

5

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALA

CIVIL APPEAL NO. 0018 OF 2022.

**(Arising from Land Claim No. 0052 of 2015 in the Chief Magistrates' Court
at Kabale)**

10 **TURYASINGURA PAUL:.....APPELLANT**

VERSUS

BARAGIZI GABRIEL:.....RESPONDENT

15

BEFORE: HON. JUSTICE SAMUEL EMOKOR

JUDGMENT

20

This Appeal arises from the Judgement delivered by the Magistrate Grade One sitting at Kabale Chief Magistrate's Court in Civil Suit No. 52 of 2015 wherein he found in favour of the Respondent.

25

The brief background to this Appeal is that the Respondent/Plaintiff sued the Appellant/Defendant seeking orders for a declaration that the Plaintiff is the owner of the suit property, a declaration that the Defendant is a trespasser on the suit land, an eviction order against the Defendant, permanent injunction, general damages and costs of the suit.

30

The Respondent/Plaintiff claims that the suit land was formerly settled on and owned by Lydia Rugyenda and her husband John Rugyenda who later died in 1989 and that the couple had lived on the suit property for about 25 years. That the plaintiff purchased the suit property from Lydia Rugyenda and sometime in 2005, the defendant was temporarily allowed to settle on the suit property after being

5 evicted by the person who bought his share of the inherited land as he organized himself to migrate to Ntungamo District and has since refused to vacate the same.

The Appellant/Defendant in his Written Statement of Defence denies the claims of the Plaintiff and avers that Lydia Rugyenda has never settled on the suit land or ever owned the suit land but that the same is owned by the family of the
10 Defendant. That previously, the suit land was a homestead where the Plaintiff and Defendant grew up from and their mother is buried there and that the Defendant since her death has remained on the suit land and lays claim to the same.

The trial Magistrate on the 6th September, 2022 delivered his Judgement in favour of the Plaintiff declaring him to be the rightful owner of the suit property and the
15 Defendant a trespasser of the same with eviction orders issuing against the Defendant.

The appellant being dissatisfied with the finding, appealed to this Court on the following grounds;

**1) That the learned trial Magistrate erred in law and fact when he took
20 into account facts which were not in evidence in arriving at a final decision which occasioned a miscarriage of justice to the Appellant.**

**2) The trial Magistrate failed to critically look at the defence filed by the Respondent (Defendant) viz the evidence on record which was contradictory and thus arrived at an erroneous decision which shall
25 occasion a miscarriage of justice to the Appellant.**

5 **3) That the learned Trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record and came to a wrong decision thus occasioning a miscarriage of justice to the Appellant.**

Representation.

10 At the hearing of this Appeal, Messrs Mutungi & Co. Advocates represented the Appellant while Messrs Bikangiso & Co. Advocates appeared for the Respondent. The parties in this matter proceeded by way of written submissions.

The duty of this Court is to reappraise the evidence on record and come up with its own conclusions bearing in mind the fact that it did not have the opportunity
15 to observe the demeanour of the witnesses.

See Active Mobile Spares Ltd versus Crane Bank & Another SCCA No. 1121/2001.

Ground one.

This ground was abandoned by the Appellant.

20 **Ground Two and Three**

I will resolve ground 2 and 3 jointly because they both allude to failure of the trial Magistrate to properly evaluate the evidence on record and hence arriving at a wrong decision.

It is the submission of the Appellants Counsel that the learned trial Magistrate
25 erred in law and fact in holding that the Appellant adduced no evidence to show

5 that his mother gifted him the suit land. It is the contention of the Appellant's Counsel that the Appellant testified that he was staying with his mother in her house and that when his mother's house collapsed she moved into his house on the suit property where he had constructed a house in 2002 after she had given him the land and that he married from that house and the house is still there and
10 that his mother lived with him until her death.

It is the argument of the Appellant's Counsel that this evidence was never challenged at all by the Plaintiff through cross examination and is proof that the Appellant had exclusive possession and use of the suit land during the life time of his mother the donor of the gift. To buttress his point, Counsel relied on the
15 decision in **Olweny Alfred** versus Otema HCCA No. 42/2019 that a gift of land may be established by evidence of exclusive occupation and user thereof by the donee.

Counsel also made reference to the evidence of PW2 who testified that the Appellant had constructed the house on the suit land and married there and that
20 the house is still there. Counsel also points out that the Respondent under cross examination testified that the suit land was his ancestral home and according to Counsel, this means that the suit land is indeed the land on which the Appellant's parents stayed which is in line with the Appellant's testimony that the suit land belonged to their mother who later gave it to the Appellant. Counsel further
25 submits that PW2 testified that St. Jude is the land that she sold to the Plaintiff and that the land she sold to the Plaintiff is the suit land and that at locus, the Appellant showed Court his house in which he was staying with his late mother and St. Jude was not on the suit land.

5 Counsel for the Appellant attacks the learned trial Magistrate for ignoring the inconsistencies in the evidence of PW1 (Respondent/Plaintiff) and that of PW2 (Seller) arguing that the inconsistencies were grave and their evidence ought to have been rejected by the trial Magistrate.

Counsel further takes issue with the locus visit conducted by the trial Magistrate
10 submitting that the same was questionable. It is the contention of the Appellant that the first locus visit was scheduled to take place on the 9th September, 2021 but the same did not happen, another was scheduled for the 17th December, 2021 but was instead conducted on the 20th December, 2021 in the absence of the Defendant's witnesses and his Counsel because they were not aware of the said
15 date.

Counsel therefore prays that the instant Appeal is allowed.

Counsel for the Respondent in his Written Submissions contends that it is the testimony of the Respondent that he bought the suit land from PW2 at Ug. Shs. 4,500,00/= and a sale agreement to this effect is PEX1. This evidence according
20 to the Respondent's Counsel was corroborated by PW2 who testified that she was the one who sold the suit land to the Plaintiff.

Counsel further contends that the Appellant in his testimony told the Court that the suit land belonged to his mother which in turn now belongs to him and that this meant that his mother never gave him the suit land and he only took over the
25 same upon her death. Counsel to buttress his argument makes reference to the evidence of DW4 who testified that the suit land originally belonged to the parents of the Plaintiff and the Defendant but upon their mother's death in 2013, the suit

5 land was given to the Defendant/ Appellant. Counsel takes issue with the above submitting that the Appellant has never been given the suit land by the mother or acquired the suit land in any form of acquiring property known by law and did not advance any gift deed in Court to prove that he was given the suit land by his mother.

10 Counsel further attacked the evidence presented by DW2 and DW3 who stated that they were not present when the suit land was given to the Defendant/ Appellant by his mother and that their evidence was hearsay and inadmissible under **Section 30 and 59 of the Evidence Act**. Counsel also made reference to the contradictions by DW3 who testified that the suit land was given to the
15 Defendant as a marriage gift which contradicted the Defendant/Appellant's testimony that he got the suit land from his mother.

It is the contention of Counsel that the inconsistencies and contradictions between the Appellant and his witnesses are not merely minor but major with intentions of deliberate false hoods. To this effect, Counsel relied on the decision in **Alfred**
20 **Tajar versus Uganda (1969) EACA**.

On the issue raised by the Appellant's Counsel that the evidence of the Respondent/Plaintiff was contradicted by that of PW2 in relation to the location of the suit property. Counsel submits that the Respondent/Plaintiff testified that the land where St. Jude Primary School is sitting, was bought by him from Fred
25 Kagina, Francis Mutahunga and Sepriano and that this was corroborated by Pw2 during re-examination when she testified that St. Jude Primary School is at the bottom of the suit land. Counsel for the Respondent also submits that the locus proceedings were properly conducted by the trial Magistrate in the presence of

5 all parties. It is the prayer of the Respondent's Counsel that the instant Appeal is dismissed with costs.

Determination:

I have carefully studied the entire record of the trial Court. I have also given due consideration to the submissions of both Counsel. It is trite that there being no
10 standard method of evaluation of evidence an appellate Court will interfere with the findings made and conclusions arrived at by the trial Court only if it forms the opinion that in the process of coming to those conclusions, the trial Court did not back them with acceptable reasoning based on proper evaluation of evidence which evidence as a result was not considered in its proper perspective.

15 This being the first appellate Court findings of fact which were based on no evidence or on a misapprehension of the evidence or in respect of which the trial Court demonstrably acted on the wrong principles in reaching those findings may be reversed.

(See Peters versus Sunday Post Ltd [1958] EA 429)

20 Three issues were formulated for determination before the trial Magistrate with the first being who is the owner of the suit property. I will reproduce verbatim parts of the decision of the trial Magistrate here:

*"it is trite law that once documentary evidence is relevant; it is admissible (Kaggwa Michael versus Olal Mark & Others Civil Appeal No. 10/2017) it is the
25 Plaintiff's evidence (PW1) that he is the lawful owner of the suit property having acquired it by way of purchase from a one Lydia Rugyenda on 7th July, 2005 as per*

5 *the agreement tendered to Court as P.EX1. The Defendant did not adduce any evidence to challenge the Plaintiff's purchase of the suit land..."*

The trial Magistrate thereafter proceeded to state that DW1 (Defendant) testified that the suit land formerly belonged to both he and the Plaintiff's parents and it's where their parents were buried and that it was later given to him as a marriage
10 gift. The trial Magistrate also notes that DW2, DW3, and DW4 all testified that the Defendant (DW1) was staying with his mother and that he got the suit land from his mother.

The trial Magistrate then makes reference to the decision in **Olweny Alfred** versus **Otema (Supra)** before making a finding that the Defendant has not
15 adduced any evidence to show that his mother gifted him the suit land and thus his allegations fail the test of a gift of land as laid down in **Olweny Alfred** versus **Otema (Supra)**.

The trial Magistrate in regard to the locus visit observed thus:

*"Further upon visiting locus on the 20th day of December 2021, a number of things
20 were confirmed as to the evaluation of the witnesses' evidence. First and foremost, it was confirmed that the Defendant stays on the suit land and it is where the graveyards of both the Plaintiff and Defendant's mother are laid. In this case while at locus, both the Plaintiff and Defendant showed to Court the land in dispute, the parties confirmed their mother was staying on the suit land and that is where she
25 was buried. The Defendant was allowed to temporarily stay on the suit land by the Plaintiff and his wife but later turned around and started claiming the suit land. His claim is not backed by any reliable evidence and he has no rights over the suit*

5 *land. When one is allowed to temporarily stay on land, he does not acquire rights of ownership. I find that the Plaintiff has proved that he is the lawful owner of the suit land having purchased it from Lydia Rugyenda as evidenced by P.EX1. In conclusion of this issue, I find that the Plaintiff is the lawful owner of the suit property.”*

10 I do not accept the findings of the trial Magistrate that the Appellant/Defendant did not adduce any evidence to challenge the Respondent/Plaintiff's purchase of the suit land. This was a blanket statement made at the very beginning of the trial Magistrate's Judgement even before he could commence analysis of the evidence adduced by the Appellant. The evidence on record is clear. The Appellant/
15 Defendant did oppose strongly the claims of the Respondent/Plaintiff in relation to his claim to the suit property by summoning not less than 3 witnesses. The Appellant therefore did adduce evidence to challenge the claims of the Plaintiff and the only issue for analysis is the weight and or credibility of the evidence presented by the Appellant/Defendant.

20 The evidence on record that is unrefuted is that the appellant lived on the suit property with his mother Nyirabakiga Magaderinah in her house and the Appellant later constructed his own house on the same property in which his mother moved into with him demolishing her old house and it is in this house that she later died. The Appellant has been in possession of the same to date.

25 This evidence is corroborated by the findings of the trial Magistrate when he visited the locus in quo and records that the Appellant/ Defendant had a house on the suit land, a toilet and banana plantation. The trial Magistrate also notes that the suit land had 3 graves one for their mother, father and step mother. The

5 original hand written record also indicates that the trial Magistrate recorded mark stones on the suit property as opposed to “graves on the mark stone” reflected on the certified record.

The trial Magistrate in his Judgment reveals that DW2, DW3 and DW4 all testified that the Defendant (DW1) was staying with his mother and that he got the suit
10 land from his mother. The Appellant under cross examination also lays claim to the suit land as having been given to him in 2002 by his mother.

It would appear that there was some confusion caused by the typing of the witness statement of the Appellant who avers to his mother passing away in 2013 but this was corrected by DW4 under cross examination as being 2003 when she passed
15 on. I believe this to be true because DW4 was the Chairperson of their mother’s burial (SIC) and as such is competent to effectively testify the date of the same.

The claim of the Plaintiff/ Respondent that he purchased the suit property from DW2 in 2005 as per P.EX1 and only allowed the Defendant/ Appellant to remain temporarily on the suit land is not supported by the evidence obtained by the
20 Court during the locus visit. This is because P.EX1 does not contain the graves of the parents of the parties in this matter. It was also never mentioned by PW2 that her property sold to the Plaintiff contained any house in which the Defendant had been living with his late mother. This is because the evidence presented by the defence that appears to be true is that the mother of the Defendant at the time of
25 her passing in 2003 was living in the house built by the Defendant and the Defendant still resides in the same house to date. The question that begs for an answer is what became of the property that was owned by the Plaintiff and Defendant’s mother after her death? The Plaintiff does not provide an answer to

5 this question and it is the Defendant/Appellant who provides the response in claiming that the same was given to him by his late mother and he remains on the same piece to date. The locus visit by the Court did not reveal that there was an independent piece of land originally used by the mother of the Defendant. The absence of PW2, the seller of the impinged property in P.EX1 at the locus visit
10 (having shifted to Munyaruguru in the early 90's) was costly to the Plaintiff's case. Her testimony would have been relevant in providing context to P.EX1 and to explaining the presence of the graves belonging to the parents of the Plaintiff and Defendant on the Suit property that she is alleged to have sold to the Plaintiff.

The claims of the Defendant/Appellant and his witnesses that the piece of land
15 that PW2 sold to the Plaintiff/Respondent is the one on which he built St. Jude Primary School that neighbours the suit property would appear to be true and Pw2 did admit as much but retracted the same during re-examination. This fact notwithstanding the evidence on record does not appear to support the claim of the Plaintiff/Respondent and his witness in PW2 that the suit property on which
20 the graves of the parents of the parties are contained together with the house in which the Defendant/Appellant's mother died is the property that was sold to the Plaintiff/ Respondent.

I will now turn to the sticking issue of whether the mother of the Defendant/Appellant gifted him the suit property.

25 It Is imperative to note that the instant Appellant did not file a counter claim to the suit nor did he seek any declarations that he is the sole owner of the suit property. As a result, the onus in this case and the burden of proof lay squarely

5 on the Plaintiff to prove his claim of ownership on the balance of probabilities.
See Nsubuga versus Kavuma [1978] HCB 307.

The trial Magistrate was alive to this position of the law but erred in shifting the burden in this case to the Defendant/ Appellant when he made a finding that the Defendant did not adduce any evidence to show that his mother had gifted him
10 the suit land. It is this finding that bolstered the Plaintiff's weak claim to the suit property.

Counsel for the Respondent made a meal of the contradictions in the Defendants/ Appellants testimony and that of his witnesses as to when the suit property was gifted to the Defendant by his late mother. The contradictions in my considered
15 opinion would have been relevant if the litigation revolved around the estate of the late Nyirabakiga Magaderinah, the mother of both the plaintiff and Defendant in the suit. Only then would it have been relevant for the trial Magistrate to make a finding on whether the suit property was gifted to the Defendant or the same still formed part of their mother's estate. The claim of the Plaintiff however was
20 that he had purchased the suit property from PW2 a claim that falls flat on its face. I shall therefore answer grounds 2 and 3 in the affirmative.

In the final result, the instant Appeal succeeds. The Judgment and orders of the trial Magistrate are hereby set aside and substituted with the decision to dismiss the suit.

5 Each of the parties shall bear their own costs in the appeal and suit in the spirit
of promoting harmony between them as brothers.

It is so ordered.

Before me,

10

.....
SAMUEL EMOKOR
JUDGE
28/02/2024