

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

CIVIL APPEAL NO 47 OF 2018

*(ARISING FROM THE CHIEF MAGISTRATE COURT OF MPIGI AT MPIGI CIVIL
SUIT NO. 111 OF 2014)*

ROSE BAKITE:.....APPELLANT

VERSUS

10 **KIZITO MUBIRU:.....RESPONDENT**

BEFORE HON: JUSTICE OYUKO ANTHONY OJOK

JUDGEMENT

BACK GROUND

The Plaintiff/Appellant Rose Bakitte instituted a Civil Suit Vide No. 111 of 2014 against the Defendant/Respondent Kizito Mubiru, claiming ownership of land, permanent injunction, damages and costs of the suit. The Defendant denies the allegation and he alleges that he acquired the disputed property from Sserwanda Charles and denies having trespassed on the said suit land and prayed for the suit to be
20 dismissed .

This appeal arises out of the judgment by **Her Worship Mbabazi Edith Mary G1** Magistrate Mpigi (herein after referred to as the trial Court) delivered on 31st August,

2018 in which the trial Court entered Judgment in favour of the defendant's case on ground that the Defendant was not a trespasser on the suit property.

Representation

During the hearing of this appeal, the Appellant was represented by M/s Asasira & Co Advocates while the Respondent was represented by M/s Sanywa, Wabwire & Co. Advocates

Submissions

The appellant never filed their written submissions

Respondents Written Submissions.

- 10 The Appellant sued the Respondent in Civil suit No. 111 of 2014 in the Chief Magistrate's Court of Mpigi at Mpigi seeking a declaration that the Appellant is the rightful owner of the suit land at Kabojja, an order that the respondent is a trespasser inter alia. The appellant contended that she acquired the suit property as a gift intervivos from her husband a one Sserwadda Charles and that she had enjoyed quiet enjoyment of her kibanja from the year 2009 until 2014 when the Respondent started laying claims. The respondent contested the Appellant's claim and Judgment was entered in his favor. Being dissatisfied with the learned trial Magistrate's Judgment, the appellant lodged his appeal.

The appellant in her memorandum of appeal raised two grounds of appeal to wit:

- 20 1 *The learned trial Magistrate erred in law and infact when she failed to properly subject the evidence adduced by the appellant/Plaintiff to serious scrutiny and evaluation in reaching her decision when she erroneously found that the Respondent/Defendant is the rightful owner of the suit kibanja.*

The Appellant having not formerly tendered in court the annexures to the witness statements, was therefore precluded from relying on the said annexures as exhibits. The learned trial Magistrate was therefore justified in refusing to consider the said attachments.

We therefore find the Appellant's attack on failure by the learned trial Magistrate to rely on her documents as being unwarranted.

Be that as it may, the evidence which was before the lower court was as below:

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DW1 (Respondent) testified that some time in 2013 PW3 approached him seeking some help to redeem his house located in Ndejje Mirimu zone which he had pledged to a money lender. That PW3 was in the company of the Appellant who at the material time were both staying in the same house which had been mortgaged by a money lender.

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That PW3 asked the Respondent whether he would allow PW3 to sell his motor vehicle Isuzu forward so that he could see the proceeds to redeem his house, and that in return he would buy for the Respondent another truck from Japan. That DW1 accepted and his cares valued at UG shs 15,000,000/= and an agreement was executed to that effect. The said agreement was tendered in Court as defense exhibit No. 6 dated 8/1/2013 which was signed by the Appellant and PW3. That however, PW3 the husband to the Appellant failed to buy for the Respondent a truck as earlier agreed.

That DW1 then arranged a meeting between him and PW3 in the presence of Magala Frank L.C I chairman Mulondo Timothy, Kazibwe Joseph, Rose Bakitte (Appellant) among others, and that in the said meeting PW3 willingly offered the Respondent the suit property in exchange of his motor vehicle and that an agreement was executed to that effect. The said agreement dated 10/6/2014 was admitted in Court as Defence exhibit DEX 4 together with its English translation.

10 DW1 also stated during cross examination that the agreement was made from Sserwada's home in Ndejje and not at police as alleged by PW3 and that PW3 also surrendered photocopy of the original sale agreement which he had used when acquiring the suit property. The said sale agreement dated 27/10/2009, was admitted as Defence exhibit I together with its English translation. The said agreement had PW3 as the only buyer and Emmanuel Sembatya as the seller.

DW1 also tendered in court defence exhibit 2 which was a police reference No. 52 /08/06/2014 by PW3 in which he had reported to Natete Police station, that he had lost his original purchase agreement of 27/10/2009. DW1 also tendered in court DEX 5 on the commits assessment and recommendations from the President's office in which the Appellant had filed a complaint against the Respondent over the suit property, which complaint was dismissed by the
20 Committee which ordered the Appellant to vacate the suit property and deliver vacant possession to the Respondent.

My Lord, it's worth noted that the aforementioned exhibits and DW1 evidence were not challenged by the Appellant. In the case of **URA v Stephen Mabosi SSCA NO. 26/1995** Karokora JSC as then was held that; *"an omission or neglect 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 subject to its being assailed an inherently credible or probably true.”

The Respondents’ evidence was corroborated by the evidence of DW2, DW3 and DW4 who all stated that DW1 had acquired the suit property from PW3 through an agreement that was executed between PW3 and the Respondent after PW3 had failed to buy a motor vehicle for the Respondent as earlier agreed.

10 My Lord PW2 evidence was full of hearsay with regard to ownership of the suit property. PW2 claimed that the suit property belonged to the Appellant however, during cross examination he stated that he had never seen the agreement which PW3 drafted while giving the Appellant the suit property. PW2 was a mere tenant of the Appellant who had no knowledge about ownership of the suit premises as per the evidence on record.

My Lord, the Appellant’s evidence as per the record of proceedings was marred with grave contradictions. The Appellant in her testimony as per the record of proceedings stated that she acquired the suit property from PW3 on 21/10/2009. However, during cross examination, the Appellant stated that the suit land was transferred to her on the same date PW3 had purchased it that is on 27/10/2009.
20 One therefore wonders how PW3 could have given the Appellant the suit property as a gift before he had legally acquired it from Emmanuel Sembatya the original owner. The Appellant’s evidence was merely a pack of lies and the trial Magistrate was justified in rejecting it since it was full of inconsistencies which were so grave and they were not satisfactorily explained by the Appellant.

The Appellant did not call Nantabazi Aidah a wife to PW3 who was present at the time when PW3 was giving the suit land to DW1 so as to corroborate the evidence of the Appellant and PW3. My Lord, the only reasonable presumption s that had the appellant called Nantabazi Aidah a wife to PW3 then the evidence would have been adverse to the Appellant's case.

My Lord, having properly evaluated the aforementioned evidence the Learned trial Magistrate held that the Respondent was the owner of the disputed property and that the Appellant and PW3 were merely trying to defraud the Respondent, and in our view she rightly held so.

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In the premises, it's our humble submission that this Honorable Court be pleased to dismiss this appeal and award costs to the Respondent.

Resolution by Court.

I have carefully perused the submission of the Respondent and looked at the authorities and the evidence on record which am grateful.

I will resolve this appeal as per the grounds outlined in the memorandum of appeal.

20 The gist of this appeal hinges on ownership . According to PW1 Rose Bakitte, in her testimony. she said that the disputed land at Kabojja measures approximately 4ft by 54ft by 35ft by 54ft with all the developments thereon, having acquired the same on the 21st October ,2009. Relied on the plaintiff exhibit No.2 being the agreement between her and her husband. That she later rented the same to PW2 Muwonge and the agreement is dated 1st /May/2013.

This was further confirmed by PW3 meaning that the land belonged to the plaintiff and her children and that whatever was done after words on the said land by PW3

regarding the suit land was illegal even if it was true that the said land was sold to another person, whether DW1 or any other person the sale was illegal.

You cannot transfer what you do not have.DW1 would have investigated to find out who was the owner of the suit land.

I find the evidence of PW1, PW2 and PW3 consistent and unshaken during cross-examination.

Therefore this appeal is allowed with costs and the orders of the trial Magistrate are hereby set aside.

In nut shell

- 10 The Appellant ably proved herself on the balance of probability and the trial Magistrate grossly misdirected herself in coming to her decision with all due respect.

The Appellant is therefore the owner of the suit property and not a trespasser .I accordingly set aside the decision of the lower Court and award costs both in the lower and in the High Court to the Appellant.

The Respondent can recover his money from DW3 using lawful means if he can prove his case .That is a different matter altogether.

Right of appeal

Explained to the parties

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HON: JUSTICE OYUKO ANTHONY OJOK
JUDGE

Dated this 30th day of March 2021

