

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBARARA**  
**HCT-05-CV-CA-0017-2010**  
*(Arising from Land Case – 001/2009 NTU).*

**JOSEPH BYAMUGISHA :::::::::::::::::::: APPELLANT**

**VS**

**1. ATWEBEMBEIRE**  
**2. MRS. BAKEHENA :::::::::::::::::::: RESPONDENTS**

**BEFORE: HON. MR.JUSTICE BASHAIJA K. ANDREW**

**JUDGMENT**

This is an appeal against the judgment/decree of Her Worship Ms. Lillian Bucyana, Magistrate Grade 1 at Ntungamo (hereinafter referred to as the “trial court”).

Joseph Byamugisha (hereinafter referred to as “the Appellant”) instituted a suit in the trial court against Atwebembeire and Mrs. Bakehena (hereinafter referred to as the “1<sup>st</sup> and 2<sup>nd</sup> Respondents” respectively) seeking, *inter alia*, for declaratory orders that the Appellant is the owner of the disputed piece of land (hereinafter referred to as the “suit land”) located in Buhanama, Nyakasinga Cell in the Ntungamo District. He also sought for orders of a permanent injunction to issue against the Respondents to restrain them from using the suit land; eviction, general damages and costs of the suit.

***Background:***

The suit land belonged to the 1<sup>st</sup> Respondent’s father who together with his wife, the 2<sup>nd</sup> Respondent obtained a loan from a one Wilson Mbarebaki (DW3); and pledged the said suit land as security. The 1<sup>st</sup> Respondent’s father passed away before he could repay the loan. When the family of the Respondents attempted to pay off the loan by offering

money, the said Wilson Mbarebaki refused because the terms of the agreement had stipulated payment in form of coffee.

The dispute was resolved by the Mbarara Grade I Magistrate's Court in ***Civil Suit No. 101/1994*** whose judgement is "*Exhibit DI.*" Court ordered the Respondents' family to pay Mbarebaki by way of 2000 Kgs of Coffee. The family paid as ordered and redeemed the security now suit land.

It would appear that before the dispute could be resolved by the Mbarara magistrate's Court in the aforesaid suit, Mbarebaki attempted to sell the suit land to a one Katwiremu, the Appellant's father for a consideration of Shs. 1.8 m/=; who paid a deposit of Shs.50,000/=. However, the transaction was rescinded after the Appellant's father failed to clear the balance of the purchase price. The deposit was refunded and the sale agreement was torn in the presence the LCs of the area.

In meantime, the Respondents took possession of the suit land and started using it after they had redeemed it from Mbarebaki. The Appellant claimed that his father had brought the said land from Mbarebaki and gifted it to him. When he tried to take possession, he was violently resisted by the 1<sup>st</sup> Respondent who chased him away. The Appellant sued the Respondents seeking for orders stated above. The trial court dismissed the suit with costs, hence this appeal.

The Appellant advanced four grounds as follows:

- (i) ***The learned trial Magistrate erred in law and in fact in holding that no clear agreement was duly executed between the Plaintiff's father and DW3.***
- (ii) ***The learned trial Magistrate erred in law and in fact in holding that the Plaintiff's father did not buy the disputed land from DW3.***
- (iii) ***The learned trial Magistrate erred, in law and in fact in holding that DW1 secured land from DW3 by paying the loan his late father had acquired from DW3 by pledging the disputed land as security.***

- (iv) *The learned trial Magistrate, therefore, erred in law and in fact in holding that the disputed and belongs to the 1<sup>st</sup> Defendant and thus dismissing the suit with costs.*

***Principles of the law.***

The duty of this court as the first appellate court is to subject the record to a fresh and exhaustive scrutiny, weighing conflicting evidence and drawing its own inferences and conclusions from it. In doing so, however, the appellate court should bear in mind that it has neither seen nor heard the witnesses and should, therefore, make due allowance in this respect. See *Selle V. Associated Motor Boat Co (1968) EA 123 at P. 126; Banco Arabe Espanol V. Bank of Uganda, SC Civ. Appeal No. 8 of 1998; Kifamunte V. Uganda, SC Crim. Appeal No 10 of 1997; Begumisa V. Tibebaga SC Civ. Appeal No.17 of 2002.*

***Resolution:***

*Ground I.*

***The learned trial Magistrate erred in law and in fact in holding that no clear agreement was duly executed between the Plaintiff's father and DW3.***

Wilson Mbarebaki, testifying as DW3, stated (on page 8 of the proceedings paragraph 2) that the land belongs to the 1<sup>st</sup> Respondent, and that he sold it to him in 2002. DW3 refuted the Appellant's claims that he sold the suit land to the Appellant's father in 2003. DW3 clarified that when the court adjudged the suit land in his favour as against the Respondents' family, they were ordered to pay him by way of 2000 kgs of coffee. They did so and redeemed the suit land and took possession. This is all contained in "Exhibit D3".

DW3 further testified (in paragraph 3 on page 8) that he tried to sell the suit land to the Appellant's father for Shs. 1,800,000/= out of which a deposit of Shs. 50,000/= was made. The sale was however rescinded and the sale agreement torn in the presence of the area LCI Chairperson, and Shs. 50,000/= deposit was refunded.

It is the view of this court that in absence of the evidence of the sale agreement between the Appellant's father and Mbarebaki (DW3); and given that the Respondent's proved that they redeemed the suit land, the trial court cannot be faulted for holding that there was no clear agreement which was executed between the Appellant's father and DW3. The Appellant's father did not buy the suit land, and therefore, could not lawfully gift the same to his son as alleged by the Appellant. As such Ground I of the appeal fails. The same evidence canvassed in Ground 1 covers Ground 2, which also fails for the same reasons.

**Ground 3.**

**The learned trial Magistrate erred, in law and in fact in holding that DW1 secured land from DW3 by paying the loan his late father had acquired from DW3 by pledging the disputed land as security.**

Exhibits "D1" "D2" and "D3" on the trial court's record properly clarify the transaction between Mbarebaki and the 1<sup>st</sup> Respondent, and show how the Respondents' family came to be in possession of the suit land. There is also the uncontroverted evidence that the 1<sup>st</sup> Respondent redeemed the suit land after paying the loan which his late father owed Mbarebaki (DW3). The named Exhibits confirm these particular facts. Accordingly, the trial court was correct in holding that the 1<sup>st</sup> Respondent secured the suit land by paying the loan his late father had obtained. Ground 3 of the appeal fails.

**Ground 4.**

**The learned trial Magistrate, therefore, erred in law and in fact in holding that the disputed and belongs to the 1<sup>st</sup> Defendant and thus dismissing the suit with costs.**

After re-evaluating the evidence afresh, it clearly emerges that the Appellant's father Katwiremu did not buy the suit land, hence could not lawfully own it. DW3 Mbarebaki, who originally owned the suit land, confirmed that the sale transaction between him and Katwiremu was rescinded. It follows that the Appellant could not claim to own the

suit land through his father as a gift. The trial court was justified to find as it did. Ground 4 of the appeal also fails.

The net effect is that the entire appeal fails. It is dismissed with costs on appeal and court below.

**BASHAIJA K. ANDREW**

**J U D G E**

**28/08/2012.**