

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CIVIL APPEAL NO. 105 OF 2019

(Arising from Budaka Land Civil Suit No.008 of 2017)

GODFREY BOB CHULE ::: APPELLANT

VERSUS

PETER GAWAYA ::: RESPONDENT

BEFORE: HON. JUSTICE LUBEGA FAROUQ

JUDGMENT

1. Background

2. The background of this Appeal is that the Plaintiff (herein referred to as the Respondent) sued the Defendant (herein referred to as the Appellant) for a declaration that he is the owner of the suit land, special damages, general damages, mesne profits and costs of the suit.

3. Plaintiff/Respondent's facts

4. The facts were that the Respondent is a son and a sole beneficiary of his mother's land Mugala Clair having purchased the same from Kirya Chule the father of the Appellant in 1982. The Appellant has however unlawfully and unjustifiably without any excuse laid claims over the suit land saying that it belongs to his clan. The Respondent attempted to stop the Appellant through local leaders and the police but he stubbornly refused. He further contended that the suit land is located in Kandeny Petete Bunamuto village which is within the jurisdiction of this court.

5. Defendant/Appellant's facts.

6. The Appellant however in his written statement of defence denied the Respondents claims and contended that the Respondent's mother was a care taker not the owner of the land and that the agreement attached is not genuine.

7. The issues for the trial court's resolution were that;

a. Who owns the suit land



- b. Whether or not the Defendant trespassed on the suit land
- c. What remedies are available to the parties

8. The Respondent/Plaintiff called a total of 5 witnesses whereas the Appellant/Defendant called 6 witnesses to prove his case.
9. The trial magistrate resolved the above issues in favour of the Respondent. The Appellant was dissatisfied with the decision of the trial court hence this Appeal.

10. **Grounds of Appeal**

11. The Appeal is based on the following grounds;

- a. That the learned trial magistrate erred in law and fact when he held that the suit land belongs to the Plaintiff/Respondent hence occasioning a miscarriage of justice
- b. That the learned trial magistrate erred in law and fact when he ignored the evidence of the Appellant that he inherited the suit land from his late father Kirya Chule and believed the uncorroborated evidence of the Plaintiff/Respondent hence occasioning a miscarriage of justice.
- c. That the learned trial magistrate erred in law and fact when he held that the plaintiff purchased the suit land hence occasioning the miscarriage of justice.
- d. That the learned trial magistrate erred in law and fact when he rejected the documentary evidence that the Appellant produced in Court for the acquisition of the said land in question to be put on record as evidence
- e. The learned trial magistrate erred in law and fact when he ignored and rejected the evidence and opinion of the neighbors during locus to reach a decision hence occasioning miscarriage of justice
- f. That the decision of the learned trial magistrate has occasioned miscarriage of justice.

12. He prayed that the Appeal be allowed, set aside the decision of the lower court and costs, enter judgment for the Appellant and costs be in the cause.

13. **Legal Representation**



14. Counsel Ntuyo Shafic represented the Appellant whereas counsel Murana Robert represented the Respondent.

15. **Determination of Court**

16. Submissions by counsel for the Appellant

17. Counsel for the Appellant argued grounds 1, 2, 3, 4, and 5 together.

18. **Grounds 1,2,3,4 and 5:**

Ground No.1:

That the learned trial magistrate erred in law and fact when he held that the suit land belongs to the Plaintiff/Respondent hence occasioning a miscarriage of justice

Ground No.2:

That the learned trial magistrate erred in law and fact when he ignored the evidence of the Appellant that he inherited the suit land from his late father Kirya Chule and believed the uncorroborated evidence of the Plaintiff/Respondent hence occasioning a miscarriage of justice.

GroundNo.3:

That the learned trial magistrate erred in law and fact when he held that the plaintiff purchased the suit land hence occasioning the miscarriage of justice.

Ground No.4:

That the learned trial magistrate erred in law and fact when he rejected the documentary evidence that the Appellant produced in Court for the acquisition of the said land in question to be put on record as evidence

Ground No.5:

The learned trial magistrate erred in law and fact when he ignored and rejected the evidence and opinion of the neighbors during locus to reach a decision hence occasioning miscarriage of justice

19. Counsel for the Appellant submitted that the evidence of PW1, PW2 and PW5 clearly shows that the Plaintiff's institution of the suit was entirely based on the Powers of Attorney which on the closer look at it is

dated 25th of October, 2017 yet the said document was filed in court after the institution of Civil Suit No. 8 of 2017 since summons were issued on 19th of October, 2017.

20. Counsel argued that by the time the Respondent instituted a suit in the lower court, he did not have locus standi to do so which is a violation of Order 7 rule 14(1) of the Civil Procedure Rules since he was suing upon a document and the only document that would have given the Respondent power to institute a suit was the Power of Attorney which was executed after the institution of the suit. Counsel added that the said Power of Attorney are not registered and non-registration of the same affected their validity
21. Counsel submitted that the Respondent's testimony coupled with the testimony of PW2 and PW5 contradict with what the Respondent stated in his plaint under paragraph 4(b) that on 26th December, 2012, the land located at Kadenge Petete Bunamunto village was handed over to him by her mother. Counsel alluded that if the said land was handed over to the Respondent on 26th of December, 2012, why would the Respondent get Powers of Attorney in respect to the same land.
22. Counsel contended that the above was a grave contradiction that goes to the route of the matter. He cited the case of **Oryem David V. Omory Phillip H.C.C.S No. 100 of 2018**, where it was held that its trite law that grave inconsistencies and contradictions unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected
23. Regarding the Agreement counsel submitted that the Respondent said his mother bought the land from Kirya Chule and the transaction was reduced in writing and later said that the agreement was made from the school where their mother was working which implies that the same was not made from the suit land and thus there is a possibility that the subject land was speculative
24. **Ground No. 6:**
That the decision of the learned trial magistrate has occasioned a miscarriage of justice
25. Counsel for the Appellant submitted that the error made by the learned trial magistrate occasioned a miscarriage of justice to the Appellant. He cited the case of **Mutego Muhammadi V. Zubairi Mulyaka**

& Anor HCT-04-CV-CA-0151-2012, where court found that a decision is said to have occasioned a miscarriage of justice if there has been a misdirection by the trial court on matters of facts relating to the evidence tendered or where there has been unfairness in the conduct of the trial resulting to error being made.

26. Counsel contended that the decision by the learned trial magistrate occasioned a miscarriage of justice to the Appellant given that the suit was decreed to the Respondent without having the evidence on the court record evaluated.
27. Submissions by counsel for the Respondent.
28. Counsel for the Respondent first of all challenged the way how ground No. 6 was drafted on the ground that it is too general and difficult to criticize. He cited Order 43 rule 1(2) of the Civil Procedure Rules. and the case of **Celtel Uganda Limited T/Z Xain Uganda V. Karugi Civil Appeal No. 73 of 2013**
29. In his submissions counsel also raised a preliminary objection on the ground that the Appellant's counsel altered the memorandum of appeal and formulated a new ground of appeal and no argument was made in respect to grounds 1, 2, 3, 4, and 5 as earlier stated in the memorandum of appeal. Counsel submitted that the Appellant re-arranged and argued an entirely new ground and grounds 1, 2, 3, 4 and 5 were never argued but instead counsel argued unknown ground that introduced the issue of locus standi of the Respondent in bringing the original suit in the lower court which is not contained in the memorandum of appeal. He cited **Order 43 Rule 2(1) of the Civil Procedure Rules and the case of Ocaya (Administrator of the estate of the late Ochan) Vs. Akena and 3 others Civil Appeal No. 30 of 2015 [2023] UGHCLD**
30. Counsel argued that the ground on locus standi was just smuggled as a new ground and prayed that it be struck out.
31. In the alternative counsel submitted that the Appellants averments in regard to the power of attorney are false. He cited paragraph 4(a) of the plaint where the Respondent clearly indicated that he is a sole beneficiary of his mother's land Magala Clair and paragraph 4(b) of the plaint where he stated that the land located at Kandeny Patete

Bunamunto Village was handed over to the Plaintiff by her mother on 26th day of December, 2012.

32. Counsel argued that from the above, the Respondent sued in his capacity as a beneficiary of his mother's land Mugala Clair according to the document dated 26th of December, 2012 which was attached to the summary of evidence.
33. Regarding halting of the proceedings upon the death of the Respondent, counsel submitted that the trial magistrate was properly guided by the evidence of PW2 at page 5 and PW3 at page 6 of the court proceedings that when the Respondent's mother fell sick, she gave the Respondent to use the suit land.
34. On the issue of using unregistered Powers of Attorney, counsel for the Respondent submitted that counsel is misleading court. The said powers of attorney was registered under registration No. 20022/17 and dated 25th October of 2017.
35. Counsel reiterated his submissions and argued that the Respondent filed the Civil Suit No. 08 of 2017 as a son and sole beneficiary of his mother's land Mugala Clair as the same was under his care, later his mother executed the Powers of Attorney in his favour for the suit land and after the death of Magala Claire the Respondent got letters of administration to administer the same estate and all these were just to re-ensure his interest on the suit land. Counsel contended that there was therefore no contradiction as to *locus standi* of the Respondent as such of nature of death dictated the Respondent's actions.
36. Counsel further submitted that the issue before the trial court was about ownership of the suit land and therefore documents contested would not change that fact.
37. **In rejoinder** Counsel for the Appellant submitted that the Appellant properly drafted ground No. 6 of the appeal.
38. On the issue of introducing a new ground of Appeal, counsel for the Appellant submitted in rejoinder that there is no new ground introduced in their submission save for the fact that grounds 1, 2, 3, 4, and 5 were argued together since they relate to the evaluation of evidence. Counsel argued that the issue of *locus standi* still falls within evaluation of evidence tendered in court since Power of Attorney was one

of the documentary evidence tendered and admitted in the lower court as PE.1 which was the Respondent's basis for instituting the suit and thus challenging it falls within the dockets of ground 1, 2,3,4, & 5 of the memorandum of appeal

39. Without prejudice to the above, counsel contended that the plaint was drafted by the Respondent who had no knowledge about the law.

40. In regards to the Respondent's *locus standi*, counsel submitted that the hand over document is dated 26th December, 2012 and the Power of Attorney is dated 25th October, 2017. He contended that the hand over document was never tendered in the trial court which is an indication that the said document was a concocted one. Counsel further submitted that had the trial magistrate re-evaluated the lower court record of proceedings and the two documents, he would have come to a different conclusion.

41. **Duty of the first Appellate Court**

42. This court takes note that it is the first Appellate Court and therefore it must scrutinize the trial court's evidence and come to its conclusion considering the fact that it did not see the demeanor of the witnesses. In the case of **Fr. M. Begumisa & Ors Vs E. Tibegana SCCA No. 17 of 2003** It was stated that-

"The appellate court has to bear in mind that its duty is to rehear the case and the court must consider the trial before the Judge with such materials as it might have decided to admit. The court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from over ruling it if on full consideration, the court comes to the conclusion that the judgment is wrong"

43. And in **Kifamute Vs Uganda SC Crim. Appeal No. 10/1997** it was held that-

"Failure by the first appellate court to evaluate the material evidence as whole constitutes an error in law".

44. I am going to be guided by the above principles in the resolution of this Appeal.

45. **Analysis of court**

46. I have looked at the court record together with the submissions of both counsel. According to the Appellant's counsel, grounds 1, 2, 3, 4, and 5 all rotate around failure to evaluate the evidence on the court record by the trial court save for ground No.6. From the submissions, the Appellant's main contention is on failure by the trial magistrate to establish that the Respondent had no *locus standi* to institute Land Suit No. 008 of 2017,

47. Counsel for the Respondent however challenged the above argument on the ground that the issue of *locus standi* was not contained in the original memorandum of appeal and for that reason, it was just smuggled and that it should be struck off the court record.

48. **Order 43 rule 2 of the Civil Procedure Rule 71-1** provides that-

"The appellant shall not, except by leave of the court, urge, or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule; except that the High Court shall not rest its decision on any other ground unless the party who may be affected by the decision has had a sufficient opportunity of contesting the case on that ground."(Emphasis added)

49. In the instant case, as guided by the above provision of the law, I will consider the ground as argued by the counsel for the Appellant since the Respondent's counsel sufficiently contested it.

50. The ground raised by counsel for the Appellant is about *locus standi*. Although it is noted by this court that the issue of *locus standi* was never brought to the attention of court in the trial court and also not contained in the memorandum of appeal, it is a pertinent point of law that this court cannot over look.

51. In **Makula International Vs. His Eminence Cardinal Nsubuga Wamala & Another Civil Appeal No. 4 of 1981**, the court cited Belvoir Finance Co. Ltd. V. Harold G. Cole Ltd. (1969) 2 All E.R. 904 at 908, where Donaldson. J. pointed out that- "*illegality, once brought to the*

attention of the court, overrides all questions of pleading, including any admission made thereon.”

52. In the present case, according to the court record, the Respondent instituted Land Suit No. 08 of 2017 on 19th of October, 2017 and yet he was given Powers of Attorney on 25th of October, 2017.
53. Counsel for the Respondent argued that the Respondent had earlier been given the suit land through a deed of gift but the same was never tendered in court as an exhibit. This so happened because all what the Respondent’s witnesses knew and understood was that the Respondent was only given the suit land by his mother to take care of it.
54. Ordinarily, care takers do not have interest in the suit land and for that reason, they do not have *locus standi* to institute a case in court concerning the alleged land.
55. Therefore, since the Respondent instituted the current suit when he was only a care taker, he did not have *locus standi* to institute the suit which is an illegality that overrides all questions of pleadings.
56. Be as it may, it is trite law that courts are only bound by documents that have been admitted in court as exhibits which form part of the court record. **See Okwanga Anthony vs.Uganda [2001-2005] HCB 36 at 38**
57. Accordingly, I agreed with counsel for the Appellant that the Respondent did not have *locus standi* to institute Land Suit No. 08 of 2017.
58. However, the Respondent having obtained letters of administration upon the death of his mother, he may re-institute a fresh suit as an administrator of his mother’s estate.
59. In the premises, this Appeal succeeds in the following terms;
- i. It is declared that the Respondent did not have *locus standi* to institute Land Suit No. 08 of 2017.
 - ii. The trial court’s decision and orders are hereby set aside.
 - iii. Costs of this Appeal and those in the lower court are awarded to the Appellant

I so order



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LUBEGA FAROUQ
JUDGE

DATE: 20th November 2023