

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF MPIGI AT MPIGI**

**CIVIL APPEAL NO 27 OF 2018**

*(ARISING FROM THE CHIEF MAGISTRATE COURT OF MPIGI AT MPIGI CIVIL  
SUIT NO. 31 OF 2012)*

**1.MUSHOTARA PHILIMON**

**2.NAKAFEERO MARGATET:::::::::::::::::::APPELLANTS**

**VERSUS**

**10 NABAASA ROBINAH:::::::::::::::::::RESPONDENT**

**BEFORE HON: JUSTICE OYUKO ANTHONY OJOK**

**JUDGEMENT**

**BACKGROUND**

The Respondent/Plaintiff instituted a Civil Suit Vide No. 31 of 2012against the Appellants/Defendantsfor declarations that the Respondent/Plaintiff is the rightful owner of the suit property and a declaration that the defendants/Appellants are Trespassers on the suit property. Judgment was entered in favor of the Respondent/Plaintiff.

20 This appeal arises out of the decision and decree by **H/W Bareebe Rosemary Ngabirano** Magistrate (herein after referred to as the trial Court) delivered on 30<sup>th</sup> November, 2015 in which the trial Court entered judgment in favour of the

Respondent/Plaintiff. The Appellants/Defendants being dissatisfied appealed to this Court on the following **grounds**:

- (1) The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record, thereby she held that the Appellants are not the rightful owners of the suit land.
- (2) The Learned Trial Magistrate erred in law and fact when she held that the Appellants are trespassers.

### **Representation**

- 10 During the hearing of this appeal, the Appellant was represented by M/S Kakona & Kwotek Advocates while the Respondent was not represented.

### **Submissions**

Court ordered both parties to file written submissions.

### **APPELLANTS SUBMISSIONS**

My lord this appeal arises from the judgment and decision of the Chief Magistrate then Her Worship Bareeba Mary of Mpigi Magistrate's court wherein the Respondent/Plaintiff sued the Appellants/Defendants for trespass, general damages for trespass to land, a permanent injunction and costs.

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The Appellants being aggrieved by the findings of the lower Court, appealed to this court on two grounds as contained in the memorandum of appeal.

## **Duty of first Appellate Court**

It is the duty of the first Appellate Court to scrutinize and re-evaluate the evidence on record and come to its own decision as provided for under section 80 of the Civil Procedure Act Cap 71. The same position was stated in **Fredrick Zaabwe vs. Orient Bank Ltd Civil Appeal No. 4 of 2006** and similarly in **Kifamunte Henry vs. Uganda SCU Cr. Appeal no. 10 of 1997.**

## **Ground of the appeal.**

1. That the Learned Trial Chief Magistrate erred in law in fact and failed to properly evaluate evidence when she held that the Appellants are not the rightful owners of the suit land.
2. That the trial Chief Magistrate erred in law and fact when she held that the Appellants are trespassers on the suit land.

## **Submissions on grounds of the appeal**

### **Ground one.**

That the learned trial Magistrate erred in law and in fact when she failed to properly evaluate evidence on record, holding that the appellants are not right full owners of the suit land;

- The trial Magistrate failed to properly evaluate evidence on record. The 1<sup>st</sup>Appellant DWI in his testimony on page 7 paragraph 2line 5 of the records of proceedings testified that he settled on the suit land in the year 1983 when the land was bushy and when he discovered the owner as **ASTANSIO TAMALE**, purchased the same from him in the year 2010and purchased the agreement on 25<sup>th</sup> day of January 2010, 16<sup>th</sup> day of January 2010and 16<sup>th</sup> June 2010 jointly

admitted by trial court as DExh (1) (a- c) respectively. That he made part payment as he awaited for certificate of title from him.

- Astansio Tamale in his testimony from pages 17-19 of the records of proceedings as DW4 to whom both Appellants and Respondent clearly refer to as the one who sold them the suit land testified that he knew the 1<sup>st</sup>Appellant and 2<sup>nd</sup>Appellant as husband and wife to whom he sold to his late father's land. On page 18 paragraph 2 line 6-7 of the record of proceedings, he testified that he had never sold the land to any other person other than the 1<sup>st</sup>Appellant and that he had known him since 1998 and further corroborates the Appellant's testimony of part payment. He maintained this testimony under cross examination on page 19 of selling the land measuring 100acres to the Appellants.

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- PansianoSesombwe the area Local Council Chairman I who testifies as DW3 further corroborates the Appellants testimony. On [page 13 paragraph 1 line 4-5 of the records of proceedings, he testified that the owners of the suit land came to his office, brought the 1<sup>st</sup>Appellant as the person who was buying their land and asked him to write the sales agreement. He wrote the sales agreement and when presented with the sales agreement of the land, he vividly identified it as the one he made.

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- **NabaasaRobinah** the respondent herein never produced any witness to corroborate her testimony. On page 5 of the record of proceedings paragraph 1 line 2-3, she gave evidence that her husband bought the land in the year 2009 from Astansio Tamale who testified as DW4 and she only completed the payments in the year 2010. Astansio Tamale signed Transfer Forms and she transferred the land into her names. She failed to tender in Court evidence of

her late husband's purchase agreement to counter the Appellants' purchase agreements. The Respondent in cross examination on page 6 of the record of proceedings paragraph 1 line 1, told the Court that the purchase agreement between her late husband and Tamale got misplaced.

Why did she not produce the one of completing payment by her to Astansio Tamale the vendor or how did she actually pay as the balance?

- My Lord her testimony from the trial record of proceedings sharply contradicted that of Astansio Tamale whom she referred to as the person who sold her the suit land, and to who she later completed the purchase that her late husband had started before his demise. Astansio Tamale (DW4) was unequivocal that he did not sell land to either the Respondent's husband or the Respondent,*(he stated on pages 17-18 of the records of proceedings)*,and throughout his testimony he never sold land to the Respondent. That only got to know the Respondent in September 2011 when he was taken to General Tumwine's place by some gentle man where he found army men with General Tumwine. He was shown the Respondent and told she is the one he sold the land to which was not true. He was seeing the Respondent the first time and never sold her the land. This clearly contradicted the Respondent's testimony of her husband first buying the land in the year 2009 but died before completion of the purchase price and that she completed payment in 2010and signing her Transfer Forms enabling her to transfer the land to her names.
- We submit, the trial, Magistrate while evaluating the evidence as a whole, sharply misdirected by failing to evaluate the evidence of Astansio Tamale (DW4) against the Respondent. She further misdirected herself by interestingly avoiding findings that Astansio Tamale (DW4) evidence corroborated the Appellants' testimony that they purchased the land from him. She all in all misdirected herself on page 3 of the judgment that DW4 was not part to the

case, that he did not challenge the registration anywhere. That the Appellant's exhibits in DExh 1 (a-c )were executed after the Respondent's husband.

- The Respondent purchase agreement or the one she used for completing the transactions were never availed or tendered in Court. The trial Chief Magistrate had no basis reaching such a conclusion that Appellants purchase agreements were after Respondent's husband. DW4'S testimony clearly strengthened the Appellants' case during the trial in the lower Court, which we opine the trial Chief Magistrate chose to ignore. The trial magistrate made her conclusion based on mere assumptions and conjectures leading to erroneous findings. We implore court that on the basis of the foregoing alone, finds that the learned trial Chief Magistrate erred in holdings as she he did.
- It is our further submissions that the learned Chief Magistrate erred in her judgment on page 2 in holding that the respondent's evidence and certificate of title admitted as **PEXh1** and evidence under section 59 of the registration of title Act as conclusive evidence of ownership and concluding that the respondent was undisputable owner of the suit land. Further that the purchase by Appellants was incomplete as they never fully paid the portion of land.

**Was the Appellants' non completion of payment in contention?** It is also our humble view that section 59 of the registration of titles Act was meant to cover dishonest dealings as it was manifestly present on side of the Respondent. She did not come to court with clean hands. (*The maxim he who comes to equity must come with clean hands*). Respondent hands were never clean. Astansio Tamale (DW4) throughout his testimony on the records of proceedings from page 17-21, clearly spelt out the unclean and coercive hand of the respondent. He stated on page 17 of the record of proceedings that he and the Respondent never entered any kind of sale agreement. He never signed any transfer forms to her and that he saw her in 2011 at GeneralTumwines

home after being taken there by a certain gentle man where he was shown a land title, “*they told me to make an agreement and refused.....*”

- This was purely dishonest dealing which the trial Chief Magistrate should not have allowed. **In the case of Molly & 4 orsVs. Engineer Ephraim &Anor SCCA NO 10 of 2018. His Lordship Buteera JSC had this to say about Section59 of the Registration of Titles Act “...it would be dishonest to allow the Respondent to retain ownership of the suit property .....Simply because the suit property was registered in his names. His lordship further held that section 59 of the Registration Titles Act was not intended by the Legislature to cover dishonest dealings**
- My Lord, the respondent' showed no proof of ever purchasing the suit property from Astansio Tamale by not producing any documentary proof in any form of purchase agreements save for stating the she purchased the suit land and Transfer Forms signed for her. The Respondent did not mention any witness who was present while either her late husband was making the first payment of unknown amountand at the time she was paying the last installment. Astansio Tamale in fact denied ever dealing with the Respondent. This evidence of denial was never challenged by the Respondent in the Lower Court. The trial Magistrate plausible ground as the entire evidence on record was against the Respondent. We invite Court to exercise its inherent powers conferred under Section 98 of the Civil Procedure Act and the prayers in the Memorandum of Appeal to recall for certificate of title in the Respondent's hand and order for cancellation at the same.

## Ground 2

**That the trial Chief Magistrate erred in law and fact when she held that the Appellants are trespassers on the suit land.**

The trial Chief Magistrate erred when she found the Appellants to be trespassers on the suit property. The 1<sup>st</sup>Appellant DW1 on page 7 paragraph.... Stated that he came on the suit property in the year 1983 while looking for pasture and settled on thereon. He used the land for cultivation. In 2010, he purchased it from Astansio Tamale. PonsianoSesombwethe area Local Council Chairman I who testified as DW3 further corroborated the fact that the appellants are not trespassers on the suit property. On page 13 of his testimony that was never challenged stated that he had known the 1<sup>st</sup> appellant's father who resided with him on the suit land died in 1990 and was buried  
10 on the land. That he has banana plantation and owns a residence. The respondent on her side testified that the 1<sup>st</sup> appellant trespassed on the land after the demise of her late husband in 2010. She conveniently avoided stating the month, leave alone the year when the Appellants settledon the suit property.

Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. This was the holding in justice **E.M.N LutaayaVs. StirlingCivil Engineering Company SSA NO11 OF 2002.**

20 The 1<sup>st</sup> appellant DW1 in his testimony on page 7 paragraphs stated that he came on the suit property in the year 1983 while looking for the pasture and settled on thereon and later purchased the same in 2010 by making part payment and awaiting completion on issuance of certificate of the titled by Astansio Tamale.

The 2<sup>nd</sup>Appellant testified on page 8 of the records of proceedings that she joined the 1<sup>st</sup>Appellant on the suit property in 1992.

PonsionoSesombwe the area Local Council Chairman I who testified as DW3 on page 13 testified that he has known the 1<sup>st</sup>Appellant for over 30 years and that when he came in the same area he found him already is occupying the suit property. Further that 1<sup>st</sup>Appellant's father died in 1990and was buried on the suit property. All these evidence was never challenged.

From the foregoing, we contented that the Appellants came on land before the Respondent and submit that the trial Chief Magistrate misdirected herself by finding

10 them to be trespassers.

Further the Trial Magistrate failed to satisfactorily establish as a question of fact that the Appellants were trespasser. In the case of **NalongoNalwogaNakazi vs. SalongoKesiBagalaaliwo HCCA NO 084 of 2012** where it was held that nonetheless, the Appellant's alleged trespass into the Respondent's land is a question of fact must be satisfactorily proved. Possession of Certificate of Title is not conclusive prerequisite for one to hold land like in this case the Appellants. The concoction by the Respondent of her late husband initiating the purchase of the suit property and her completing it was never supported by any documentary proof.

We submit that the trial Chief Magistrate erroneously believed the Respondent's version leading to holding that the Appellants are trespassers. We opine that the findings was erroneous

In a nut shell we humbly pray that the appeal be allowed in its entirety with the prayers therein, costs in the Lower Court and the appellate court to the appellants.

## **RESPONDENT'S WRITTEN SUBMISSIONS**

### **Background:**

The Respondent is the Registered Proprietor of Land comprised in Private Mailo Block 80 Plot 8 land at Bujugiro, Ssabaddu in Gomba District measuring 40.47 hectares and was Registered thereon on the 12<sup>th</sup> August, 2011. The Respondent sued the Appellants vide Civil Suit No. 31 of 2012 in the Chief Magistrate's Court at Mpigifor trespass among others. The Appellants stated that they also purchased the suit land from the then Registered Proprietor, Tamale Astansio, on the 25<sup>th</sup> of January, 2010, who promised to hand over the title of the suit land upon the payment of the last installment

- 10 Judgment was entered in favor of the Plaintiff on the 20<sup>th</sup> of November, 2015 and the Appellants being dissatisfied thereby lodged the instant appeal.

Issues:

- 1. That the Learned trial Chief Magistrate erred in law and infact when she failed to properly evaluate the evidence on record holding that the Appellants are not the rightful owners of the suit land.*
- 2. That the Learned trial Chief Magistrate erred in law and in fact when she held that the Appellants are trespassers on the suit land.*
- 3. What remedies are available to the parties?*

Resolution:

- 20 *1. That the Learned trial Chief Magistrate erred in law and infact when she failed to properly evaluate the evidence on record holding that the Appellants are not the rightful owners of the suit land.*

Your Lordship, under Section 59 of the Registration of Titles, Cap 230 and the case of **PATEL versus PATEL [1992-93 ] HCB 137** A certificate of Title is conclusive evidence of ownership . it is , therefore, our submission that the Respondent, in the

absence of fraud specifically pleaded and also proved, is the lawfully recognized Registered Proprietor and anyone else, especially the Appellants that are on the suit land without Respondent's consent are trespassers. The Respondent's title is therefore indefeasible.

The Appellants in their written statement of Defence and in their testimony acknowledge that the respondent purchased the same property as them, the suit land. In **Zimbe versus Kamanza (1952-1956) 7 ULR 68**, Ainley, J held that the first person to register the land takes better rights than a person to whom the land was sold  
10 first, but failed to register it.

Further still, the 1<sup>st</sup> and 2<sup>nd</sup> appellant's testimony is a clear departure from the pleadings when the 1<sup>st</sup> Appellant states that he started staying on the suit land in 1983 and the 2<sup>nd</sup> Appellant in 1992. He 1<sup>st</sup> appellant state that in 1983 "other men" sold the suit land to him and he could only remember the name Nsereko from Ngona. The 1<sup>st</sup> appellant stated that he never knew who the owner of the suit land was and had "just settled on the suit land." This is at page 7 paragraph 2 line 4 of the judgment.

Your Lordship, it is our submission that the Respondent was first to purchase and also first to register herself thereon the certificate of title. The Honorable trial Chief  
20 Magistrate rightly held that the Respondent is the rightful owner of the suit land.

We pray this issue be answered in the negative.

**2 That the Learned trial Chief Magistrate erred in law and in fact when she held that the appellants are trespassers in the suit land.**

I was Respondent's testimony that her husband, Rwakungunika, was purchasing the suit land in 2009 and that she is the one who personally paid the balance in full of shs 20,000,000/= in 2010 to DW4 , who gave her transfer forms and the certificate of title to the suit land. This is clear on page 5 paragraph 1 Line 5 paragraph 2 line 2 of the Judgment . Thereafter the Respondent registered herself thereon the Certificate of Title which is prosecution Exhibit 1 on 12<sup>th</sup> of August, 2011. The 1<sup>st</sup>Appellant confirms that the Respondent's husband (now deceased) bought land that allegedly neighbour's his. This is at page 7 paragraph Line 4 and also by the 2<sup>nd</sup> Appellant at page 8 paragraph 4 line 4 and she confirmed the same in cross examination when she stated that the Respondent's husband bought the land and chased her and the 1<sup>st</sup>Appellant from the suit land at page 9 paragraph 3 line 1 of the judgment.

The Respondent further testified that it was after husband's death that the Appellants trespassed onto the suit land. The Respondent reported the matter to the President's Office then to the trial Court.

The Respondent testified in cross examination that the neighbor's to the suit land are Kayira and Mugisha on the lower side, Plaintiff and Mugulumu on the upper side.

The 1<sup>st</sup>Appellant on the other hand testified that he knows the Respondent as his neighbour and that her husband bought opposite his and 2<sup>nd</sup>Appellant's land. 20 1<sup>st</sup>Appellant stated that he jointly purchased the suit land with the 2<sup>nd</sup>Appellant at shs 15,000,000/= from DW4 and that he only paid shs 4,700,000/= in 2010 and that he was to pay the balance upon delivery of the Certificate of Title by DW4, Tamale Astansio. It is the 1<sup>st</sup>Appellant's evidence that whenever he demanded the Certificate of title from DW4 , he would say that "there is a caveat on it".

In cross examination, 1<sup>st</sup>Appellant testified that he bought the suit land in 2010 when he knew the real owner , DW4 Tamale Atansio, and that apart from the shs 4,700,000/= he has not paid him the balance as DW4 had not given him the Certificate of title.

The 1<sup>st</sup> and 2<sup>nd</sup>Appellant's testimony is a clear departure from the pleadings when the 1<sup>st</sup>Appellant states that he started staying on the suit land in 1983 and the 2<sup>nd</sup> Appellant in1992, The 1<sup>st</sup>Appellant states that in 1983 “other men” sold the suit land to him and he could only remember the name NSEREKO from Ngona. The 10 1<sup>st</sup>Appellant stated that he never knew who the owner of the suit land was and had “just settled on the suit land.” This is at page 7 paragraph 2 line 4 of the Judgment. DW1further testified that he purchased the suit land in 2010.

The 2<sup>nd</sup>Appellant on the other hand stated in contradiction that she first bought the suit land, in 1993 fromMattathen again in 2010 with the 1<sup>st</sup>Appellant from DW4, Tamale Astansio.

These are clear false holds and evident departure from the pleadings that are clear and point at the fact that the Appellants trespassed on the suit land in 2010 and not before as they alleged.

DW3 PonsianoSejombwe, the chairman of Rwanewa village, Gomba District testified 20 that he made the sale agreement but ironically testified that he does not know the owners but that the owners cameand introduced themselves with documents and that he does not remember the owners. DW3 did not bring alongto Court the copy of the sale agreement.

It is DW3's evidence that he has been the Chairman since 2001, and that it was his first time meeting the owners of suit land, at the drafting of the sale agreement in 2010 and the agreement was between DW1 and DW4 . DW3 later contradicts himself when he states that Kiggundu Edward, the Vice Chairman, drafted the agreement. DW3 alleges that DW1 and DW2 were on the suit land as owners for 35 years, this is not pleaded at all.

DW4's testimony, Tamale Astansio, had grave inconsistencies when he said that he has known DW1 since 1998, and that he had known him for 10 years. DW4 gave his evidence on 11<sup>th</sup> November, 2014 and 10 years back makes it 2004. DW4 stated that he sold the said land. He admitted that he has never been on the land and does not know where it is located. He never stated the size of the suit land in the agreements, he purportedly made with the Appellants but said he sold to the Appellants in 2010 and they only paid shs 4,000,000/= out of the total of shs 13,000,000/=. DW4 testified that the land is 100 acres. These are total falsehoods aimed at depriving and misleading this Honorable Court as they are futile after thoughts hatched to defeat the Respondent's title.

From 2010 up to-date, DW4 has never lodged any complaint to Police or Court in regard to the allegations that his Certificate of Titles was taken/stolen. He has never lodged a caveat thereon or applied for Special Certificate of Title.

In his evidence in chief, DW3 stated that DW1 has been on the land for 30 years and later in cross examination changes and states contradictorily that the 1<sup>st</sup> Appellant was on the land for 35 years. DW3 further stated that the Respondent was the owner of the suit land for 35 years and that DW4 was owner prior to the Agreement, and the Appellants were tenants.

This departure from the pleadings is gravely contradictory.

DW3 further displaced his ignorance on the matters before Court when he admitted lack of knowledge of the particulars of the suit land or even the size. His testimony and that of Appellants fell on all fours when they stated that the Respondent's land is separate from the Appellants' land. It is one and the same suit land as pleaded in the plaint and admitted in the written statement of defence.

Your Lordship, it is not true as stated in the written submissions of the Appellants at page 5 at the second line, that there was any evidence adduced in the trial Court that the 1<sup>st</sup>Appellant's father resided with him on the suit land and/or upto his death  
10 in 1990. We pray the same be disregarded and/or expunged from the record.

It is further untrue that the 1<sup>st</sup>Appellant or any other witness gave evidence alleging that the 1<sup>st</sup>Appellant was "awaiting completion of the Certificate of Title by Asatansio Tamale". We pray the same be disregarded and expunged from the record.

It is our submission that the learned trial Chief Magistrate rightly held that the Appellants are trespassers.

We pray that this issue be answered in the negative.

### **3 What remedies are available to the parties.**

We pray that this Honorable Court be pleased to find no merit in the appeal and  
20 dismiss the same with costs to the Respondent.

#### **Resolution by Court.**

#### **Duty of first Appellant Court**

It is the duty of the first Appellate Court, to scrutinize and re-evaluate the evidence on record and come to its own decision as provided for under section 80 of the Civil Procedure Act Cap 71. The same position was stated in **Fredrick Zaabwe vs. Orient Bank Ltd C/A no. 4 of 2006** and similarly in **SanyuLwangaVs Sam Galiwango SCCA NO. 48/1995**

**S.59 of the Registration of Titles Act.** Says that certificate of title is conclusive evidence however there must be no dishonesty in acquisition of such land especially where there is fraud or dishonesty.

- 10 In the case of **Molly &4 others Versus EngineerEphraim Turinawe&Anor SCCA 10/2018**. His Lordship Buteera JSC(As he was then) had this to say about **S .89of the Registration of Titles Act.**

“.....it would be dishonest to allow the Respondent to retain ownership of the suit property simply because the suit property was registered in her names.

**S. 59 Registration of Titles Act** was not intended by the legislature to cover dishonest dealings. The Respondent never produced any documentary proof of buying, or the husband buying the land.

- DW4 Tamale Atanasio denied ever selling the land to the Plaintiff,Page 17 of the record of proceedings lastparagraph. This means that DW4 denied selling land to the  
20 Respondent. Hence Ground one succeeds.

Since ground No 1 succeeds,automatically the Respondent is a trespasser .In the case of **Justine E.M.N LutayaVsStirling CivilEngineering Company SCCA No. 11**

/2002.Trespass was defined to mean unauthorized entry upon land which interferes with another person's lawful possession of the land.

DW4 Astansio Tamale, was very clear in his testimony that he did not know the Respondent nor sell the land to her. Even if so, there was no proof.

Where there is proof of fraud or dishonest dealing, then the Title can be impeached. I therefore find that the Respondent is a trespasser. All the grounds succeed. Costs in both High Court and Lower Court are awarded to the Appellants.

The Certificate of Titles of **Block 80 Plot 8 land at Gomba** in Mengo District measuring 40.47acres is hereby cancelled.

- 10 Right of appeal explained

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**HON JUSTICE OYUKO ANTHONY OJOK**  
**JUDGE**

*Dated this 31<sup>st</sup> day of March 2021*