

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KABALE**

**CIVIL APPEAL 020/2005**

**(From Kabale Chief Magistrate's Court Civil Suit NO. 130 of 2003)**

1. BASIMAKI VIAN 1

2. BYAMUGISHA J.BJ .....APPELLANTS

**VERSUS**

TWINOBUSINGYE TEOPISTA .....RESPONDENT

**BEFORE HON.MR. JUSTICE J.W KWESIGA**

**JUDGMENT**

In the original suit the Plaintiff/Respondent sued KUBIRABE VIRARI (her husband), Byamugisha J.B and Basimaki Vian (her brothers-in-law and neighbours). In which she claimed that her husband stealthily sold her (5) five strips of land at Rwesanziro to the said Byamugisha J.B and Basimaki Vian. She claimed that as a result of these transactions she suffered deprivation of use of the land, starvation and mental disturbance. She sought court orders nullifying the sale and restoration of her property plus general damages for the inconveniences and suffering.

The Defendants/Appellants denied liability and at the conclusion of the hearing, the Chief Magistrate decided the Suit in the Respondents favour. The summary of the Judgment was that The Plaintiff/Respondent and first defendant jointly owned the suit land and that the first defendant illegally sold the land which was a family property without the plaintiff/Respondents consent or approval. She nullified the sale and ordered eviction of the second and the third Defendant from the suit land. She awarded the plaintiff general damages of Sh. 1,000,000/= and 600,000/= payable by the second and third respondents respectively plus the judgment date until payment in full. Each party was ordered to bear his or her own costs.

Basimaki Vian and Byamugisha J.B (hereinafter referred to as the first Appellant and the second Appellant respectively) filed this Appeal with 4 ground of Appeal. I will not reproduce these grounds of Appeal which in my view are just one ground of appeal. They have been reduced to one ground in these terms:

*“That the Chief Magistrate erred both in Law and facts when she failed to correctly direct her mind to the Law and evidence and arrived at a wrong conclusion that the Plaintiff had proved her case on the balance of probabilities. ”*

This court being the first appellate court has a duty to and will subject the evidence on record to fresh evaluation and arrive at its conclusion keeping in mind that unlike the trial Magistrate, there is no opportunity to assess the demeanor of the witnesses. See the leading Judgment in PANDYA VS R (1957) EA 336. The Plaintiff testified as PW1 and stated that she wedded the first defendant on 15<sup>th</sup> January, 1977 a fact that is not contested. They were blessed with 8 children but developed marital misunderstandings that led to separation. Without her consent, the first Defendant sold a family piece of land to third Defendant. The first Defendant sold yet another piece of family land to the second Defendant. All in all the first Defendant sold 5 pieces of land, third Defendant sold 5 pieces of land, 3<sup>rd</sup> Defendant bought two pieces and second

Defendant bought one piece. She consented to the sale of first two pieces of land which are not in dispute in this case.

The second Defendant's written statement of Defence states that he purchased the suit piece of land from the first Defendants at Sh. 1,000,000/= pm 20<sup>th</sup> February, 1999. The Agreement was witnessed by eight people (see Annexure W to W.S.D). This piece of land had the following boundaries; on the lower side it borders with the land of Vagina Kanama and V. Basimaki. On the upper side it borders with Steven Batekire. On the left hand side it borders with Tindimukira and V.Kanama on the right hand side. He contended that he was **a bona fide** purchaser and that the plaintiff had a cause of action. Under cross-examination he confirmed that the plaintiff used to cultivate this land before. She was not present when he purchased and she did not consent to the sale. He confirmed he was aware of the dispute between the first defendant and the plaintiff because the first defendant is his brother. He explained that he bought this land because the first defendant badly needed money for medical treatment. The trial Chief Magistrate properly evaluated the above

evidence and found that Byamugisha J.B illegally purchased the family property without the consent of the hold that this transaction violated the provisions of section 39 (1) (a) of The Land Act cap 227 (as amended) which states;

*"No person shall sell, transfer, mortgage .....land on which the person ordinarily resides with his spouse and from which they derive their sustenance, except with prior consent of the spouse."*

In the instant case the plaintiff/Respondent proved that this land was cultivated for sustenance of the family. She had been cultivating this land exclusively. She was not party to the sale and she did not approve or consent to the sale. In the circumstances I find no merit in the complaint against the trial Magistrate's conclusion.

In the final submissions filed by M/s Bitwenda & Co. Advocates it was stated that the second Appellant, Byamugisha J.B died before this Appeal was had and that the said deceased's legal representative had reached an out of court disposal of the deceased's appeal. The memorandum of settlement dated 14<sup>th</sup> October 2006 was tendered and

accepted in these proceedings as exhibit CT.I. The effect of the settlement was that:-

- (i) The Appeal was unconditionally withdrawn.
- (ii) The disputed/suit land was restored to the plaintiff/Respondent.
- (iii) The Respondent forfeited the claims for damages and costs incurred both on appeal and in the lower court.

In view of the above evaluation of evidence against Byamugisha J.B in the original suit and the above memorandum referred to, the decision of the Chief Magistrate against Byamugisha J.B is hereby confirmed in the following terms:-

- (a) That the sale of land between Kubirabe Vitari and Byamugisha J.B was illegal for lack of the seller's spouse's consent and it is hereby set aside and the plaintiff/Respondent is entitled to repossession of this family land.
- (b) By consent of the plaintiff/Respondent and the legal representative of Byamugisha J.B (second respondent) the trial Magistrate's order for Sh.

1,000,000/= as general damages and its accruing interests are hereby set aside.

The first appellant's case is that he bought land which did not belong to the plaintiff/Respondent. That he bought the land from the parents of the Respondent's spouse and that she had no right of claim. It would appear that the circumstances of this transaction is different from that of the second Appellant which, even if there was no amicable settlement of the appeal, was clearly in favour of the Respondent. This being the case, each appellant's case shall be decided on its own circumstances and facts. The Plaintiff case was clearly stated under cross-examination by third Defendant/first Appellant. That this Appellant bought the land which the Respondent's mother-in-law and father -in-law had given her. She was the person cultivating it. That the LC II court and the Gender Officer stopped the sale but the appellant disregarded this and proceeded to purchase the land. DW 3 testified he purchased a small piece of land from first Defendant's mother. That the plaintiff had used it for three (3) years only. Under cross examination he confirmed the plaintiff was his sister-in-law

and that she had left their home seven to ten years before. He confirmed the plaintiff used the land before.

DW4 Bahemwire (80 years) the plaintiff's mother-in-law confirmed she sold two pieces of land to the third Defendant. She confirmed she gave the plaintiff two pieces of land when she got married to her son, the land is at RWAMUGARI. What she sold to DW 3 is a piece at home and another at Rwamugari. That the two pieces she gave to the Plaintiff/Respondent were given to her permanently and different to what she sold to DW 3.

**DW 5 NTUNGWA FABIANO** (75 years) The father to J.B Byamugisha, Kubirabe and an uncle to the 3<sup>rd</sup> Defendant now the Appellant. He confirmed that the piece of land was sold to the 3<sup>rd</sup> Defendant by PW 4 to raise money to look after YAKOBO their son to whom the land belonged and who was mentally ill. Like DW4 he confirmed that the Plaintiff had been allowed to use this land of YAKOBO temporarily. He corroborated DW 4 that the only land given to the plaintiff



permanently as marriage gift are two pieces of land at Rwamugari.

From the above evidence it appears clear from the evidence of Ntungwa Fabiano (DW 5) and his wife DW 4 Bahemwire that it is true that the Plaintiff/Respondent was given two pieces of land as a marriage gift and this land is at Rwamugari. They also confirm that the third Defendant was sold two pieces of land that belonged to their mentally sick son called YAKOBO. DW 4 and DW 5 in my view were the best witnesses to rely on to decide whether or not DW 3 bought land which had been given to the Plaintiff/Respondent as a marriage gift. Their evidence differentiated between the land they gave her which is at Rwamugari which is different from the land they had alienated, as parents, for Yakobo. The test here is that the land was not permanently given to the plaintiff but she was allowed to cultivate it.

The trial Magistrate failed to evaluate this evidence when she based her decision on the findings that because the plaintiff cultivated this land, because DW 4 could not remember the

piece she sold to the third Defendant from the documents presented in court, the fact that she contradicted herself when she said she never gave any land to the Plaintiff for temporary use and yet later stated that the plaintiff was allowed to use Yakobo's land temporarily for about two years, that these were major contradictions for favour of the Plaintiff's case. My assessment is PW 4 is a woman from a rural set-up, illiterate and of very advantaged age who should not be faulted for her loss of memory. She can not be expected to give accurate date evidence. What is important is that she is consistent on the major details that the land in dispute belonged to Yakobo and she sold it to the third Defendant to treat Yakobo who was mentally ill. This is corroborated by her husband PW 5. Both PW 4 and PW 5 confirmed that they gave the Plaintiff two pieces of land as marriage gift. I do not agree with the trial Magistrate's finding that these two witnesses had any major contradictions in their evidence or that they lacked credibility in their testimony on record. I agree with the stated legal position that a gift land is recognised as a form of land alienation under customary per decision in Bulasi Muwerezwa vs Christopher Mpungye (1992)

HCB 185 however the land purchased by DW 3 does not qualify. In the instant case the donors of the alleged marriage gift have clarified that they own different pieces of land and what was given to the Plaintiff are two pieces different to what was sold to the Appellant. They ably described the difference of location. They were honest when they testified that it is true the plaintiff was allowed to cultivate the other sons land for two to three years. It does not matter, in my view, even if it was for a longer period provided it was known that it belonged to YAKOBO a mental patient and as his parents and guardian would not need the consent of the licence who had no crops on the land when the need to sell it arose. In view of the above I find that the trial Magistrate did not exhaustively evaluate the Defence evidence in the favour of the Appellant and she erred to hold that the plaintiff/Respondent had proved her case on the balance of probabilities without giving the evidence of DW4 and DW 5 the weight that it deserved. In the circumstances this appeal shall succeed and all orders made against Basimaki the first appellant are hereby set aside and I make no orders as to costs for or against any of the parties given

that the trial Magistrate ordered that each party bears his/her  
costs

and there was no appeal against that order.

Dated at Kabale this 3<sup>rd</sup> day of August, 2011.

**J.W KWESIGA**

**JUDGE Read in the presence of:**

The Mr. Bakanyebonera Felix for Respondent Respondents  
present.

Mr. Muhangi Justus for Appellant.

Appellant present.

Mr. Turyamubona Court Clerk.