

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 11 OF 2010

SALONGO LUTWAMA
APPELLANT

VERSUS

EMMANUEL SSEBADUKA & ANOTHER
RESPONDENTS

(Arising from Entebbe Chief Magistrates Court Civil Suit No. 197 of 2008)

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

This is a 1st appeal arising from the judgement and orders of a Grade 1 magistrate at the Chief Magistrates Court of Entebbe in Civil Suit No. 197 of 2008. The appellant, Salongo Lutwama, was a kibanja owner on part of the land comprised in Block 401 at Kisusa Muwanyi, and in possession and occupation of the same. The ownership of this piece of land was disputed, with the respondents maintaining that the appellant had encroached on land that belonged to the estate of a one Joseph Kyakulumbye (deceased), in respect of which they were administrators. The appellant purported to sale the disputed premises to a one David Muhairwe whereupon the respondents sued both of them for a permanent injunction, eviction order, a declaration that the purported sale was null and void and general damages. On 5th February 2010 judgment was delivered in favour of the respondents granting all the remedies sought.

Aggrieved and dissatisfied with the judgment, the appellant lodged the present appeal. At the hearing of the appeal the memorandum of appeal was orally amended and presented three (3) grounds of appeal as follows:

- 1. The trial magistrate erred in law and fact in holding that the appellant sold the disputed part of the kibanja to the 2nd defendant.**
- 2. The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence hence reaching a wrong conclusion.**
- 3. The learned trial magistrate erred in law and fact when she allowed the plaintiffs to amend the plaint contrary to the law.**

Mr. Richard Rubale appeared for the appellant while Ms. Zawedde Lubwama represented the respondent.

On the first ground of appeal, Mr. Rubaale argued that the purported sale of the suit premises to a one David Muhairwe, the 2nd defendant in the suit from which this appeal arises, was not proved by the respondents therefore there was no basis for the trial magistrate's contrary finding. Mr. Rubaale referred this court to sections 101 and 102 of the Evidence Act, as well as the cases of **Sebuliba vs. Cooperative Bank Ltd (1982) HCB 130** and **Miller vs. Minister of Pensions (1947) 2 All ER 372** in support of his contention that the burden of proof in the lower court lay with the respondents and they did not discharge that burden.

With regard to ground 2 of the appeal, Mr. Rubaale contended that although the learned trial magistrate properly identified the issues for determination before her she did not resolve them on the basis of the adduced evidence. Counsel argued that there was no evidence to support the trial magistrate's finding that the appellant had sold any land to his co-defendant; the evidence from the visit to locus was relied upon without having been entered on the court record; the trial magistrate failed to identify an anomaly in the evidence that reflected the alleged co-existence of mailo and kibanja tenures in respect of the same piece of land, which is not legally tenable, and she did not provide reasons for her preference of the respondents' evidence over that of the appellant.

On ground 3, learned counsel argued that the amendment of the plaint changed the cause of action, the subject matter and the parties to the suit. Mr. Rubaale argued that while the ownership of the kibanja and the purported sale thereof were the issues in dispute in the original plaint, the

amended plaintiff introduced the issue of trespass and substituted a one Kenneth Muhwezi for the original co-defendant, David Muhairwe.

Ms Zawedde, on the other hand, supported the findings of the trial magistrate in a different civil suit namely civil suit no. 254 of 2008. Learned counsel made no reference to the proceedings of the suit in issue presently, namely, civil suit 197 of 2008.

I shall address the third ground of appeal forthwith given its procedural connotations.

I have carefully perused the court record. I have not seen any amended plaintiff in respect of civil suit 197 of 2008 from which the present appeal arises nor have I seen any application for amendment of pleadings in relation thereto. What is on record is an amended plaintiff purportedly in respect of civil suit no. 97 of 2008 with Emmanuel Ssebaduka & 2 others versus Salongo Lutwama & Kenneth Muhwezi as parties. However, while the plaintiffs and the first defendant in that case are the same as those in the proceedings from which this appeal originates, the cited second defendant is different and so too is the suit number. It would appear that is the amended plaintiff being referred to by learned counsel for the appellant presently. This court has also seen an application for leave to amend a plaintiff, miscellaneous application no. 21 of 2009 arising from civil suit no. 254 of 2008. Indeed, learned counsel for the respondent makes reference to the same application in her submissions in the present appeal. However, quite clearly, both the amended plaintiff and the cited application for leave to amend the plaintiff relate to a different suit from the one in issue presently.

Interestingly, the parties and cause of action in civil suit 254 of 2008 are identical to the parties in the suit upon which the present appeal is premised. Even more perturbing, the same amended plaintiff attached to miscellaneous application 21 of 2009 and arising from civil suit no. 254 of 2008 then metamorphoses and appears on the court record as being in respect of civil suit 97 of 2008. Finally, the purported judgments in respect of civil suits 97 of 2008 and 197 of 2008 are virtually identical. I must point out that throughout the record the latter citation (civil suit no. 97 of 2008) is a handwritten insertion over a typed citation of civil suit no. 254 of 2008. To compound matters, a handwritten note on the court file dated 22nd September 2011 and seemingly addressed to the Chief Magistrate, which highlights suits akin to the one in issue presently and registered in the court makes no reference to the existence of the purported civil suit no. 97 of

2008 but, rather, indicates that the physical file of civil suit no. 254 of 2008 is missing although the suit was entered in the register. It would appear, therefore, that civil suit 97 of 2008 is a fictitious suit that was superimposed over civil suit 254 of 2008, and is being used interchangeably with civil suit 197 of 2008. This denotes obvious malpractice.

This court might have attempted to make some sense of these anomalies had the record of proceedings in respect of civil suit no. 197 of 2008 been complete. Unfortunately, this is not the case. The record does not include the pleadings or final submissions in respect thereof. Not only is the plaint in contention in the ground of appeal under consideration, it is my considered view that pleadings are a critical component of a record of proceedings under consideration on appeal.

Therefore, it does appear to me that the case management of the dispute upon which the present appeal is premised entailed a high degree of malpractice characterised by a dishonest tampering with court documents and, on a balance of probabilities, raises the inference of a miscarriage of justice. This court takes the view that it is of paramount importance that justice is not only seen to be done but is done with corresponding transparency and honesty.

This court therefore sets aside the judgment and decree of the trial court and hereby makes the following orders:

1. It is ordered, within the provisions of section 80(1)(e) of the CPA and Order 43 rule 21 of the CPR, that a new and expeditious trial in this matter be held by the Chief Magistrates Court of Entebbe.
2. All authentic civil proceedings that are pending before the Chief Magistrates Court of Entebbe in which the same or similar questions of law or fact as those in the new trial arise should be consolidated with the new trial.
3. A copy of this judgment to be served upon the office of the Inspectorate of Courts for due consideration.

I so order.

Monica K. Mugenyi
JUDGE

14th November, 2012