THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT LIRA

CIVIL APPEAL NO. 2 OF 2018

(Arising from Civil Suit No. 016 of 2013)

APAC MUNICIPAL COUNCIL :::::::::::::::::::::::::::: APPELLANT

VERSUS

1. AWIO MICHEAL
2. OGALI THOMAS
3. OCEN BENSON
4. **DORCUS OCEN :::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE DUNCAN GASWAGA

JUDGMENT

[1] This is an appeal from a decision of the Magistrate Grade One of Apac in Civil Suit No. 16 of 2013 given at Apac on 14/12/2017 wherein the subject land was decreed to the respondent, eviction orders made against the appellants, and payment of general damages of Ugx 6,000,000/= ordered for the respondent, permanent injunction and costs of the suit as well ordered.

[2] The grounds of the appeal as set out in the memorandum of appeal are that;

1. *The trial Magistrate erred in law and fact when he failed ignored or refused to take into consideration the sale agreement between the appellant and Awio Micheal or its import,*

2. *That the trial court erred in law and fact when it failed refused or ignored to take into considerations admissions made by the plaintiffs and his witnesses in the case and thus came to a wrong decision occasioning a miscarriage of justice,*
3. *That the trial Magistrate erred in law and fact when he ignored refused or failed to take into consideration the inconsistencies and contradictions in the testimony of the plaintiff's witnesses and thus reached a wrong decision,*
4. *That the trial court erred in law when it conducted locus in contravention of practice directions on visiting locus by taking new evidence,*
5. *That the trial court erred in law and fact when it awarded the respondents damages and costs,*
6. *That the trial magistrate erred in law when he entertained a suit that had been filed without the requisite statutory notice,*
7. *That the trial Magistrate erred in law and fact when he failed to judicially evaluate the evidence on record and thus came to a wrong decision occasioning a miscarriage of justice.*

[3] The appellant seeks for orders that; *this appeal is allowed and the order/judgment of the magistrate is set aside; suit be determined finally by decreeing the land to the appellant, award of damages, injunction, interest to the appellant and that the costs herein and in the court below are awarded to the appellant.*

[4] The background of the appeal is that the appellant bought the suit land at Ugx 5,000,000/=in October 2007 by way of a

sale agreement executed between the appellant and the 1st respondent, Awio Micheal. The land was later surveyed and divided into 19 plots which were given out to developers. The first respondent on the other hand contends that he only sold one plot of land at upper centre to the appellant and allowed Olwa Ben to continue using the land allocated to him by the appellant. He further admitted the sale agreement dated 03/10/2007 but claimed that the appellant secretly demarcated the suit land into 19 plots of land and the contents of the agreement were not properly explained to him.

[5] Both parties led evidence before the trial court and the court in its judgment found for the respondents and consequently awarded them the 19 surveyed plots of land and costs of the suit. Although the appeal was premised on seven grounds, only five grounds were submitted on by way of written submissions.

Duty of the 1st appellate court.

[6] In the case of **Bogere Moses and Anor Vs Uganda, SC Criminal Appeal No. 1 of 1997** it was stated that;

> *"the first appellate court has all the powers to take into consideration evidence lawfully adduced at the trial but overlooked in the judgment of the trial court, and to base its own decision on it. In doing so however, the appellate court must bear in mind that it did not have the opportunity to see and hear the witnesses and should, where available on record, be guided by impressions of the trial judge on the matter and demeanor of witnesses.*

More so, care must be taken not only to scrutinize and re-evaluate that evidence as a whole but also to be satisfied that the trial court had erred in failing to take that evidence into consideration."

Ground 1: that the trial magistrate erred in law and fact when he failed, ignored or refused to take into consideration the sale agreement between the appellant and Awio Micheal, the 1st respondent /plaintiff and its import.

[7] It was submitted that the respondent in his own pleadings in the trial court stated that on 03/10/2007 he entered into a sale agreement for a piece of land that as per the record from the trial proceedings and the sale agreement, the plaintiff's testimony is at a clear variance with the written agreement which he himself signed and admitted and took a benefit under and only came up with different stories 5 years after it had been executed and the land plotted with 19 plots. That his denial negates the import of section 91 and 92 of the Evidence Act which refuses extrinsic evidence in instances where the terms of an agreement have been entered into a document. The appellant relied on the case of **Sempijja Vs Semueneya HCCA No. 5 of 2014**.

[8] That the evidence given by the plaintiff to the effect that he was only paid Ugx 5,000,000/= for Olwa's plot is in contradiction of the terms of the agreement which referred to land that was not yet surveyed but to be plotted and developed by the buyer. That as such, the Magistrates

holding in this regard is not borne out by the evidence on record and is contrary to the law as the trial magistrate did not give due attention to the contradiction between the provisions of the written agreement and the oral narrative by the plaintiff in court. That the agreement does not reflect 19 or 1 plot of land to Olwa Ben, rather a piece of land that was to be plotted. By stating that the plaintiff had failed to prove that it acquired all the 19 plots, court clearly ignored the terms of the agreement which referred to a piece of land and not plots. That the trial Magistrate opted for oral evidence in place for a written down agreement with clear terms between the buyer and seller.

[9] In response thereof it was submitted that the 1st ground should fail and the decision of the learned Magistrate be upheld because the 1st respondent is an illiterate who ought to have been protected. See **Section 1 of the Illiterates Protection Act Cap 78.** That the purported sale agreement was not read over and explained to the 1st respondent who is an illiterate and his signature was not verified. See **Section 2 of the Illiterates Protection Act Cap 78.** Further that, the said sale agreement was not verified by whoever wrote it as per **Section 3 of the Illiterates Protection Act Cap 78.** See also **Tikens Francis & Another Vs the E.C & 2Ors H.C Election Petition No. 1 of 2012**. That as such the mandatory provisions of the Illiterate Protection Act were not adhered to.

Resolution of ground 1

[10] Section 92 of the Evidence Act is to the effect that;

> ***92. Exclusion of evidence of oral agreement***
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> *When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—*
>
> ***(a)*** *any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;*
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> ***(b)*** *the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;*
>
> ***(c)*** *the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;*
>
> ***(d)*** *the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which that contract, grant or disposition of*

property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) *any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of the incident would not be repugnant to, or inconsistent with, the express terms of the contract;*

(f) *any fact may be proved which shows in what manner the language of a document is related to existing facts.*

[11] **Section 3 of the Illiterates Protection Act Cap 87** states thus;

Verification of documents written for illiterates;

"Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and explained to him or her."

[12] It is indeed true that the 1st respondent admitted to having entered a sale agreement with the appellant in October 2007. Whereas the appellant insists that the agreement was only restricted to a piece of land, the 1st respondent insists that the contents of the agreement were never explained to him and he was made to understand that he was negotiating for

the piece of land that was in use by one Olwa Ben. He insists that he has never agreed to having the land sub-divided into various plots. This is captured in the 1st respondent's testimony in the trial court. It is therefore apparent that beyond not explaining the contents of the agreement to the 1st respondent, he entered into the agreement under misrepresentation believing to be agreeing to one thing yet the council intended for another. As such, it is prudent to say that the council in their capacity took advantage of the illiteracy of the 1st respondent and proceeded to do as they wished with his piece of land.

[13] In such circumstances therefore, it is safe to say that extrinsic evidence will be allowed in order to bring context to the contents of the written agreement since an aspect that can invalidate the sale agreement has been raised. See **Section 92 (a) of the Evidence Act Supra**. I find that there was no evidence presented to challenge the 1st respondent's claim that he did not understand the contents of the impugned agreement. The trial Magistrate cannot be faulted that he did not consider the sale agreement while evaluating the evidence. On the contrary, the record shows that the lower court considered the impugned agreement and rejected it. The court having decided against the appellant on this aspect cannot be interpreted to mean that the matter was not considered.

GROUND 2; That the trial court erred in law and fact when it failed, refused or ignored to take into consideration admissions made by the plaintiff and his witnesses in the case and came to a wrong decision, occasioning a miscarriage of justice.

[14] It was submitted for the appellant that the trial Magistrate made spurious allegations against the defendant for taking advantage of Awio Micheal's ignorance to take over 19 plots instead of 1. Further, that the sale agreement was written in English and it was not translated to him since he was only made to sign when he was arrested twice. That the plaintiffs did not file the suit to invalidate the transaction entered into between him and the appellant five years earlier on any known ground contained in the pleading for avoidance of contract or agreement. Further, that the plaintiff admitted to the agreement having been read to him and never raised any complaint between 2007 and 2013. He only sued the town council after he was dragged to police by Ocen Benson for having sold the land to other people without disclosing that he had already sold the same to the appellant and as such, this claim is an afterthought.

[15] That **PW2 Ocen Benson** admitted to having arrested the 1st respondent, Awio Micheal so that he would come clear on the transaction he had with the Town Council and **Abdalla Moro PW4** who witnessed the impugned agreement stated that the Town Council gave Awio Micheal Ugx 5,000,000/= and he was not forced to sign. That since there is clear evidence on

who dragged the 1st respondent to police, and had the trial Magistrate taken that evidence into consideration, he would have come to the conclusion that the appellant bought the land way before there was any controversy and from the right person who was never ignored at all during any of his moves.

[16] In response it was submitted that there was no admission by the plaintiff for the learned Magistrate to take into consideration in favour of the appellant. That the learned Magistrate was 100% right in law when he stated in paragraph 6 on page 8 of his judgment that; "the sale agreement was written in English and not translated to Awio Micheal the latter was only made to sign." That in paragraph 7 on page 8 the trial Magistrate stated that; "D11 Akora Sam Denis (who was an accountant working for Apac Town Council now Apac municipality) testified that he is the one who paid the 1st plaintiff Awio Micheal and they were only communicating in Luo language and some people helped the 1st respondent to write the request for payment that confirms that he does not know the language which they used to write on agreements. That the purported sale agreement has no jurat or certificate of translation and ought to be ignored on appeal.

[17] That the 1st respondent being illiterate was duped and deceived into signing an agreement which he in fact did not understand and did not in truth consent to. As such, the said agreement is in violation of the Illiterates Protection Act. The 1st respondent further relied on the case of **Foster Vs Mackinnon (1869) L.R paragraph 4 @ page 704**. Further,

that the appellant's lawyers lied about the 1st respondent having never complained between 2007 and 2013 yet he litigated before the LCI, LCII and LCIII where he was the successful party throughout. The LC courts are conferred with jurisdiction by the Local Council Act to hear land matters. This is undisputed evidence which the appellant is well aware of. That this suit was res judicata having been decided by the LC Courts however, since it constituted a continuing tort, the 1st respondent had to sue in a court of competent jurisdiction.

[18] Also, that Awio Micheal was arrested 3 times and was as a result forced to sign the sale agreement being an elderly citizen who was tired of being disturbed. That the reason for the arrests of Mr. Awio Micheal was misrepresented by the appellant. Indeed, the 1st respondent was arrested three times by the Council and one time by Ocen Benson who intended to have him clear the circumstances surrounding the transaction.

Resolution of ground 2

[19] Though the appellant seems to suggest that there was no issue with the land sale agreement into which they entered with the respondent, it is apparent that an unfair advantage was exerted on the 1st respondent who in the circumstances was illiterate and was facing a mightier opponent both in power and financially. The appellant states that the 1st respondent was only arrested by Ocen Benson to clarify the

earlier transactions with Apac Town Council. However, the record clearly indicates that the 1st respondent was arrested multiple times and not only by Ocen Benson.

[20] What is further apparent is that this litigation is not an afterthought like the appellant wants to make it appear. It is also clear that the 1st respondent litigated this matter with the Local Council Court and there is no record of the appellant disputing the findings thereof and seeking to overturn the said decision or have it revised.

[21] In the circumstances therefore, I find that the trial Magistrate indeed took into consideration all the evidence presented by the parties including the admissions made by the plaintiff and his witnesses and as such there was no miscarriage of justice occasioned. This ground also fails.

GROUND 3; That the trial magistrate erred in law and fact when he failed, ignored or refused to take into consideration the contradictions and inconsistencies of the plaintiff and his witnesses and thus came to a wrong decision.

[22] It was submitted in this regard that PW1 Awino Micheal told court that he was paid Ugx 5,000,000/= for the land allocated to one Olwa Ben by the Town Council but that PW3 Ocen Benson informed court that he bought the land adjacent to Olwa Ben. Further that PW4 Moro Abdallah who was a witness to the sale and signed the agreement told court that the town council gave Ugx 5,000,000/= to Awino Micheal.

That Awio was not forced to sign the sale agreement. Also, that the Ugx 5,000,000/= was not for Ben Olwa's land and that he could show court the plot which the town council bought.

[23] That the above evidence is at variance with the trial Magistrate's conclusion that the appellant bought 1 plot of land which was settled on now by Olwa. That had the Magistrate taken into consideration the variances, he would have come to a different outcome and decision.

[24] In response thereof it was stated that Apac Town Council agreed to pay Awio Micheal Ugx 5,000,000/= for the land they illegally allocated to Mr. Olwa Ben and both of them testified to that effect. The testimony states thus;

"Apac Town Council surveyed my land in 2004, I was not aware when the Town Council was surveying my land they had sold. And I found Olwa making foundation on my land. I stopped him from using my land and Mr. Olwa wrote a letter to Apac Town Council informing Apac town council that he had bought land from them and yet the land did not belong to them. Apac town council called me when I came to their office and they agreed to pay me 5,000,000 Ug/= for the plot which Olwa was constructing. When they paid me, I allowed Olaw Ben to continue with his construction and he has completed it now. That was in 2007. I did not sell the entire 19 plots to Apac Town Council." (Underlining mine)

[25] Further, that the 1st respondent did not sell the entire 19 plots to Apac Town Council. That he stopped Olwa Ben from using the land which prompted him to write to Apac Town Council to clear the matter and Awio Micheal was paid by the Town Council and that's why Olwa Benson is currently living

on the land. That Moro Abdallah was a credible witness who was initially a witness for Apac Town Council in the sale of one plot of land owned by Olwa Ben. He insisted that it was in regard to only one plot. That he subsequently litigated the matter between Apac Town Council and the 1st respondent and decided in favour of the 1st respondent. The respondents prayed that the appeal be dismissed with costs following the decision in **Makula International Ltd Vs His Eminence Cardinal Nsubuga 1982 HCB 11.** That the court has a duty to make sure that Section 3 of the Illiterates Protection Act couched in mandatory terms is not flouted because the courts are eyes of justice and the court is under duty at all times to uphold the law and its procedures.

Resolution of ground 3

[26] What is apparent from the proceedings is that the appellant entered into the impugned agreement long after they had illegally allocated the 1st respondent's land to one Olwa Ben. This therefore clearly explains why Mr. Awio Micheal signed the sale agreement under the misguided understanding that it was in regard to the land occupied by Olwa Ben. All this has been clearly explained on record. Even the inconsistencies pointed out, if any, are so minor and of no consequence to the substance of the case. I therefore find no inconsistencies to speak of in the evidence presented by the 1st respondent and or his witnesses as alleged and submitted

by the appellants. This ground is therefore answered in the negative.

GROUND 4; That the trial Magistrate erred in law and fact when he conducted locus in qou visit and admitted new evidence and he then went ahead to rely on in the judgment to the prejudice of the appellant.

[27] It was submitted that as stated on page 27 of the proceedings, Counsel for the appellant objected to the admission of new evidence through bringing of new witnesses but he was overruled by the Magistrate. That consequently 8 new witnesses testified at locus namely; **Eyume Alfred, Okori Patrick, Opo Niighty, Charles Ogwang Agona Moses, Naptal Ogwal, Alice Okello Obong, Okori Patrick, Henry Aguma.** That this was in clear violation of the law as per **Practice Direction No.1/2007** and case law. See **David Acar Vs Alfred Acar 1982 HCB 60**, **Gawona Vs Mawazi & 3 Ors HCCA 8/2016**.

[28] That in the instant case the trial magistrate relied heavily on the testimony of the witnesses at the locus while making his judgment. For example on page 7 thereof where he stated;

> *"in fact during locus some of the people testified that they were not compensated and they said that the late Oyite Ojok used force to take their land....during locus people like Okori Patrick testified that when they were displaced by the hospital they came there and found the 1st plaintiff already staying on the suit land...."*

[29] That the trial Magistrate relied on the new evidence to bolster or fill in gaps and found for the respondents. That this complaint is not without basis as it can be seen from the final judgment and reasons given by the trial Magistrate.

[30] In response thereof it was submitted that both witnesses of the plaintiff and defendant testified at locus. For the appellant **DW1, Nuptal Ogwal, DW2 Alice Okello, DW3 Okori Patrick** and **DW4 Aguma Henry**. That their testimonies start from page 27 of the proceedings and the trial Magistrate considered their evidence on the last 3 pages of the judgment. That the plaintiff's/ 1st respondent's witnesses were **Opio Nighty, Opio Charles** and **Agona Moses**. That the trial magistrate followed **Practice Direction No. 1 of 2007** in conducting the locus visit and all the new witnesses where cross examined and their evidence formed part of the record. Moreover, the learned trial Magistrate did not solely rely on new evidence but other pieces of evidence stood in favour of the respondents. For this submission Counsel relied on the case of **Kwebiiha & Anor Vs Ruanga & 2 Ors HCCA No. 21 of 2011**.

[31] Counsel submitted that ground 4 holds no merit since all witnesses who testified during the locus in qou were subjected to cross examination by the Advocates on both sides and were fully recorded.

Resolution of ground 4

[32] According to the case of **David Acar Vs Alfred Acar 182 HCB 60** it was stated that;

"When the court deems it necessary to visit the locus in quo, then both parties, their witnesses and counsel must be told to be there. When they are at locus it is in my view not a public meeting where public opinion is sought. It is a court sitting at the locus in quo.... in fact the purpose of the locus in quo is for witnesses to clarify what they had stated in evidence in court. So when a witness is recalled to show or clarify what he or she had stated in court he must do so on oath. The other party may be given an opportunity to cross examine him. The same opportunity must be extended to the other side.... Any observation by the trial Magistrate must be recorded down and must form part of the proceedings".

[33] In the case of **Kwebiiha & Anor Vs Ruanga and 2 Ors HCCA No.21 of 2011** it was stated that;

a) *The purpose of visiting locus is to clarify on evidence already given in court*

b) *It is during locus that witnesses who were unable to go to court either due to physical inability or advanced age may testify*

c) *The evidence in locus quo cannot be substituted for evidence already given in court. It can only supplement once locus is visited all relevant procedures must be followed*

d) *Witnesses must testify or give evidence after taking oath or affirmation and they are liable to cross examination by the parties, or their advocates*

e) *All proceedings at locus in quo must be recorded and form part of court record. Evidence at locus can't be considered in isolation from the existing evidence recorded in court.* (Underlining for emphasis)

[34] A close perusal of the judgment from the trial court indicates that the trial Magistrate indeed partly relied on evidence obtained at locus. Its however important to note that this evidence was not used in isolation of the evidence earlier recorded by the trial Magistrate from witnesses who had testified earlier on in Court. It is safe to say that the trial Magistrate judiciously handled the matter and his reliance on evidence obtained from witnesses during the locus in quo cannot be faulted. The record shows that he had followed the proper procedure. Moreover, there was already substantial credible evidence on record even before the court visiting the locus. In that regard therefore, I find no merit in ground 4 and it is hereby answered in the negative.

GROUND 5; That the trial court erred in law and fact when it awarded the respondents damages and costs

[35] Relying on the case of **Candiru Vs Centenary Rural Development Bank HCCS No. 22 of 2016** wherein it was held that;

> *"Although section 27 CPA, costs follow the events unless court orders otherwise, a successful party who has been guilty of some sort of misconduct relating to the litigation or the circumstances leading up to the litigation may be denied costs. The defendant having been found previously in a judgment of this court to have been a perpetrator of the fraud, the defendant is guilty of misconduct relating to the circumstances leading up to this litigation which conduct is reprehensible or worthy of*

reproof or rebuke by way of denial of costs of the litigation."

[36] The appellant submitted that the respondent sold land to the appellant at Ugx 5,000,000/= and never made any complaint from 2007 to 2012 when he decided to fight for the land. That by that conduct he misled the appellant who assumed all was okay and peacefully dealt in the land. That unknown to the appellant the respondent sold the land later to the 3rd and 4th plaintiffs. The appellant was never involved in all these dealings which preceded this suit. That the respondents contributed to this litigation and as such it would be unfair to allow them benefit from their own wrongs. That he who comes to equity must come with clean hands.

[37] That since the trial Magistrate's judgment is not based on evidence as on record, the appeal ought to succeed on all grounds, judgment be set side and a retrial ordered. The appellant finally prayed that the appeal be allowed, judgment of the lower court be set aside with orders to have the suit determined finally by decreeing the land to the appellant, award of damages, injunction, interest to the appellant and costs herein and in the court below awarded to the appellant.

[38] In response thereof it was submitted that the appeal be dismissed with costs at court's rate of 25% per annum from the time the suit was filed to date. That costs of any action, cause or other matter shall follow the event unless the court orders otherwise see. S.27(2) CPA. That such rate ought to be 6%. See Section 27(3) CPA. That in the case of **Bank of Uganda Vs Joseph Kibuuka & 4 Ors C.A No. 281 of 2016**

it was stated that; *it is a well settled principle that the successful party in civil litigation is awarded costs and the principle flows from section 27(2) of the Civil Procedure Act Cap 71.*

[39] That the lower court having found the fraudulent, oppressive arbitrary or unconstitutional action by the appellant's servants ought to have granted general damages to the 1st respondent. The 1st respondent prayed that the court finds no merit in this appeal and the same be dismissed with costs both of the appeal and lower court.

Resolution of ground 5

[40] **Section 27 (1) of the CPA** is instructive on the matter and states:

> *"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of the incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and give all necessary directions for the purposes aforesaid"*

[41] Section 27(2) CPA states thus;

> *"The costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."*

[42] Section 27(3) CPA states thus;

> *"The court or judge may give interest on costs at any rate not exceeding 6 percent per year, and the interest shall be added to the costs and shall be recoverable as such."*

[43] Though the appellant alleges misconduct on the part of the respondent thereby warranting denial of costs, I find no merit in such an allegation which has just been stated without any proof. In the circumstances, I find that the respondent being the successful party was rightfully awarded the costs of the suit. In that regard, this ground too is answered in the negative.

[44] Since all the grounds have failed, I dismiss this appeal with costs of both the lower court and this court to the respondent who is the successful party herein. See **Jenniffer Rwanyindo Aurelia & Anor Vs School Outfitters (U) Ltd, CACA No. 53 of 1999**

Dated, signed and delivered this 27th day of March, 2023.

Duncan Gaswaga

JUDGE