

The trial Magistrate dismissed the Appellant's suit for lack of merit.

- 5 Two grounds were raised on appeal before this court namely:
1. That the learned trial Magistrate erred both in law and fact when he failed to evaluate the evidence on record thereby arriving at the wrong decision.
 - 10 2. That the learned Magistrate erred in law and fact when he held that the disputed land belongs to the Respondent.

This Court in its appellate capacity has the mandate to re-
15 evaluate the evidence before the lower Court and subject it to fresh scrutiny, and may come up with its own findings.

Secondly in civil matters, cases are determined on a balance of probabilities and in accordance with Section 101 of the
20 Evidence Act, it is upon the person alleging certain facts to prove the existence of those facts.

In the instant case, the Plaintiff presented his own evidence and a document referred to as the agreement of sale.

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He called no witnesses and claimed that his witnesses were influenced by the Defendant not to come to Court.

5 The Defendant presented his own evidence, 2 Agreements of sale and also presented 4 witnesses to support his case.

10 It was submitted for the Appellant that the sales Agreement on which he relies dated 12/10/1997 was authored by one Salongo Moses, thumb printed by the Vendor Nangusi Gertrude and was signed by Okumu Misaki.

That the Plaintiff was not shaken on cross-examination in respect of the agreement.

15 It is further submitted that the Magistrate out rightly rejected the Appellant's witnesses on grounds that they had turned against him and these included DW2, DW3 and DW4.

20 Counsel further submitted that the Agreements of sale presented by each of the parties were clearly authored by the same person, one Salongo Moses the area LC.I.

That both Agreements for example bear the name of Misaki Okumu in his own handwriting.

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That the trial Court should have taken the trouble to study the genuineness of the documents and even sought the opinion of a handwriting expert.

- 5 That the Magistrate would have discovered that it was a case of fraudulent dealing where the Respondent and his witnesses were conning the Plaintiff.

10 The Appellant's Counsel also submits that there were inconsistencies and contradictions in the Defendant's evidence. This was in respect of the dimensions mentioned by DW1, DW2 and what appears on the sale agreement. That the Defendant seems to be talking of a different piece of land.

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It has been submitted for the Respondent that there were no competing equities on the suit land. That the Appellant had a burden to prove on a balance of probabilities that the land was his.

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If witnesses gave evidence in the Defendant's favour then it strengthens the Defendant's case.

The witnesses having denied participating in the agreement of sale he presented, it was up to the Plaintiff to prove his document.

- 5 Further, that the Magistrate had no stake in the case so he was not duty bound to prove the Plaintiff's documents for him.

It was upon the Plaintiff to subject the agreements to a handwriting expert.

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It is submitted that collusion was alleged but there is no such evidence and that Counsel for the Appellant was making allegations from the Bar.

- 15 Finally that the contradictions in the Defendant's case do not go to the root of the case since he relies on his agreement of sale and what is mentioned therein is what he bought.

Both sides did not cite any authorities.

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I have considered the submissions by both Counsel. I have also considered the evidence on record.

Firstly, the Appellant had no witnesses to support his case.

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His so called would be witnesses denied him and instead supported the Defendant/Respondent.

5 Thirdly, the Appellant claims the Magistrate should have sought the opinion of the handwriting expert to ascertain the genuineness of the agreements presented by both parties.

10 This was never an issue at the trial as seen from the evidence presented by the Plaintiff. It was his duty to prove his case and he cannot fault the Magistrate for issues he himself never raised.

15 The Magistrate had no duty to subject the documents to a handwriting expert.

Fourthly, it is the Plaintiff himself who told Court that his witnesses had been prevented by the Defendant from coming to Court. The Magistrate did not reject them as claimed.

20 Fifthly, the Appellant alleges collusion between the Defendant and his witnesses to defraud the Plaintiff of his land.

25 There was neither evidence of fraud produced or of collusion.

All that the Appellant has tried to do is to try to manufacture evidence that was never presented in the lower Court to bolster his case. It is preposterous to suggest that the
5 Magistrate should have moved an extra mile to ensure that the Plaintiff is successful.

I agree with Counsel for the Respondent that the Plaintiff/Appellant failed to prove his case before the trial
10 Court.

I do not also agree that there were major contradictions and inconsistencies in the Defendant's case.

15 I find that the Magistrate properly evaluated the evidence that was presented to him and came to the right conclusions based on the said evidence.

This Appeal lacks merit. It is dismissed accordingly.
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The Judgment and orders of the trial Court are upheld accordingly. The Appellant will meet the costs of this Appeal.

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Godfrey Namundi

JUDGE

6/5/2015

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6/5/2015:

Appellant present

Were for Appellant

10 Respondent and Counsel absent

Court: Judgment read in open Court.

15 **Godfrey Namundi**

JUDGE

6/5/2015