of the Respondent came from Getrude Birungi Dw4. She testified that the Plot in question belonged to Kasule and the Respondent. That the Respondent built a Muzigo on the same and called her to take care of it during the war. That, the Respondent recognized Kasule's interest on part of the suit land. Interestingly, the Respondent's evidence also finds support from those of the Appellants. For instance, Abubakar Mukasa Pw5 testified inter alia, that in 1991 he was Secretary LC I Migera when a dispute arose over the disputed property between the Respondent and people who were claiming interest from the late Kasule.

That Mr. Mukasa who was one of the warring parties decided to settle the matter by dividing the suit land. However, the rest of the claimants never accepted the settlement. Wasswa Senyange Salim Pw6 testified that his Chairman appointed him together with a one Mukasa Abubaker Pw5 to witness an agreement between Mukasa and the Respondent, which he did. After carefully analyzing the above evidence, it is clear that the land in question was disputed and in one way or the other, the local authorities tried and witnessed its settlement. Furthermore, it is clear on the balance of probabilities, that the land in dispute was shared by the Respondent and the late Kasule getting 40ft × 360 ft. That is possible because the late Kasule died a sudden death and could not have time

to tell his relatives of the above arrangement, By the above analysis this appeal is bound to fail."

58] It is clear from the judgment of the learned Judge that he made an attempt to re-evaluate the evidence presented in the trial court. However I hasten to add that the learned Judge failed to subject all the evidence before him to evaluation as he duty bound to do. The learned Judge only considered the evidence of witnesses and disregarded the documentary evidence that was presented in form of a lease offer form dated 21st September 1984.

59] According to the lease offer form, following an application dated 1st August 1980 by the Late Didas Kasule, Uganda Land Commission under ULC. Min. 8/3/84 (a) (471) of February 1984 offered the Late Didas Kasule a lease of 10 years on terms and conditions set in the lease offer letter/form.

60] A lease is defined by the **Oxford Dictionary of Law, 5th Edition at page 283** as a contract under which an owner of property (the Landlord or lessor) grants another person (the tenant or lessee) exclusive possession of the property for an agreed period, usually (but not necessarily) in return for rent and sometimes for a capital sum known as a premium.

61] The disputed land was acquired from Uganda Land Commission under a lease and this fact was not disputed in the Nakasongola District Land Tribunal or before the Magistrate Court or the first appellate Court. For a party to claim an interest in land under a leasehold tenure, which is premised on a contractual arrangement that party must adduce evidence of how they acquire that interest.

62] In the instant case no evidence was adduced in the trial court to prove how the Respondent acquired interest in the disputed land which was held under a lease from Uganda Land Commission. The First Appellant Court was duty bound to re-evaluate the evidence presented to the trial court to confirm whether there was sufficient evidence to prove that the Respondent held an equitable or legal interest in the lease to warrant the issuance of an order for division of the disputed land as claimed.

63] According to the evidence of the Respondent before the trial court, he acquired the disputed land measuring 80 x 360 feet in 1972 upon allocation by a one Kawesa, the Sub-County Chief of Nabiswera. In 1973 when the Late Kasule came allocation was already over so the Respondent parcelled the disputed land into two and gave 40 x 360 feet of the land to Kasule. The Respondent subsequently moved to Masindi. However, during cross examination the Respondent told court that the reason he was not on the lease offer form was because he gave a portion of the land to Kasule.

64] I have re-evaluated the evidence presented on this issue, and I find the Respondent's explanation as to why his name was not on the lease offer form unfathomable. If indeed Court was to rely on and believe the Respondent's claim, he should have adduced evidence proving the allocation of the land or a separate lease offer form or a lease application letter for his alleged portion (40 x 360 feet) of the land.

65] The Respondent's evidence and claim to the disputed land was hinged on the agreement executed on 15th January 1991 with Mukasa, a son of the Late Didas Kasule which agreement the trial court and the 1st appellant Court found to be null and void because it was executed under duress. Upon the trial court making the said finding, the other evidence of Respondent's claim of interest or ownership of the disputed land rested on testimonies of Erinsani Mulindwa, DW2, Kabanda Sulaman, DW3 who both told court that they were called to settle a dispute concerning land between the Respondent and Mukasa.

66] According to DW2, he could not recall the year when this dispute happened but for DW3 he stated that it was in 1991. DW3 also stated that that he did not know the history of the plots he only witnessed what was agreed upon. Another Witness Bukenya Peter told court that he was part of the Local Council committee that sat to deal with the dispute between the Respondent and Mukasa, the Local Council sat twice and gave the disputing parties a month but before the month lapsed the Respondent and Mukasa made an agreement to share the land. Similar evidence was also given by Abubakar Mukasa, Getrude Birungi and Mukasa John.

67] With all due respect to the learned Judge, there is no way such evidence could prove the Respondent's ownership of a lease over the disputed land. The only thing the evidence adduced could prove is that following the death of the Late Didas Kasule, a dispute arose between the Respondent and the family the Late Kasule on who owned the disputed land.

Section 91 of the Evidence Act Cap 6 provides that;

> ***"When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."***

Section 92 of the Evidence Act;

> ***"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms....."***

68] Consequently, the oral evidence presented in the trial court from the witnesses of the Respondent and Abubakar Mukasa (PW5) could thus not be the basis of disregarding the documentary evidence contained in the lease offer form that the lease over the disputed land was granted to the Late Didas Kasule.

69] It is my considered view that firstly had the 1st appellate Court duly exercised its duty to re-evaluate the evidence and reconsider all the materials before the trial magistrate as required and guided by the Supreme Court in **Henry Kifamunte v Uganda (Supra)** it would not uphold the order of the trial magistrate

to divide the disputed land along the line of what had been decided in the agreement with Mukasa which agreement the trial Court and the 1st appellate Court found to be null and void.

70] Secondly had the 1st appellate Court duly exercised its duty to re-evaluate the evidence and reconsider all the materials before the trial magistrate as required it would have come to a conclusion that the Respondent did not present evidence to the required standard in civil matters of a balance of probabilities to prove that he had a legal or equitable interest in the disputed land that would entitle him to have the land divided into two equal portions of 40 x 360 feet.

71] Owing to the above, it is my considered view that the first appellate Court failed in its duty to re-evaluate the evidence as required and this Court is duty bound to re-evaluate the evidence as the 1st Appellate Court would have done. Following the re-evaluation of the evidence conducted above, it is my finding that;

a) The agreement between Mukasa and the Respondent was executed under duress as held by the trial court and the 1st Appellate Court; and

b) The Respondent did not adduce evidence to the required standard of a balance of probabilities to prove that he had a legal or equitable interest in the lease of the disputed land.

72] This appeal therefore succeeds in favour of the Appellants. The judgment and orders of the High Court and Magistrate Grade One, Nakasongola are hereby set aside and substituted with the following **orders;**

1. The disputed land measuring 80 x 360 feet situated in Migera belongs to the Estate of the Late Didas Mukasa
2. A permanent injunction is hereby issued restraining the Respondent from interfering with the Appellants' quiet enjoyment and possession of the suit land
3. The costs of this appeal, in the High Court and the Chief Magistrate's Court of Nakasongola are awarded to the Appellants.

Dated at Kampala this 05th day of June 2024

Christopher Gashirabake
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL No. 139 OF 2014

(Arising from High Court Civil Appeal No. 31 of 2008)

(*CORAM: MUZAMIRU M. KIBEEDI, C. GASHIRABAKE & O.J. KIHIKA,JJA)*

1. BAGULA JOSEPH
2. KATO ROBERT :::::::::::::::::::::::::::: **APPELLANTS**
3. NALONGO KASULE

VERSUS

LUBEGA GEORGE WILLIAM :::::::::::::::::::::::::::: **RESPONDENT**

(Appeal from the decision of the High Court of Uganda at Kampala (Land Division) before Hon. Justice Rubby Opio Aweri dated 28th June 2011 in High Court Civil Appeal No. 31 of 2008)

JUDGMENT OF OSCAR JOHN KIHIKA, JA

I have had the benefit of reading in draft the judgment of my learned brother Hon. Justice Christohper Gashirabake, JA. I agree with the reasoning and the proposed orders. I have nothing useful to add.

The appeal is allowed in the terms set out in the judgment of Hon. Justice Christohper Gashirabake, JA.

Dated at Kampala this 05th day of June 2024

OSCAR JOHN KIHIKA
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Muzamiru M. Kibeedi, Christopher Gashirabake & Oscar John Kihika, JJA]

CIVIL APPEAL No. 139 OF 2014

1. **BAGULA JOSEPH**
2. **KATO ROBERT**
3. **NALONGO KASULE** ::: **APPELLANTS**

VERSUS

LUBEGA GEORGE WILLIAM ::: **RESPONDENT**

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

(Appeal from the decision of Hon. Justice Rubby Opio Aweri dated 28th June, 2011 in High Court Civil Appeal No. 31 of 2008 of the High Court of Uganda at Kampala (Land Division)

I have had the advantage of reading in draft the judgment prepared by my Learned brother, Hon. Justice Christopher Gashirabake, JA. I agree with the reasoning and orders proposed.

As Hon. Justice Oscar John Kihika, JA likewise agrees, the unanimous decision of the court is that the appeal is allowed in the terms set out in the judgment of Hon. Justice Christopher Gashirabake, JA.

It is so ordered.

Dated at Kampala this 05th day of June 2024

Muzamiru Kibeedi

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL