THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 0041 OF 2008

KATAKUWANGE MUKOBA FRED:::::::::::::::::::::::::::::::: APPELLANT

VERSUS

MULWANYI MICHAEL:: RESPONDENT

[Appeal from the Decision of Her Worship Nasambu Esther (G1) dated 18th April 2008 in Jinja C/S No 002 of 2005]

BEFORE: THE HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This is an appeal against the judgment and orders of Ms. Nasambu Esther sitting as the GI magistrate at Jinja in which she declared that the land in dispute belonged to the defendant (now respondent). She further ordered that the plaintiff (now the appellant) vacates the land and that he pays special and general damages to the defendant, as well as the costs of the suit.

The plaintiff sued the defendant in the Chief Magistrates Court at Jinja. He claimed that in 1995, he purchased from the defendant a piece of land located at Mutai Central Zone LCI, Kagoma Parish, Buwenge sub-county in Jinja District. That the land which was held under customary law measured 70ft in width by 90ft in length. The plaintiff claimed that he paid the whole of the purchase price of shs 800,000/= to the defendant and that after he purchased the land he developed it by constructing a maize mill on it. That in 1996 he registered both the land and the factory on the roll of the Uganda Small Scale Industries Association and went on to register the factory as is required by the Factories Act.

The plaintiff further claimed that in 1998 he executed a written agreement with the defendant in respect of the land but it was misplaced when he was away on duty in Kapchorwa. Further that after

he bought the land in dispute, he bought 2 other pieces of land adjacent to it so as to enlarge his land holding in the same area. He complained that sometime in 2000, the defendant began to build a permanent dwelling house on the land and claiming that the land and all developments on it belonged to him. The plaintiff then filed this suit against him for trespassing on his land.

The defendant denied that he sold land to the plaintiff. He claimed he was in occupation of the land having bought it from one Bulukani (Bruhan) Waiswa in 1989. Further that the plaintiff came onto the land after his wife, the defendant's sister, requested the plaintiff to loan them a piece of land to construct a factory. That he allowed the plaintiff and his wife to build their factory on his land on condition that they would later buy their own land and transfer the factory to it. The defendant raised a counterclaim in which he complained that after he built the factory, the plaintiff laid false claims to his land and refused to vacate it when he requested him to do so. He therefore prayed that the plaintiff's suit be dismissed and that a declaration be made that he is the owner of the land. He also prayed that the plaintiff pays him special and general damages, as well as the costs of the counterclaim.

The trial magistrate found in favour of the defendant on his counterclaim, dismissed the plaintiff's suit and made the orders that I have enumerated above. The plaintiff (hereinafter "the appellant") appealed against that decision and raised 4 grounds of appeal as follows: -

1. That the learned trial magistrate erred in law and in fact when she held that the appellant failed to prove that he was a bona fide purchaser (of the suit land) for value despite the overwhelming evidence on the court record, thereby occasioning a miscarriage of justice.

2. The learned trial magistrate erred in law and in fact when she held that the suit land belonged to the respondent.

3. The learned trial magistrate failed to evaluate the evidence before her and arrived at a wrong decision.

4. The learned trial magistrate erred in law and in fact when she failed to find that the respondent had sold the land to the appellant.

The appellant proposed that this court allows the appeal, sets aside the judgment and decree of the trial court and makes the orders that the appellant sought there, with costs both here and in the court below.

Before the appeal was heard, on 20/04/2009 the appellant filed Miscellaneous Application No. 101 of 2009 in which he sought leave to adduce additional documentary evidence in the appeal. The evidence that he sought to adduce comprised of 6 documents that he claimed to have annexed to his statement of claim in the lower court but which were not admitted in evidence. As a result of that application on 31/08/09 I allowed in evidence a certificate of registration of a factory dated 13/09/1996 (**Exh.AA1**); a memorandum acknowledging payment of membership fees to the Small Scale Industries Association dated 8/09/1996 (**Exh.AA2**) and a membership application form to the same association dated 14/03/1996 (**Exh.AA3**). Counsel for the respondent was allowed to cross-examine the appellant about the documents after they were admitted in evidence.

Having admitted the said documents in evidence, I ordered the advocates to file written arguments in the appeal. The appellant's advocates then filed written submissions on the 15/09/2009 while the respondent's advocate filed a reply thereto on 16/11/2009. Counsel for the appellant filed no rejoinder.

In her submissions, Ms. Mildred Nassiwa addressed grounds 1 and 4 of the appeal together and grounds 2 and 3 separately. Grounds 1 and 4 were complaints about the trial magistrate's finding that the respondent did not sell the land in dispute to the appellant and that the appellant was not a bona fide purchaser thereof. In that regard Ms. Nassiwa submitted that the testimonies of the appellant (PW1) and his wife Ruth Yogera (PW2) proved that by an oral agreement made in 1995, the respondent sold the land in dispute to the appellant at a price of shs 800,000/=. Further that the appellant took possession of the same and constructed a permanent structure thereon to house a maize mill. Further that the testimonies of the same witnesses proved that the appellant purchased two more pieces of land adjacent to the land in dispute.

In support of her submissions, Ms Nassiwa relied on the decision of the Court of Appeal in **Wilberforce John v. Yowana Tinkasimire CACA No. 32 of 1998** where it was held that when a purchaser of land either by oral or written agreement takes possession of it with the consent of the vendor, the property in the land passes to the purchaser and the vendor cannot thereafter deny the

purchaser's title to it. She went on to draw court's attention to the doctrine *'qui quid plantatur solo, solo cedet'*, that what is attached to the soil belongs to the soil. She contended that the respondent who allowed the appellant to build a permanent structure on the land after he bought it could not turn round and claim he did not sell it to him.

Ms. Nassiwa also relied on the decision of Berko, J. (as he then was) **In the Matter of Alexander J. Okello, H.C.C.A. No. 8 of 1995,** where he ruled that it is a principle of justice and equity that when a man has by his words and conduct led another to believe that he may safely act on the faith of them and the other does act on them, he will not be allowed to go back on what he has done when it would be unjust and inequitable for him to do so. She went on to draw court's attention to the decision in **Bank of Uganda v. Fred William Masaba & 5 Others, C/A Civil Appeal No. 23 of 1998** where it was held that where a party makes a definite offer to another and that other person accepts it, there is a binding contract.

Ms Nassiwa then submitted that since the appellant was in actual possession of the land in dispute for 10 years between 1995 and 2005, the respondent should not have built a permanent dwelling house thereon and started claiming the maize mill as his own. Further that the appellant's occupation of the land in dispute was not temporary because he built a maize mill on it and registered it vide Exhibits **AA1** and **AA2**. That the respondent was fully aware of this because he signed **Exh.AA2** as one of the appellant's referees. She finally submitted that the additional evidence (Exhibits **AA1** and **AA2**) proved that the respondent acquiesced in appellant's claim that he was the lawful owner of the land in dispute.

With regard to ground 2 of the appeal, Ms. Nassiwa submitted that the trial magistrate erred when she relied on a sale agreement between Bruhan Waiswa and the respondent (**Exh.D1(a)**) to come to the finding that the respondent was the lawful owner of the land. She argued that the appellant did not deny the fact that the respondent bought the land in 1989 as stated in that agreement, but the appellant proved that he subsequently purchased it from him. That in view of the evidence adduced by the appellant, the trial magistrate ought to have found that the respondent sold part of his land (the portion on which the maize mill stood) to the appellant. That as a result, the trial magistrate erroneously found in favour of the respondent on the counterclaim.

Turning to ground 3 which was to do with the evaluation of evidence generally, Ms. Nassiwa relied on her submissions on grounds 1, 2 and 4. She further argued that though she stated in her judgment that she had reviewed the laws relevant to the facts before her, the trial magistrate did not do so. She contended that the trial magistrate wrongly accepted the evidence that the appellant took the respondent's land by force or coercion when he threatened him with a pistol and his police uniform because the respondent neither pled those allegations in his WSD nor did he do so in his counterclaim. She further contended that the respondent's allegation that he went to Kigali in 1999 and returned in 2003 only to find the appellant on the land should not have swayed the decision in his favour because by 1999 the appellant had already established the maize mill on the land. He had also registered it as required by law and installed 3 phase electricity supply which was not originally on the land. Ms. Nassiwa then concluded that the evidence adduced by the appellant proved that he purchased the land and was not on it on humanitarian grounds.

In reply, Mr. Kugumisiriza for the respondent submitted that the appellant could not have bought the land because there was no written agreement to prove the sale. Further that the testimony that an agreement that was signed between the appellant and the respondent's father got lost in an attack by cattle rustlers on the police at Kapchorwa was neither pleaded nor proved. In his view, this proved that the appellant was dishonest and his testimony that the agreement got lost was merely an afterthought.

Mr. Kugumisiriza urged me to uphold the decision of the trial magistrate because in his opinion she properly applied customary law in coming to her finding that a sibling could lawfully loan a piece of land to another. He submitted that the transaction between the respondent and the appellant was a customary bailment where the respondent bailed his land to the appellant and his wife. He attempted to distinguish the decision in **Wilberforce John v. Yowana Tinkasimire** (supra) from the instant case by stating that the principles therein applied only upon proof of a valid agreement, which was not done in this case.

Mr. Kugumisiriza also challenged the application of the principle of estoppel to this case for the reasons stated above. He urged me to disregard the additional evidence in **Exhibits AA1** and **AA2** because the 2 only proved that there was a factory on the land but not ownership of the land. He said that the respondent's acquiescence in the appellant's ownership of the land in **Exh.AA2** was necessary to facilitate the appellant to register the factory under the Factories Act and to get

membership to the Small Scale Industries Association but it did not mean the respondent acquiesced in the appellant's ownership of the land.

Turning to ground 2, Mr. Kugumikiriza submitted that the respondent proved that he held a valid sale agreement in respect of the land which was executed in 1989. He further submitted that the appellant's construction of permanent structures on the land and his long period of occupation thereof could not have passed title in the land to him. He concluded that the appellant only began to lay false claims to the land because the respondent prevented him from using it as security to obtain a loan.

With regard to ground 3 of the appeal, Mr. Kugumikiriza relied on his submissions above as disposing of the complaint that the trial magistrate failed to properly evaluate the evidence on the record. He contended that the respondent had no obligation to plead his allegations that the appellant threatened him with a gun while in police uniform because the alleged acts were of a criminal nature. He relied on s.49 of the Evidence Act for his submission that this part of the respondent's testimony was *res gestae* but not a material fact to be pleaded. He concluded that the trial magistrate properly evaluated the evidence and came to a correct finding that the respondent was the lawful owner of the land in dispute, and her decision should be upheld.

The duty of the first appellate court is to rehear the case on appeal by reconsidering all the evidence before the trial court and to come up with its own decision. The parties are entitled to obtain from the appellate court its own decision on issues of fact as well as of law [**Father Narsensio Begumisa & Others v. Eric Tibekinga, S/C Civil Appeal No. 17 of 2002 (unreported)**]. I will therefore re-evaluate the evidence on the record taking into consideration the complaints raised by the appellant in the grounds of appeal.

Grounds 1 & 4

These two grounds were really one and the same complaint, i.e. that trial magistrate erred both in law and fact when she found that the appellant did not purchase the piece of land in dispute from the respondent; or that the appellant was not a bona fide purchaser thereof. In that regard, it is important to lay down the basic principles of contracts for the sale of land. According to *Megarry's Manual of the Law of Real Property (4th Edition, by P.V. Baker, pp. 317-319)* a contract to sell or make any other disposition of land is made in the same way as any other contract. As soon as there is an agreement

for valuable consideration between the parties on the essential terms, there is a contract between them; and this is so whether the agreement was reached orally or in writing. The learned author goes on to state that the essential terms that prove the contract are three: i.e. the parties, the property and the consideration. Further that the contract will be unenforceable unless there is either a sufficient memorandum thereof in writing or a sufficient act of part performance.

With regard to the contract in this case, there were contradicting allegations from the parties. While the appellant pled that he bought the land in dispute at shs 800,000/= the respondent pled that he loaned it to the appellant's wife (his sister) at her special request and instance. I now turn to the evidence to determine whether either of these claims was proved.

On his part, the appellant testified that sometime in 1995, he purchased the land in dispute from the respondent at shs 800,000/=. He stated that the respondent had before that approached him frequently (more than 5 times) offering to sell the land to him. He said that he eventually decided to pay him for it and he did so in the presence of his (the appellant's) wife, Ruth Yogera at Naguru Mobile Police Unit. The appellant further stated that it was then agreed that a written agreement would be executed but due to his busy schedule as a police officer in the Uganda Police Force he failed to meet with the respondent to do so. That he eventually executed an agreement in respect of the land with the respondent's father, Amoni Muguli, but Muguli had since died. The appellant who was at the rank of Assistant Superintendent of Police (AIP) at the time of the transaction further testified that in 1999 he was deployed to work in Kapchorwa. And that while he was there, the said agreement got lost in a raid by cattle rustlers on the Police.

The appellant went on and testified that after he paid for it, sometime in 1995 the respondent took him to the land and showed him around it. That at the time the respondent's mother resided in a hut on the same land. He said that the land was already demarcated with *birowa* when they inspected it and he named the occupants of the neighbouring land on all sides of it. The appellant also testified that in the same year, he constructed a permanent commercial building and a pit latrine on the land and he installed a maize mill in the commercial building. He complained that while he was away on duty in Gulu, the respondent evicted his (the respondent's) mother from the hut on the land and began to occupy it with his wife. The appellant said he brought this to the attention of the respondent's parents and they tried to resolve the dispute but they failed to do so till they passed on. That matters came to a head when the respondent began to construct a permanent dwelling house on

the land and to claim that all the developments on the land belonged to him. That it was then that respondent ordered the appellant to leave the land by letter sent to him by his lawyers and dated 28/01/2005 (**Exh.P1**).

The appellant further testified that after he bought the land from the respondent, he bought two other pieces of land adjacent to it to expand his holding. He produced two sale agreements in respect of the purchase (including **Exh.P2**) but the second agreement was not admitted in evidence because it was a Photostat copy. He complained that the respondent stopped him from going on with any further developments on the land though he (the respondent) occupied only part of it where he had constructed a one bed roomed house.

When he was allowed to produce additional evidence on appeal, the appellant testified that he registered the factory under the Factories Act in 1996. He produced a certificate of registration of the factory **Exh.AA1**). He further testified that he registered his business with the Uganda Small Scale Industries Association. He produced an application in that regard and a receipt for membership fees, Exhibits **AA2** and **AA3,** respectively.

The respondent's advocate cross-examined the appellant in great detail. He then stated that he knew about the land before and at the time he bought it there was a small grass thatched hut on it. He denied that his wife ever approached the respondent requesting him to loan them the land for construction of a maize mill. He stated that the purchase price was agreed upon after the respondent showed him the agreement by which he purchased the land from Waiswa which showed him that respondent paid shs 40,000/= for it. That the transaction was concluded in Naguru at the behest of the appellant and there was no document executed because the respondent was the appellant's brother in law. The rest of the cross-examination related to execution of an agreement with the respondent's father and the respondent's claims that all the land, including that which the appellant bought from other persons belonged to him.

Ruth Yogera (PW2) testified that in 1995, the respondent sold a plot of land at Mutai Trading Centre to her husband (the appellant). She confirmed that the purchase price was shs 800,000/= paid in two instalments (i.e. shs 600,000/= and later shs 200,000/=). She also confirmed that the money was paid to the respondent at Naguru Barracks in her presence. Further that the respondent showed the piece of land to the appellant in her presence and after that the appellant built a commercial building on it.

She also confirmed that appellant installed a maize mill in the commercial building. She clarified that the land was not demarcated for the appellant but he was shown the boundaries of the piece he purchased. Further that the dispute arose when the respondent began to build a house on the rest of his plot which he had reserved for himself and not sold to the appellant. That she tried to reconcile the two but both resisted her efforts.

When she was cross-examined, PW2 insisted that the plot on which the maize mill stood was sold to the appellant and not given gratuitously. That she was present when shs 600,000/= was paid to the respondent. She further testified that there was no written agreement because the appellant and the respondent were intimate as in-laws. That the purchase price was paid before the respondent took them to inspect the land. She confirmed that after he bought land from her brother the appellant bought two other pieces of land in the vicinity to expand his holding. She insisted that the land was not temporarily loaned to the appellant but he bought it.

It was clear to me from the testimonies of these two witnesses that there was sale of a specific piece of land at Mutai Trading Centre and the neighbours were Kitamu, Kwatumu, Mutai Clinic, Kezironi and Muledhu. That the purchase price for the land was shs 800,000/= and it was paid to the respondent. Further that the appellant took possession of the land in the same year (1995) and built a permanent commercial building thereon and installed a maize mill in it. Also that after he bought and built on the land, he sought to expand it by buying more land in the area. The testimony of Emmanuel Mwase (PW3) proved that at the time he sued the respondent, the appellant was in possession of the land. Also that when he took possession he bought more land in the area. The appellant's testimony also proved that in order to comply with the law he registered the maize mill under the Factories Act. Also that he registered the business with the Small Scale Industries Association in order to facilitate him to access loans and equipment. I therefore find that the contract for the sale of land between the appellant and the respondent was proved.

That being the evidence adduced by the appellant, I could not agree with Mr. Kugumikiriza's submission and the finding of the trial magistrate that there had to be a written contract in order to prove the contract. I say so because the law in Uganda is similar to that in the United Kingdom and Wales. In the often cited case of **John Katarikawe v. William Katwiremu & Onesiziforo Zikampata [1977] HCB 210**, it was held that a buyer on an oral contract for the sale of land is in the same position as a buyer on a written contract and both are entitled to sue for damages and specific

performance, in case of a breach. But a buyer on an oral contract is not entitled to specific performance unless he has performed some effective act of part performance such as taking possession of the land. The same was held in the case of **Wilberforce John v. Yowana Tinkasimire** which was cited by Ms. Nassiwa. In the instant case, the buyer not only took possession and built a permanent structure on the land almost immediately after the purchase, but he went ahead to buy more land in the area. The appellant was therefore entitled to specific performance of the contract by the respondent.

Turning to the evidence adduced by the respondent, he denied that he sold land to the appellant though he admitted that the maize mill and a pit latrine on the land belonged to the appellant and his wife. He further testified that he bought the land in dispute in 1989 from one Bulukani (Bruhan) Waiswa. He produced an agreement of sale (**Exh.D1**) to that effect. He went on to testify that in 1995 his sister (PW2) asked him to loan them part of the land so that she and her husband could build a maize mill. That he agreed on condition that it would be a temporary arrangement. He further testified that he allowed the two to build and start a maize mill on condition that when they bought their own land they would transfer the mill to it.

The respondent further testified that after the appellant bought land in the area he asked his sister Yogera why they did not transfer the maize mill to it but she informed him that the appellant refused to do so. The respondent went on to say that after this, the appellant began to visit the land in his police uniform with a pistol to threaten him. He further testified that in 1999 he went away to Rwanda but when he returned in 2003 he found that the appellant had turned the vent of his maize mill onto his kitchen. That the mill used to pollute his wife's cooking but when he complained, the appellant responded by bringing people from the bank to inspect the land. He said that his neighbours refused to sign any documents to support the appellant's claims of ownership of the land and instead reported to him that the officials from the bank went to inspect the land. He charged that the appellant wanted to obtain a lease in respect of the land and that is why he gave him notice to vacate it. That it was then that the appellant sued him claiming he sold him the land. He prayed for an eviction order against the appellant.

When he was cross-examined, the respondent continued to deny that he sold the land to the appellant. He insisted that the appellant went to his land with a pistol and threatened him trying to send him away from the land. Further that when he saw the pistol he felt threatened. He admitted

that he was not present when bank official went to inspect the land but he received information from his wife that appellant gave flour to his neighbours, ostensibly to bribe them.

The respondent did not call any witnesses to support his defence and counterclaim but his advocate claimed that the testimony of Emmanuel Mwase (PW3) supported the respondent's case. He argued so because Mwase stated that he did not know whether the appellant bought the land in dispute or not. Also that Mwase admitted that he wrote the sale agreement upon which the respondent originally bought the land from Bruhan Waiswa. That may be so, but it was never the appellant's case that the respondent never owned the land before he sold it to him. The appellant was well aware of the fact that the respondent bought the land from Waiswa because it was also his testimony that the transaction to sell it to him involved the respondent showing him the agreement with Waiswa, in order for him to determine the price to pay.

Mwase also stated that it was his understanding that the land on which the mill stood belonged to the appellant because he had developments on it which had been on it for 5 years before the suit. Further that the appellant bought two other pieces of land next to it on which he had constructed a bakery. PW3 not only witnessed the agreement between the respondent and Waiswa in 1989, but he was also a witness to the agreement by which the appellant bought an additional piece of land from Fred Mondo in the same area (**Exh. P2**). I therefore find that PW3's testimony confirmed that after he bought the land, the appellant took possession thereof and developed it.

I did not think that the appellant's testimony that he entered into a written agreement with the respondent's father in 1999 had any effect on the testimonies of the appellant and his wife about the oral contract. But I formed the opinion that if it did exist at all, the contract was one that was entered into by the appellant in desperation seeing that the respondent was taking overt steps to renege on the oral agreement with him. I say so because at page 3 of the record the appellant said:

> *"The defendant's mother who was staying on the suit land was kept there but when I was in Gulu on coming back I found out that Mulwanyi (defendant) had chased her and put his wife into the hut originally belonging to my mother in law.*

I complained against Mulwanyi before his father and mother why he brought his wife on my land and the father in law offered to resolve the matter but it was not resolved till his death.

I did not talk to Mulwanyi because he had misappropriated my electricity machines."

I was also not persuaded, as the trial magistrate was, that by testifying that he executed an agreement with the respondent's father, the appellant was a liar. To my mind he was just a desperate man trying to secure land that he had bought. The respondent's father who tried to mediate between them, just as PW2 did was only trying to help him enforce his rights. However, the respondent's father was not the owner of the land in dispute. For that reason, the contract with him, if it did exist at all, was illegal, null and void.

The fact that the appellant bought two more pieces of land next to the land in dispute was very important. It went to prove that he acted upon the contract to purchase the land though it was not evidenced by a written agreement. The nature of the building for the mill, a permanent structure, went to prove that the arrangement was not temporary. Building for a mill is no mean feat; the structure must be able to withstand the vibrations generated for long hours each day by the grinding mill. It is inconceivable that the appellant could have paid money to build such a structure and installed a maize mill only to tear it down after a few short years. The fact that the appellant went on to register the factory and to install three phase electricity supply in the permanent building at his own cost confirmed that the arrangement was not temporary. On his part, the respondent watched all this for 10 years and took no legal action to stop it till 28/05/2005 when his lawyers wrote to the appellant (**Exh.P1**). This too belies his claims that the transaction was a temporary arrangement.

I therefore agree with Ms. Nassiwa's submission that the respondent acted in such a manner as to make the appellant believe that he sold the land to him in good faith. The principle of justice and equity that when a man has by his words and conduct led another to believe that he may safely act on the faith of them and the other does act on them, he will not be allowed to go back on what he has done when it would be unjust and inequitable for him do so, certainly applies to the facts at hand. In conclusion, the trial magistrate erred both in law and fact when she found that the appellant was not a bona fide purchaser of the land in dispute. She also erred both in fact and at law when she ruled

that the respondent did not sell the land to the appellant**.** Grounds 1 and 4 of the appeal therefore succeed.

Ground 2

Ground 2 was a complaint about the trial magistrate's finding that the land (still) belonged to the respondent. To my mind that included her finding that the transaction in issue was a lease under customary law between the respondent and his sister Ruth Yogera. I have already pointed out above that the appellant did not contest the respondent's ownership of the land by virtue of the 1989 agreement between him and Bulukani Waiswa, but the trial magistrate ruled as follows:

> *"The defendant's evidence in court's eyes is more consistent, truthful and he has a sale agreement to prove ownership whereas the plaintiff's evidence raises doubts and may be laced with untruths.*
>
> …
>
> *In African traditional culture a sibling can lease/lend property to another without any written proof and basically this is what the defendant did with his sister Ruth the plaintiff's wife(.) Unknowingly to the defendant the plaintiff used this chance to push the real owner and took over completely. Coupled with the absence of the defendant the plaintiff truly expanded his tentacles. This is an exact replica of the Arab and his camel where the Arab invited the camel to his tent and the camel ended up by kicking him out completely."*

When she made this finding, the trial magistrate allowed herself to be swayed off the real issues at hand. I thought it would have been more pertinent to the whole case for her to consider whether there was sufficient evidence to justify the respondent's claim that he leased/loaned the land in dispute to the appellant and his wife gratuitously, and the law in that regard.

The respondent was the only person who testified about an agreement to lend/lease land to the appellant and his wife. He called no witnesses to support him in this. Although he stated in cross-examination that Ruth Yogera testified in the appellant's favour because she was interested in saving her marriage, I was not convinced by the inference that Yogera was a witness who testified with the intention of satisfying her own purposes. Though she was the appellant's wife, her testimony carried equal weight to his. I say so because in **Watete v. Uganda [2002] 2 EA 559**, the Supreme Court had

occasion to discuss the weight to be placed on the testimony of a witness who has a *"purpose of his own to serve."* The court came to the conclusion that there is no legal requirement to treat a witness who has a purpose of his own to serve in a special way, though that purpose may be taken into consideration when assessing the witness's credibility.

Although I did not have the opportunity of observing her testify, which the trial magistrate had, I had no reservations in believing Yogera's testimony. Her testimony fully corroborated that of the appellant and remained important evidence that went to prove the contract for the sale and purchase of land between the two parties and what transpired after the purchase.

However, there is an important portion of Yogera's testimony that the trial magistrate did not consider at all. At the end of her testimony in- chief Yogera stated as follows:

> *"The cause of action arose in November 2004 when Katakuwange claimed that Mulwanyi was building on the plot he sold to him yet Mulwanyi was building on his reserved plot. Plaintiff claims to have bought that portion but to my knowledge he did not. I tried to reconcile the two but failed as both were resistant. That is all."*

In cross-examination Yogera clarified her testimony when she said that she did not know the size of the land that the appellant bought from the respondent but that it had a maize mill and an empty space beside it. Further that Mulwanyi's house was nearby, behind the maize mill.

I am of the opinion that this piece of evidence required the court to visit the *locus in quo* to establish what was on the ground. I say so because in his testimony, the appellant stated that he purchased land that measured 70ft x 90ft, i.e. 6,300 sq. ft. On the other hand the respondent said that the land that he purchased from Bulukani Waiswa in 1989 measured 56ft x 96ft, i.e. a total of 5,040 sq. ft. This was borne out by the agreements of sale, defendant's Exhibit **1(a)**. In that regard, Ruth Yogera who was present when the appellant bought and inspected the land did not know its size but said it was all that land with a maize mill on it and a space beside it. The appellant had earlier testified that there were *birowa* to show the size of the land. The court therefore ought to have moved to the *locus in quo* in order to establish the actual size of the land in dispute.

Nonetheless, on the basis of the evidence on record, I would hold that the land that the appellant claimed was that piece of land in front of the respondent's house on which he built his commercial building, including the pit latrine. Needless to say, the appellant is also the owner of the whole area of land comprised in the pieces that he bought from Fred Mondo Mataama and Kitawu Ismail. That may explain why the appellant claimed a larger piece of land than that which the respondent purchased from Waiswa and then sold to him.

I thought it important to consider the anomaly that in spite of the body of evidence adduced to prove the sale and subsequent possession and development of the land in dispute by the appellant; the trial magistrate relied on "African traditional culture" or customary law to come to her finding that the respondent leased/lent his land to the appellant and his wife. As a result of that she arrived at the final decision that respondent was still the lawful owner of the land. Though the appellant's counsel did not address me on the court's reliance on customary law, I thought it ought to have been another ground of appeal. I will therefore next address it because it is the duty of this court to revise the decisions of Magistrates Courts under s.83 of the Civil Procedure Act, and correct any errors made therein.

The respondent did not plead customary law in his WSD. However, the appellant stated that the land was held under customary law and that may have induced the trial magistrate to stray into that area. In order to justify the finding that there was a lease under customary law, the court had to draw guidance both from the evidence on the record and the law relating to proof of it. It is pertinent to note that s.46 of the Evidence Act provides for opinions as to existence of right or custom, when relevant. It is there provided that when the court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of that custom or right, of persons who would be likely to know of its existence if it existed, are relevant. The definition of "general custom or right" given under s.46 Evidence Act is that it includes customs or rights common to any considerable class of persons.

In addition, the Land Act defines customary tenure in s.3 thereof as a form of tenure that (among other things) is applicable to a specific area of land and a specific description or class of persons. It is governed by rules generally accepted as binding and authoritative by the class of persons to which it applies and applicable to any persons acquiring land in that area in accordance with those rules. In

Kampala District Land Board & Another v. Venansio Babweyaka & 3 Others, Civil Appeal No. 2 of 2007, the Court of Appeal held:

> *"It is well established that where African customary law is neither well known nor documented, it must be established for the Courts' guidance by the party intending to rely on it. It is also trite law that as a matter of practice and convenience in civil cases relevant customary law, if it is incapable of being judicially noticed, should be proved by evidence of expert opinion adduced by the parties."*

That being the legal position on customary law and its proof, I could not agree with the trial magistrate's decision that what happened in the instant case was a customary lease because there was not an iota of evidence to support the finding as is required by the Evidence Act. Neither did I believe the respondent's testimony about the alleged transaction because the evidence of purchase by the appellant carried more weight than his testimony that he leased the land gratuitously to the appellant and his wife. For the same reasons, I was not persuaded by Mr. Kugumikiriza's submission that what transpired in this case was a customary bailment of the land. I therefore find that the trial magistrate erred both in law and fact when she held that the land in dispute still belonged to the respondent who had leased it to the appellant and his wife. Ground 2 of the appeal therefore also succeeds.

Ground 3

This was a general complaint that the trial magistrate failed to properly evaluate the evidence on the court record and thus came to a wrong decision. While addressing it, Ms. Nassiwa focused on the respondent's testimony by which he suggested that the appellant used duress or undue influence to evict him from the land. She complained about it because based on that part of his testimony the trial magistrate believed that the applicant used "his uniform and pistol plus the pips" to "push out the real owner and take over completely." She also believed that the applicant used the absence of the respondent to "expand his tentacles."

If what he stated in his testimony was indeed the respondent's case then I do agree with Ms. Nassiwa that the manner in which the trial magistrate approached this set of facts had a serious legal flaw. The trial magistrate believed the respondent's testimony so unreservedly without pleadings to introduce it and evidence other than that of the respondent to prove it. This was in spite of the provisions of

Order 7 rule 1 of the Civil Procedure Rules that every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be. Rule 3 of the same Order goes on to provide that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.

In **Bank of Uganda v. Masaba & Others [1999] 1 EA, 2,** the Supreme Court of Uganda held following the decision in **Lubega v Barclays Bank (U) Ltd [1990-1991] 1 EA 294** that the rule in Order 7 rule 3 CPR is mandatory. Further that the failure to observe it is a fundamental error. That being the law on the proof of undue influence and duress, the trial magistrate ought not to have accepted the respondent's evidence about duress and undue influence without pleadings to introduce it because this resulted in denying the appellant the opportunity to respond to it.

It is important to note that the respondent was represented by counsel in the lower court. He therefore cannot claim that he was ignorant of the procedure applied in such matters. However, Mr. Kugumikiriza who represented him both here and in the court below advanced the argument that the trial magistrate was correct when she admitted evidence about duress and undue influence because it bordered on the criminal. I do not agree with his submission. On the contrary, due to the manner in which these facts were introduced into the proceedings, I came to believe that the attempt to infer undue influence against the appellant was in bad faith. It was an afterthought that came to the respondent during the course of his testimony and he testified so in order to bedevil the appellant and make the court sympathise with him (the respondent). He succeeded in his ploy much to the detriment of the appellant.

It is also my opinion that the undue influence alleged would have had no effect on the appellant's case even if it had been properly pleaded. I would still have been more inclined to believe the testimonies of the appellant and his witnesses than that of the respondent. I say so because the alleged undue influence or duress that the respondent testified about was said to have occurred in 1999. That was all of four years after the appellant's purchase of the land from him. I therefore find that the trial magistrate erred in her evaluation of the evidence on that point as well as on the law relating to it, and this contributed to her coming to a wrong decision. Ground 3 of the appeal therefore succeeds.

In conclusion, I hereby set aside the orders of the trial magistrate and they will be substituted with the following declarations and orders:

a) The appellant is the owner of the piece of land on which he constructed a maize mill and pit latrine in front of the respondent's house at Mutai LC1 Village, Kagoma Parish in Buwenge sub-county, Jinja District.

b) The appellant is entitled to quiet possession of the said piece of land and the developments thereon;

c) A permanent injunction shall issue to restrain the respondent, his servants, agents and/or employees, and others deriving title under him from further trespassing on the said land.

d) The respondent shall pay the appellant's costs both here and in the court below.

Irene Mulyagonja Kakooza
JUDGE
23/09/2010