THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

CIVIL APPEAL NO. 0059/2010

(From Bubulo Civil Suit No. 29/2010)

1. **NAMWAKI SARAH**
2. **SITUMA JIMMY**
3. **KHAUKA MULAKO……..APPELLANTS**

VERSUS

WANGOTA MULAKO…….…….……..RESPONDENT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal against the judgment and orders of the Magistrate Grade I Bubulo of 28.5.2010 whereby the trial magistrate entered judgment against the appellants declaring that;

a) The plaintiff/respondent is the rightful owner of the suit land.
b) A permanent injunction be issued against all the defendants/appellants, their agents or any other person claiming interest through them.
c) General damages of shs.500,000/= be paid to the respondent by the appellants; and,
d) Costs of the suit be paid.

According to the respondent, he sued the appellants for recovery of the suit land. He claimed that he bought the suit land from **one Yokana Mutama** in 1995 for Ug. Shs. 1,000,000/= and took possession in 1996 upon completion of payment of the purchase price. That he fenced the land, planted bananas, made bricks and sand for construction and enjoyed peaceful occupation until March 2010 when the appellants took over the land and started building a house on it.

The appellants disputed these assertions. Their case is that the suit land forms part of their late father's estate the late **Musamali Nathan Wamukota** who died in 1987. That **Musamali** acquired the land from his father **Yokana Mutama**. Upon the death of their father, **Yokana Mutama** the biological father to **Musamali Nathan Wamukota** and biological grandfather to the appellants became caretaker of the suit land and held it in trust for the appellants who were still minors. Upon the death of **Mutama Yokana** the suit land was handed over to the appellants who took over effective possession in March 2010 and started constructing a house thereon, planted coffee and crops including maize and beans.

Being aggrieved by the decision of the learned trial Magistrate, the appellants filed this appeal through their lawyer Ms Aigihugu & Co. Adovcates. The respondent is represented by M/s Musamali & Co. Advocates.

The grounds of appeal are that;

1. The learned trial Magistrate erred in law and fact when she admitted and based her judgment on a photocopy of the sale agreement of the suit land without ruling out that the original copy could not be produced and without resolving the issue that it was not signed.

2. The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence on record and held that the sale agreement was valid.
3. The learned trial Magistrate erred in law and fact when she held that;
    i) The suit land did not belong to the appellants and **Yokana Mutama** did not hold it in trust for the appellants.
    ii) **Mutama Yokana** was not a caretaker of the suit land for the appellants.
    iii) **Yokana Mutama** sold the land as owner.
    iv) There was no house on the suit land.
4. The learned trial magistrate erred in law and fact when she held that the appellant's defence evidence sounded like fabricated story and is full of contradictions and inconsistencies.
5. The learned trial Magistrate erred in law and fact when she failed to evaluate the respondent's evidence and accepted the respondent's case wholesale.

At the hearing of the appeal, both learned counsel were allowed to file written submissions.

As rightly put by learned counsel for the appellants, the duty of a first appellate court is to re-evaluate the evidence which was adduced before the trial court and arrive at its own conclusions as to whether the findings of the trial Court can be supported. ***PANDYA V. R. 1957 E.A. 336***.

Mindful of that duty, I will go ahead and determine this appeal as argued by the appellant and responded to by the respondent.

I will start by what appeared like a preliminary point raised by learned counsel for the respondent challenging the validity of this appeal. He imputed that this appeal is defective, bad in law, incompetent, frivolous and an abuse of court process. That this is so because the memorandum of appeal was filed by Magellan F. Olubwe & Co. Advocates yet Magirigi & Co. Advocates were counsel for the appellants in the lower court. That the former never represented the appellants and therefore they had no *locus standi* to file a memorandum of appeal on behalf of the appellants because they had no such instructions.

That in any case there was no notice of change of advocates or a notice of instructions therefore no appeal exists in this court. That the memorandum of appeal ought to have been filed by Magirigi & Co. Advocates.

I was surprised by the submission by learned counsel for the respondent. An appeal process is distinct from the trial process. I therefore agree with the submission by **Mr. Ayigihugu** that this objection is totally misconceived, has no merit because there is no law which states that counsel who represents a party during trial must be the one to institute an appeal where necessary. A party is entitled to instruct another advocate to institute an appeal especially if such party is not satisfied with the service of his/her/its advocate.

There was no satisfactory proof to show that Magellan Olubwe & Co. Advocates had no instructions. Regarding the absence of a Notice of Change of Advocates or notice of instructions, **Mr. Ayigihugu**'s submission is correct that it is not the responsibility of the appellants to prepare such notices. If the advocates omitted to file such notices then it cannot be visited onto the appellants. In any case in Misc. Application No.154 of 2010 to amend the memorandum of appeal, the *locus standi*

of M/s Magellan F. Olubwe & Co. Advocates was not in issue and learned counsel for the respondent did not oppose the application. He cannot raise that issue now.

Even if the converse is correct the papers filed on behalf of the appellants would be protected under sections 14 A (1) and 14(1) of the Advocates Act.

I will consequently overrule the objection by learned counsel for the respondent.

Ground 1 and 2

Regarding the sale agreement it is not disputed by the respondent that the sale agreement which was admitted in evidence was a photocopy. (Exhibit P.1). However in response to the complaint by the appellant, that a photocopy of an agreement ought not to have been admitted outside the exceptions, learned counsel for the respondent said counsel for the appellants should not raise it since they did not object to it being admitted.

I think it was negligence that learned counsel for the appellant allowed the mistake to pass. See sections 61, 62 and 64 of the Uganda Evidence Act. When I perused the record, I discovered that learned counsel for the respondent promised to produce the original sale agreement which he said exists later. When this was not done, it led to a miscarriage of justice.

There was a claim that the sale agreement was not signed by the parties. This is evidence. According to the record, the sale agreement was signed by one **Yokana Mutama** who was the vendor and the purchaser was represented by his brother **Wamatele**. Learned counsel for the respondent submitted that the agreement was signed by the parties. There was however no effort to counter the evidence by the

appellants that **Yokana Mutama** the alleged vendor was at all material times sick at Mulago Hospital and could not have signed the sale agreement. This was confirmed by DW.1 in her evidence.

I will uphold ground 1 of the appeal that the learned trial Magistrate erred in law when she admitted and based her judgment on a photocopy of the sale agreement of the suit land without ruling out that original could not be produced and without resolving the issue that it was not signed by the parties thereto.

In his submission, learned counsel for the respondent urged that the learned trial Magistrate rightly held that the sale agreement was genuine because it was executed by the vendor and the representative of the respondent. That the agreement had been signed. Further that the appellants never subjected the agreement to a handwriting expert to prove the late **Yokana Mutama** did not sign or that the signature was not his. Further that the respondent's evidence was consistent, clear and left no doubt in the learned trial magistrate's mind.

On this issue I agree with the appellants' submission that the learned trial magistrate did not evaluate the evidence adduced in respect of the sale agreement. In the first place, the sale agreement was not signed by the parties thereto. The respondent testified and admitted that he did not sign the sale agreement.

It was signed for him by one **Bwayo Wamatele**. The status of **Bwayo** is not clarified. It is not clear whether he as an agent with powers of Attorney or otherwise. The purported vendor **Yokana Mutama** did not sign either.

To confirm that the vendor did not sign is confirmed by the testimony of the respondent that at the time of sale, the vendor was sick. This is shown on P.8 paragraph 3 of the proceedings where he testified that;

> "*I do not know whether the late Mutama had a wife at the time I bought the land. By the time I bought the land, Yokana Mutama was sick. We made the agreement at home in the village. I was not present when the agreement was made*."

Infact DW.1 at P.20 of the record doubted the signature of her grandfather. She testified that;

> "*This is not how my grandfather signs*."

According to the evidence of DW.3 he testified that **Musamali** was the one who stopped them from renting the land. This was not reported to **Yokana** because he was in Mulago. Therefore there was no way **Yokana** could have signed the agreement when he was sick in Mulago Hospital.

On a balance of probabilities there is doubt about the authenticity of the agreement the lower court based on to decide this dispute. There were glaring contradictions about where it was made.

According to **PW.3 Musamali Charles** the son to **Yokana Mutama** and brother to father of the appellants, the same was made at home of **Yokana Mutama**.

He testified at P.14 of the record that;

"*The agreement was written in the home of our father.*
Bira did not sign it."

Bira was wife to **Mutama**. This however is contradicted by the evidence of **PW.4 Mulako Wangota Joseph** who allegedly wrote the agreement. He testified that,

"*The main agreement was written from the land itself.*" See. P.16.

These contradictions were not considered by the learned trial Magistrate. This evidence cast doubt on the validity of the sale agreement.

I agree with the appellants that if the agreement was made at the home of **Yokana Mutama**, the wife **Bira** would have signed it given her vested interest in the land. The agreement could not have been made on the land because if that was the case then **Yokana Mutama** would have signed. But at the time he was sick in Mulago. The learned trial Magistrate therefore came to a wrong conclusion when she believed the respondent's witnesses and based her decision on them.

This ground of appeal also succeeds.

Grounds 3, 4, 5

According to learned counsel for the respondent, the learned trial magistrate properly evaluated the evidence on record when she held that the suit land did not belong to the appellants and that **Yokana Mutama** did not hold it in trust for the appellants. That the evidence adduced by the appellants lacked merit because it was full of contradictions and inconsistencies. Learned counsel outlined the evidence on both sides and concluded that the appellants' evidence was fabricated unlike the evidence for the respondent which is very consistent and corroborative.

Learned counsel for the appellants submitted to the contrary.

After studying the record and comparing the same with the record, I am inclined to agree more with learned counsel for the appellants.

According to the judgment, the findings on ground 3 is on P.7. The court held that;

> "*This court finds that the alleged sale was by the very owner of the land and not a caretaker. This land did not form part of Musamali's estate. Defendants failed to prove this.*"

Then at P.8, court held regarding ground 4 that;

> "*The law of trust truly protects trust and beneficiaries in the case of unjust deprivation. In this case however the defence evidence on record most of which is unreliable did not prove this relationship*."

Then the decision on ground 5 at P.7 is to the effect that;

> "*This court did not find any credibility in the evidence of the defence. It all sounded like fabricated story full of contradictions and inconsistencies. There is instead overwhelming evidence pointing to purchase by the plaintiff. The plaintiff's case is clear without any contradictions*."

The evidence on record does not support the learned Magistrate's conclusions. The evidence by the respondent was to the contrary full of contradictions and

discrepancies. For example I have already pointed out the issue of where the agreement was made from. Was it at home or on the land?

Further **PW.2 Bwano Wamatele David** testified at P.11 that **Yokana Mutama**'s wife had died but Bira the wife referred to was in court with other witnesses.

PW.1 Wangota Mulako Joseph said **PW.3 Musawali Charles** signed on his behalf but was not related to him. However PW.3 at P.12 paragraph 5 testified that PW.1 was his brother-in-law. Regarding payment for the suit land PW.3 testified on P.13 paragraph 2 that Ug. Shs.500,000/= was paid on the date the agreement was written on 8.10.1995.

However the lugishu version of the agreement states that Ug. Shs.500,000/= was paid on 30.10.1995. Yet the English version states that Ug. Shs. 500,000/= was paid on 13.10.1995. These were unresolved and glaring contradictions.

From the evidence on record DW.2 testified that **Yokana Mutama** was her husband and that the disputed land belonged to the children of **Musamali** who was a son of her family. That **Musamali** acquired the land from his father **Mutama Yokana. Musamali** constructed a house on the land which had coffee trees. Her husband took over the land after **Musamali**'s death.

DW.5 Joyce Nabafu testified that **Mutama Yokana Musamali** as her brother. That **Musamali** got the suit land from he father in 1964. That the father told her that he gave the land to **Musamali** to put up a house on it. She was mature and married by 1964.

DW.4 Wamukota Michael testified on page 22 that he was the area LC.I Chairperson Walukeli village. He said there was a house on the suit land. That **Musamali** got the land from his own father. That when **Musamali** died the land was left to **Mutonyi** sister to **Musamali** as caretaker. When **Musamali** died his father **Yokana** took over the land. DW.3 was rented the land from 1988-1995. He rented it from **Mutama.** After their tenure, they left the land to new tenants. The land was shown to them at the funeral rites of their father. Infact PW.3 **Musawali** admitted in cross-examination that **Yokana Mutama** was caretaker of the estate of **Musamali.**

I agree with learned counsel for the appellants that DW.2 could not testify falsely against the interest of her late husband's estate. The evidence of PW.3 **Musawali Charles** is suspect. He could have colluded with agents of the respondent to deprive the appellants of their land. What makes me conclude so is that;

- He chose to testify for the respondent against the interests of the appellants who are related to him.
- He is the one who informed **DW.3 Wamukota Michael** that the suit land was going to be leased to **Wamatele,** which was false. The truth is it was going to be sold to PW.1.
- The purpose of the purported agreement on behalf of his brother was to lease the land for 10 years. This was in 1995.

Therefore the evidence of PW.2 ought to have been found unreliable.

On the whole I am convinced by learned counsel for the appellant's submission and find that;

(a) **Mutama Yokana** did not sell the land to the respondent.

(b) The land belonged to the appellants' late father's estate, **Musamali Wamukota Nathan.**

(c) **Musamali** acquired the land from his father **Yokana Mutama** and when **Musamali** predeceased his father **Mutama, Mutama** became caretaker and trustee thereof for the appellants. When **Mutama** died, the land was shown to the appellant as theirs.

These grounds of appeal are also allowed.

Finally, I will comment on the failure to pay stamp duty on the sale agreement although I have decided that a sale agreement is invalid. Stamp duty is a revenue collection requirement and its nonpayment does not *perse* render a land sale agreement especially by villagers invalid. The only effect is that such agreement is rendered inadmissible in evidence until it is properly stamped.

The holder of such agreement can be given opportunity to go and clear the requisite stamp duty so that his/her evidence can be admitted later on. It is trite law that any instrument on which a duty is chargeable is admissible evidence only if that instrument is duty stamped and duty chargeable has been paid. If it is not paid it can be admitted on payment of the duty plus any penalty if applicable. See;

- ***Yokoyada Kagwa v. Mary Kiwanuka and Anor. 1979 HCB 23.***
- ***Kananura Melvin Consultant Engineers & 7 Ors v. Connee Kabanda [1992] 111 KALR 61***.

For the reasons given herein, I will allow this appeal. The judgment and orders of the trial court are set aside. I will substitute therefore orders that;

(1) Judgment is entered for the appellants.

(2) The suit land belongs to the appellants.

(3) The respondents, his servants and or agents shall be evicted from the land after one month from the date hereof.

(4) A permanent injunction is hereby issued against the respondent, his servants or agents and all that derive interest from him.

(5) The appellants shall get the taxed costs of this appeal and the lower court.

Stephen Musota

JUDGE

24.01.2013