THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

CIVIL APPEAL NO. 0024 OF 2009

ANGUMANIYO ROY :::::::::::::::::::: APPLELLANT

=VERSUS=

EZARU VENNY MAGA ::::::::::::::::::::RESPONDENT

JUDGMENT

BEFORE HON. JUSTICE NYANZI YASIN

Facts giving rise to this appeal can be gathered from the evidence of the witnesses who testified before the trial court.

It seems, after the death of their father, the family of Ms Justina Aliangu (now deceased) distributed the late father's land amongst his (the father's) survivors. Late Justina Aliangu got her part and decided to sell it off.

On 13/august/1996, she sold her land to the appellant Mr. Angumaniyo Roy. An agreement was made to that effect. It is comprised in Exhibit DE1 and DE2. According to the evidence of the appellant, he took possession of the piece of land he purchased, unchallenged on until when he was sued in the lower court on 6th Dec. 2007.

In a contrary story by the respondent who was the plaintiff in the lower court, she claimed to have got the suit land through purchase. She bought from the same person as the respondent did. An agreement was made Exh. PE1. The purchase took place on the 25th September 2000 Exb P.1 just like Exh DE1 related to the same sale by the same seller.

What seems to be the source of the disagreement is that both sales were in respect of the same piece of land by the same vendor to two different purchasers. From evidence on record there was an attempt to explain what happened.

It is said by PW1 that after the first sale to the appellant, he rejected the land he had bought because it had been rumored that the land would be affected by the development of a railway line. That they he asked the seller to find him an alternative piece of land. She did not have one. That forced her step mother PW2 to give her part of her land to be surrender to the appellant.

It is claimed that this was done. It is also claimed by PW2 that the appellant occupied the new area. Evidence at locus also confirmed the appellant's occupation of this area. The appellant himself does not deny the fact of occupation but the allegations of the plaintiffs/respondents case of how he occupied it.

Apparently all the above was unknown to the respondent who after purchase, cleared the land free as she said and occupied it by cultivation. She intended to plant ground nuts but claimed that her prepared land was heaped into potatoes garden by the Appellant. He fenced the land and brought materials on the land. She through the seller late Justina, reported the matter to local council but the appellant ignored it and continued with occupation of the land hence the suit by the respondent in the court below.

After hearing the case of the plaintiffs and defendant and visiting the locus, the trial magistrate entered judgment for the plaintiff. He declared that the suit land belongs to the plaintiff now respondent, granted an order of permanent injunction and awarded costs of the suit to the plaintiff. That decision aggrieved the appellant, hence this appeal.

The memorandum of appeal that was filed in this court on the 13th of May 2010 had four (4) grounds which complained in ground 1, 2 and 3 of wrong evaluation of evidence and ground 4 complained of admission of oral evidence to contradict or vary the terms of a written document.

At the scheduling conference of the appeal before me, both sides agreed that the 4 grounds be turned into issues for consideration by this court. Those two issues as agreed are;-

1) Whether the trial Judge properly evaluated the evidence on the record and reached the right decision.
2) Whether the trial Magistrate properly admitted oral evidence to vary the terms of a written contract of sale agreement.

In this court Mr. Manzi Paul represented the appellant while Ms Daisy Bandaru acted for the respondent. By their own agreement the appeal

proceeded by filing written arguments. They both answered the issues in the order they were framed. That is how this court will answer them.

Issue 1

Whether the trial court properly evaluated the evidence on the record and arrived at the right decision.

As a judge of the High court, in an appeal of first instance my duty is to subject the evidence on record to fresh exhaustive scrutiny and make my own findings and conclusion, **PANDYA =VS= REPUBLIC [1957] EA 336** followed.

In a way this appeal is handled like a retrial where I am not bound to follow the decisions or findings of the trial court on matters of facts. ***SELLE & ANOTHER =VS= ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1968] EA 123*** applied and followed.

The evidence to be evaluated here is two fold. First the evidence contained in the documents tendered in court as exhibits. That is to say exhibits PE1, DE1 and DE2. Secondly the oral evidence adduced by the respective parties with their witnesses.

Mr. Manzi strongly argued that by reason of exhibit DE1 and DE2 the appellant bought the suit land on the 13/Aug/1996 this was supported by the oral evidence of PW1, DW1 and DW2. He reasoned that this purchase was earlier than that of the respondent which took place on the 12/09/2000 when exhibit PE1 was executed between the seller, late Justina Aliango and the respondent in this appeal.

Mr. Manzi argued that there was evidence of possession on the part of his client which evidence would be added to establish ownership the cited ***JOHN KATARI KAWE –VS- WILLIAM KATWIREMU [1971] HCB 187.***
He also argued apparently, that if the property had two purchasers as equity holders his client's equity being earlier in time was and is superior to the respondent's equity. He relied on **Rice Vs Rice** [1854] 2 drew 73, 61 ER 646.

In reply to this issue Daisy Bandaru learned counsel for the respondent disagreed. She relied on evidence of PW2 and DW2 to refute any claims that the suit land belonged to the appellant.
From the on set it is important to single out facts which are not disputed but are very relevant to the issue before me. They facts are:-

1) It is true and not disputed that late Justina is one vendor who sold the suit land.
2) She sold the suit land to both the respondent and appellant.
3) That she first sold the suit land to the appellant under exhibit DE1 and DE2 and later to the respondent under Exh. PE1.

The court now has to decide who is the rightful owner of the land in the above circumstances. I have found reference to the record and review evidence of **PW2** of great relevance to this issue. The court record runs as follows;-
PW2 Mercelina Angiru catholic sworn and states

> ***"I am an adult. I stay in Nsambia. I am a peasant. I know the plaintiff. I also know the defendant. He was the first to buy the land. He bought land from my daughter. She is now dead. She***

was called Justina Aliango. The plaintiff bought the land after the defendant. When the defendant bought the land I was a witness for my late daughter. I also witnessed the agreement of sale between my late daughter with the plaintiff. I know the land I witnessed. This is the same land that the plaintiff also bought. It is the suit-land now. My daughter together with the defendant came to my house and the defendant declined taking or using the land because it was going to be used as a railway path, so the defendant said. The defendant demanded another piece of land.

He was given another piece of land on the upper side thereof. The defendant left or gave possession of his land that is why my daughter sold it to the plaintiff.

The defendant put a foundation to the other land that was exchanged. His foundation is still there. The reason the parties are in court is because of a dispute over this land, that started when the plaintiff wanted to plant ground nuts on her land and the defendant instead heaped potatoes.

The matter was reported to L.Cs. My daughter wanted to refund the defendant's money before the L.Cs which the defendant refused to accept. I can show the demarcations".

Cross examination by defence.

PW2 continues

"The money to be refunded was that the defendant had paid my daughter for the land. We advised the defendant to use the land we gave him on the upper side".

Cross examination by court

PW.2 continues

> ***"I gave part of my land to compensate the defendant for the land he bought from my daughter and had rejected it. The defendant took the land. He cultivated beans, potatoes, maize. He uses it to date. The defendant planted cassava on the land he rejected. "The railway land". He also used the upper land which was given to him so the railway land".***

Counsel Paul Manzi is shown no record to have sought leave to seek clarification from the witness, which leave court granted.

Court: leave granted.

PW2 states further

> ***"I gave this land on the upper side by myself because I did not want my daughter Justina Aliango to suffer"***

The other relevant part of PW2's is the evidence she gave at the locus. At the locus PW2 stated

> **"The suit land was rejected by the defendant. The upper part that is equal to the suit land, was given in alternative to the rejected piece of land".**

In cross by Mr. Manzi PW2 added

> ***"By the time the defendant rejected the suit land, Justina Aliango was still alive. I do not know whether any agreement was made in respect of the upper land. The upper land was mine. I gave it to Justina Aliango. I gave my land to Justina to compensate the defendant who had claimed he did not want the suit land for it was a***

railway reserve. The giving of land to Justine was before elders and LCs. The upper land is the defendant's land. He dug a pit latrine and put a foundation for a house on it".

I have laboured to reproduce the oral account that PW2 gave to the trial court because in my view it contains evidence for both sides if this court and the lower court were to arrive at the right decision.

PW2 as the record shows, remained very consistent in her evidence both in evidence –in- chief and cross examination by both counsel and the court. She told a plain and natural story. She was a truthful witness. She could not invent the story about the railway line if it did not exist. She was never even cross examined on it. If any body the appellant in particular, felt that PW2 was telling a lie was bound to cross-examine on the fact.

In Crim. Appeal 5 of 1990 ***James Sawabin & Fred Musisi –Vs- Uganda*** (unreported) a decision followed in ***SC C.A NO. 4 OF 1999 HABRE INTERNATIONAL LTD –VS- IBRAHIM KASSIM & OTHERS the JC*** in the judgment of ***Karokora JSC*** it was held that

"an omission or negligent to challenge the evidence-in-chief on a material or essential point by cross examination, would lead to the inference that the evidence is accepted subjected to its being assailed as inherently incredible or probably untrue".

The issue whether there was a project of the railway line crossing into people's land was a material point. If untrue or a mere claim to defeat his interest, the appellant would have instructed his counsel to seriously cross

examine PW2 on it. There was no such cross examination instead his own witness DW2 confirmed it when he said in cross examination that;-

> ***"I heard about the passage of the railway line in our area. The railway line was supposed to pass near the suit land".***

I am convinced that the simple and open true story is as told by PW2, fully explained how one piece of land was sold to two purchasers by the same vendor.

However before I finally conclude this issue, I have to review the appellant's evidence. It seems that the appellant claims to be the true owner of two pieces of land. One the land that is contested which is referred to as the suit land and secondly, the land which is not contested. If a logical explanation is given, it is not difficult to conclude that the appellant owns both plots.
PW1 gave evidence that in effect took away the appellant's lower plot. PW2 added and explained that the appellant only got the upper plot by way of compensation for the land he had rejected.
It is surprising that when it came to his chance to stand in the witness box, the appellant never explained how he got the upper plot at all. Not even in pleadings does he claim to be having two (2) plots and indicate how he got them both.

He described the borders of the lower land (suit land) as follows in his evidence-in-chief.

"It is approximately 30* 40 meters. The suit land has bounders. The lower side is Bethany road, the upper one has Mr. Okello who built a hut. The northern side has a residential house of Richard Edemachu, the southern has Mr. Jurua's residence"

In his description of borders he never mentioned he had a plot above the disputed land. Yet this was the opportunity to tell court that he had a plot above the dispute land which he had acquired in a manner different from and independent of the way PW2 was claiming that he got the above plot. Why was he silent at a very relevant time?

He instead waited until the locus visit by court that is when he said in cross-examination by court that:-

"In 1996 I bought two plots, the suit land and the adjacent plot now owned by Mr. Jurua. Mr. Jurua's plot is the same given as the suit land. The upper plot was given in compensation for the one occupied by Jurua. I gave away the Jurua plot because it was going to be affected by a road as I was told by the Arua Municipal Council Authorities.....there is no agreement for exchange of the two plots it was just implied".

It is a matter he had to plead in the defence. Why did the appellant wait until when he was cross examined by court to explain how he owned a second plot? Yet this matter was raised the evidence of PW2. He needed to contract PW2's claims that the plot was given to him after he rejected the first one he bought. He did not. Be that as it were, even when he explained a lot of gaps were left in his explanation. He does not tell court

who gave him the land in compensation when was the land given to him. And why is Jurua able to use it while he could not, at those instances was it that he compensated.

Unfortunately even if he had filled those gaps still his evidence given at locus for the first time would not help his case.

In **YASERI WAIBI –VS- EDISA LUJI BYANDALA [1982] HCB** Manyindo J (as he then was) held that the practice of visiting the locus in quo is for checking on evidence given by the witnesses in court and not to fill gaps.

While **FERNADES –VS- NORANHA [1969] EA 506** and **JW ONONGE –VS- OKALANG [1986] HCB 63** it was stated among others that the purpose of visiting the locus in quo is for each party to clarify on what was testified in court room regarding such particulars that may include boundary and physical features. Going by the above decided authority the appellant had no room to bring fresh evidence to support his claim even if such evidence really existed. In the present case I find it to have been an afterthought which was in the first place not true and secondly brought out of procedure even if it were to be true which is not.

I have additionally studied the sketch map drawn by the learned trial magistrate, it clearly shows the suit land. The development the appellant claim to be his like the foundation and trees are placed within the plot that is said by witnesses to have been given to the appellant including his own witnesses like DW2.

Jurua's land and house are in the side of the suit land and not at the top. I entirely agree with the comments the trial magistrate made because he based them on evidence of parties.

I find Mr. Manzi's complaint that the observations of court were wrong not to be supported by evidence. PW2 who knew this piece of land better then any other witness identified the suit land properly. She referred to the land that was given in replacement as "upper land" which it actually was.
Mr. Manzi's complaint that the comments were not read back to counsel and signed by them is unfortunate. He never made such a request or prayer at the locus yet he was present. He did not raise that complaint in his submission in the court below. I can not entertain here. But even if I were to entertain it, it would not affect or rebut the fact that evidence to support the appellant's claim does not exist. Although Mr. Manzi argued vehemently for the existence of competing equities, I have found none. True there were two equities but the two never overlapped. The second one started after the first had ceased and the land reverted to late Justine who sold it to the appellant. I agree with the authorities Mr. Manzi cited but find them not applicable to the present case.

I finally find that there is ample evidence to show that the appellant rejected the plot he bought in Exh. DE1 and DE2 because it was feared it could be affected by a railway reserve. PW2 gave her daughter the vender, a piece of land which was given to the appellant in compensation. When he accepted it, it freed the first piece sold to him to be free for resale to the respondent. PW2's and DW2's evidence fully support that deduction. For those reasons ground 1, 2 and 3 of the appeal fail and I advice the first issue in the affirmative.

Issue II

Whether oral evidence was properly admitted by the trial court to vary the terms of the written contract of sale agreement.

Mr. Manzi for the appellant submitted that the lower court erred (in law) when it admitted oral evidence of PW2 MARCELLA DHUGIRA which was to the effect that the appellant rejected the suit land and was given another plot of land in exchange. According to the learned counsel that violated S.91 of the Evidence Act. He cited to this court the case of **U.R.A –Vs- STEPHEN MABOSI S.C Civil Appeal No. 26 of 1995** to support his submission.

On evidence he argued that the respondent who appeared in the lower court as PW1 never denied that she bought the land on 25th September 2000 and she did not challenge the appellant's earlier agreement dated 13/08/1996. He concluded by praying that the appeal be allowed in that regard.

In reply learned counsel Daisy Bandaru for the respondent argued that the evidence of PW2 complained of did not in any way challenge or vary the terms of the contract in Exh. DE2. She submitted that PW2 only gave vital evidence that after execution of the agreement in question, a subsequent transaction took place between the parties. On the authority relied on by the appellant she disagreed that it was applicable and in her view it was distinguishable from the present case.

In that the oral evidence complained of in that case attempted to vary the number of items in the secure notice while in the present case the oral

evidence shows that there was a subsequent transaction which rescinded the written agreement. She therefore prayed that ground 4 fails.

In answer to this issue I will consider S.91 and other related sections of the evidence Act, my understanding of the application of **U.R.A –Vs- Stephen Mabosi's case.** However I will start with answering whether the evidence of PW2 varied or did not vary the terms of the written agreement that is to say Exh. DE2 the two advocates do not agree in this point the word to "vary" which is used in S.92 but related to S.91 Evidence Act is defined in OXFORD advanced learners' dictionary 5th edition as follows;-

> **"To be different in size. Volume as strength 3. To make something different by introducing changes".**

Both Exh. DE1 and DE2 stated that the appellant had purchased a particular piece of land from late Justine Aliango Exh. DE2 named the consideration to be shs. 760.000= and stated that interest in that piece of land had been passed from late Justine to the appellant.

Evidence of PW2 was to the effect that the piece of land the appellant bought in Exh. DE1 and DE2 was not the one that is his but a different one was. She well explained why however in my considered view it when I compare the apply the English definition of the words to "vary" as given above, and I compare the contents of exhibit DE1 and DE2 to the statements of oral evidence given by PW2 the natural conclusion I make is that her oral account changed the appellant's terms of the agreement. Actually it was

because the trial magistrate believed the fact that the land changed that he decided the way he did.

I therefore reject the argument advanced by Ms Daisy that PW2's oral evidence did not vary Exh. DE1 and DE2.

I now turn to the consideration of application of S.91 of the evidence Act and the authority of **URA -Vs-Mabosi** (supra) to the present case over the above situation S.91 of the evidence Act provides relevantly that

> **"When terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a document .....no evidence except a mention in S.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 it self or secondary evidence of its contents....."**.

The holding in the case of **URA –Vs- Mabosi** (supra) is more less in the same language as the provision of S.91. It was held by Karokora JSC that;-

> **"When as provided by S.90 (91) of the Evidence Act, the terms of a contract or other disposition of property have been reduced to the form of a document no other evidence is admissible to exclude or and onto what is contained in the document. The document speaks alone and by itself therefore the appellant was estopped from claiming that in fact the goods seized were less then what was recorded in the future notice".**

In that case the appellant had issued a seizure notice against the good of the respondent for non-payment of taxes due. The appellant claimed that the notice issued had more items. Then those actually impounded they wanted to rely on other evidence other than the notice to prove that fact. The trial judge rejected the evidence the revenue authority appealed to the Supreme Court hence the above holding.

It must be noted that in the above case URA itself which was a party to the suit sought to adduce evidence to very the secure notice. The trial judge and the Supreme Court considered S.91 of the Evidence Act alone. In Isolation of the other section simply because that case never called for their consideration.

In the case before me the additional evidence that changed the terms of the written agreement was not given by the appellant but PW2. PW2 was not a party to the suit. She was a mere witness who had seen both the appellant and the respondent buy the same piece of land from her daughter under different circumstances.

In my view section 91 is not absolute. It is qualified by the sections that follow it. I will give an example from the same case when Karokora JSC stated:-

"No amount of oral evidence would change the position since they cannot plead coercion, fraud or illegality in the view of the circumstances prevailing at the secure".

In that statement the learned justice of the Supreme Court appeared to suggest that if fraud, coercion or illegality existed oral evidence would be accepted. That exception is embodied in S.92 (a) of the same Act. S.92 states:-

When the terms of any such contract grant or other disposition of property.....have been proved according to S.91, no evidence of oral agreement or statement shall be admitted as between the parties to any such instrument or their representative in interest for the purpose of contradicting varying adding or subtracting from its terms, but.....

a) Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating hereto such as fraud, intimidation, illegality want of execution, want of capacity in any contracting party went or failure consideration or mistake fact or law.

I have quoted the above section simply to show that the provision of S.91 are not absolute. There are several exceptions to the general rule stated by S.91.

Explanation 3 to the law section shows another area of exception. Explanation (3) provides;-

"The statements, in any document whatsoever, of a fact other then the facts referred to in this section shall not preclude the admission of oral evidence as to the same fact".

Having shown that the provision of section 91 are not absolute even in the statue itself well aware that the judge himself pointed out one in the URA case, I now consider the actually relevant exception to the case. S.99 the marginal note or the hand title of section 99 is stated as below

"Who may give evidence of agreement varying terms of document"

Then the section itself goes on to provide;-

> ***"Persons who are not parties to a document or their representative in interest may give evidence of such facts tending to show a contemporaneous agreement varying the terms of the document".***

In my considered view S.99 of the evidence act squarely applies to this case. In the present case PW2 was not a party to the documents in question Exh. DE1 and DE2. The parties were the appellant and PW2 daughter late Justine. The evidence she gave was to the effect that although Exh. DE1 and DE2 were entered into as valid agreements between the appellant and her daughter, another agreement or understanding was reached between the same parties that varied the terms of the first written agreement. That is how her position is as I said squarely covered by the provision of S.99.

I would in the result find that it is true PW2's oral evidence varied the written agreement between the appellant and late Justine Aliango but the same never offended S.91 of the Evidence Act as it is permissive under S.99 of the same act PW2 having not been a party to the document in question. I

do not agree with however that PW1's evidence was admissible under S.58 of the evidence Act. The above explanation is enough to explain why I reject her agreement ever the less I agree issue No. 2 in the affirmative and accordingly ground No. 4 of the appeal succeeds.

I would in the final result dismiss the appeal and uphold the judgment of the lower court, this appeal is therefore dismissed with costs to the respondent both here and in the court below.

28/03/2011
Daisy Bandaru for the respondent
Respondent is in court.
Appellant in court but without Manzi Paul
Joyce court clerk.

Judgment read in chambers in presence of the above.

NYAZI YASIN
28/03/2011