

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CIVIL APPEAL NO.63 OF 2021

(ARISING FROM CIVIL SUIT NO.64 OF 2017)

NANDUTU GRACE MAENA ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

1. **NAPOKO NICHOLAS**
2. **MATEMBO JOHN**
3. **WANGANGA ANTIHONY**
4. **MATEMBU JAMES**
5. **WATUWA NICHOLAS**
6. **MUSUNGU RONALD**
7. **MATEMBU BUSIMA**
8. **WAKOOLI MARY MAENA ::::::::::::::::::::::::::::::::::: RESPONDENTS**

BEFORE: HON. JUSTICE LUBEGA FAROUQ

JUDGMENT

1. **Introduction**
2. This appeal was brought against the whole judgment and orders of his worship Daniel Epobu Kiboko magistrate grade one, delivered on the 3rd May 2021 at Mbale Chief Magistrate's Court.
3. **Background**
4. The Appellant/plaintiff sued the Respondents/defendants for recovery of two pieces of land. The first piece of land is located at Bulwendede village, Buyinza parish, Bukusu in Manafa District which she contends that she bought from a one Mayeku James in 1997. The second piece of land is located at Bunatanga Village, Bumaefe parish, Manafa District which she contends was gifted to her by her late husband Ignatius Maena in 2012.
5. The Respondents in their joint statement of defence denied committing any acts of trespass and contended that the 3rd, 4th, 5th and 7th Respondents

lawfully acquired their respective pieces of land by way of purchase from Maena Ignatious.

6. A consent judgment was entered between the plaintiff and the 6th Respondent to the effect that the Appellant is the lawful owner of the land at Bunatanga Village, Bumaefe parish, Manafa District having been gifted to her by her late husband Ignatius Maena.

7. Issues for determination by the trial were-

- a. Whether the 3rd, 4th, 5th and 7th defendants lawfully acquired their respective portions of the suit land?
- b. Whether the defendants committed acts of trespass on the suit land?
- c. Who is the rightful owner of the suit land?
- d. What are the remedies available to the parties?

8. The trial court's decision

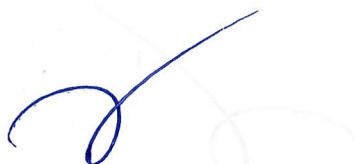
9. The trial magistrate found that the Appellant failed to prove her case on the balance of probabilities and dismissed the suit with costs.
10. The Appellant was dissatisfied with the above decision hence this appeal.

11. Grounds of Appeal

12. Appellant based her appeal on the following grounds of Appeal-
- a. That the learned trial magistrate grade one erred in law and fact when he did not properly evaluate the whole evidence on record hence reached an erroneous decision.
 - b. That the learned trial magistrate erred in law and fact when he did not take into consideration the facts and circumstances proved and or admitted.
 - c. That the decision of the learned trial magistrate has occasioned a miscarriage of justice.

13. Legal Representation

14. Counsel Luchivya Faith represented the Appellant while Counsel Wetete Ronald represented the Respondents in this matter.



15. **Submissions**

16. At the hearing of this appeal, both sides were given schedules to file their respective written submissions. All the parties all did not comply but this court has gone ahead to determine this matter.

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

18. The duty of the first appellate court is to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account of course that the appellate court did not have the opportunity to hear and see the witnesses testify. ***See Birungi Moses Vs Uganda Criminal Appeal No. 177 of 2014.***

19. The above principle will guide this Court in the resolution of this Appeal.

20. Ground 1: ***That the learned trial magistrate grade one erred in law and fact when he did not properly evaluate the whole evidence on record hence reached an erroneous decision.***

21. It is a settled principle of law that grounds of appeal should specifically point out errors observed in the course of the trial and the decision being appealed from.

22. **Order 43 Rule 1 (2) of the Civil Procedure Rules SI 71-1** provides-

"The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively."

23. **Attorney General V Florence Baliraine Court of Appeal Civil Appeal No.79 of 2003** it held-

"Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned, a miscarriage of justice. Appellant courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times."

24. In view of the above, I find that ground 1 of this appeal was not properly framed because it does not specifically point out the particular alleged errors but instead generalizes failure by the trial magistrate to evaluate the whole evidence on record.
25. I would have struck out ground 1 for being improperly framed but in the interest of justice I will proceed to resolve the same.
26. In respect of the land at Bulwendede village, Buyinza parish, Bukusu in Manafa District. PW1 at page 6 of the record of the lower court said she bought that piece of land from a one Mayeku James in 1997. To support her evidence, PW1 tendered in court her land purchase agreement which was admitted with no objection as PE1. See page 7 of the lower court record.
27. The evidence of the Appellant was collaborated by the evidence of PW2 Mayeku Jackson who stated at page 15 of the record that ***"I knew Mayeku James my biological father. He had a transaction of land sale between him and the plaintiff. It was in May 1997."*** PW2's evidence was not in any way discredited during cross examination.
28. The evidence of the Appellant and PW2 was also collaborated by the consistent testimony of PW3 Mutembu Fred at page 18 of the record where he stated that ***"One piece is in Bunatanga and another in Bulwandeda, the plaintiff bought it herself from James Mayeku."*** PW3 maintained that position even in cross examination.
29. The 8th Respondent (PW6) from whom the 3rd, 4th, 5th and 7th defendants acquired their respective portions testified at page 47 of the record that ***"In reference to the land in Bulwendende, I bought this land together with the deceased in 1996....."*** She tendered in her alleged purchase agreement to that effect as DE4.
30. However, her evidence in cross examination at the same page of the record states that ***"I was on the agreement as a witness"*** which creates an assertion that she did not purchase the said land and none of her other witnesses testified to the effect that she purchased the land at Bulwendede.

31. I therefore find the Appellant's evidence concerning her purchase of the land at Bulwendede truthful and reliable.
32. In respect of the land at Bunatanga Village, Bumaefe parish, Manafa District, it was consistent evidence of the Appellant that it was gifted to her by her late husband Ignatius Maena in 2012. This was confirmed by DW1 who stated at page 35 of the record that ***"I confirm the land was distributed on 3/9/2012 between Grace Nandudu and Wakooli Mary."***
33. However, DW1 at page 33 of the record testifies that those gifts were altered by the late Meana through his will when he bequeathed the same to his three children.
34. It is trite that a gift *inter vivos* of land may be proved by evidence of exclusive occupation and usage by the donee during the lifetime of the donor and when perfected, it becomes operative upon its acceptance by the donee. (See **Oyet & Anor Vs Abwola Civil Appeal No.0068 OF 2016 [2018] UGHCCD 65 (25 October 2018)**)
35. It was evidence of the 8th Respondent (DW6) that the Appellant was in possession of her piece of land at Bunatanga when she stated at page 47 of the record that ***"She was cultivating in Meana's land in Bunatanga."***
36. That evidence moreover from the defence witnesses cannot be doubted that indeed the Appellant had interest in the land at Bunatanga which was gifted to her by her late husband and she perfected the same by being in such exclusive possession through cultivating the same.
37. Therefore, ground No. 1 is answered in the affirmative.
38. Ground No. 2: ***That the learned trial magistrate erred in law and fact when he did not take into consideration the facts and circumstances proved and or admitted.***
39. It was an agreed fact that the portion of the suit land that was held by the 6th Respondent at Bunatanga Village, Bumaefe parish, Manafa District belongs to the Appellant having been gifted to her by her late husband Ignatius Maena and they accordingly entered a consent judgment to that effect.

40. It is trite that a consent judgment derives its legal effect from the agreement of the parties and it is therefore governed by the ordinary principles of contract. (See: **Hirani vs Kassam (1952) 19 EACA 131**)
41. The doctrine of privity in the law of contracts prohibits influence of and inference to third parties to a contract. (**See Tweddle v Atkinson (1861) 1 B&S 393**). Therefore, in this case there is no way a consent judgment between the 6th Respondent and the Appellant would be used as against the other Respondents who were not party to it.
42. I therefore find that the trial magistrate was right not to apply results of a consent judgment between the 6th Respondent and the Appellant to the 3rd, 4th, 5th and 7th Respondents because they were not party to it.
43. Ground 2 is answered in the negative.
44. Section 101 (1) of the Evidence Act Cap 6 provides that-
- "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist".*
45. Subsection (2) of section 101 of the same Act further provides-
- "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*
46. In **Godfrey Sayi v Anna Siame (as legal representative of the late Mary Mndolwa), CAT - Civil Appeal No. 114 of 2012** (unreported), the Court of Appeal of Tanzania held that-
- "It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."*
47. In the present case, the Respondents were under a duty to prove that at the point of purchase of their respective pieces of land, their vendor had legal interests to pass on to them which they failed to prove as it is discussed in the body of this judgment.
48. The land which the Respondents allegedly purchased or distributed to them in the Will of late Meana Ignatius, had already been given out as a gift inter vivos to the Appellant and she took possession of the same by cultivation. Late Meana Ignatius therefore having donated the suit land to

the Appellant in 2012 as a gift inter vivos, he could not donate or sale the same to other people in 2017.

49. Regarding the land at Bulwendede; as proof of ownership, the Appellant tendered in court the purchase agreement which was admitted as PE.1. It is trite that where a contract of sale is reduced into writing, no oral evidence must be adduced to vary, alter or contradict the same. **(See section 92 of the Evidence Act.)**
50. Ground 3: ***That the decision of the learned trial magistrate has occasioned a miscarriage of justice.***
51. It is settled that a miscarriage of justice is only taken to have occurred where there has been misdirection by the trial court on matters of fact or law relating to the evidence tendered or where there has been unfairness in the conduct of the trial. **(Mutege V Mulyaka & Another HCT 04-CV-CA-0151-2012)**
52. Having found in ground No. 1 that there was failure by the trial magistrate in evaluation of the evidence on record, it is automatic that his decision occasioned miscarriage of justice because of such misdirection by the trial magistrate.
53. In the circumstances this appeal succeeds in the following terms-
- a. The judgment and orders of the lower court are hereby set aside.
 - b. It is declared that the Appellant is the rightful owner of the two pieces to wit; land at Bulwendde and at Banatanga.
 - c. The 3rd, 4th, 5th and 7th Respondents are hereby declared trespassers on the suit land.
 - d. Costs of this appeal and those of the lower court are awarded to the Appellant.

I so order

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LUBEGA FAROUQ
JUDGE

Judgment delivered via email of the parties this 16th May 2024.