

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL APPEAL NO. 144 OF 2012**

5

(ARISING OUT OF MUKONO CIVIL SUIT NO. 006/2009)

**LUSWATA**

**KANAKULYA ::**

**APPELLANT**

10

**VERSUS**

**MUSISI**

**KONDE ::**

15

**RESPONDENT**

**BEFORE: THE HON. JUSTICE GODFREY NAMUNDI**

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**JUDGMENT**

25 This Appeal arises out of the Judgment and Orders of the  
Principal Magistrate Grade 1, Her Worship Ruth Nabaasa  
sitting at Mukono Chief Magistrate's Court.

In the Judgment the trial Magistrate entered Judgment  
against the Appellant who was the Defendant before that  
Court.

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The Plaintiff - Konde Musisi sued in his capacity as co-Administrator of the Estate of his father Abdukeri Ssali. The claim was in respect of unlawful grabbing of 2 portions of land forming part of the Estate of the late Abdukeri Ssali.

5 The Plaintiff claimed that the Defendant grabbed portions of the land comprised in Block 162 Plots 65 and 66 and two Bibanja pieces.

The Plaintiff therefore sought Judgment and Orders for  
10 vacant possession, General damages, Interest and Costs of the case.

The Defendant denied the claims in his statement of defence, claiming he is a lawful occupant, through purchase  
15 from Abdukeri Ssali in 1992. He also claims he loaned substantial amounts of money to some of the Administrators.

The Appellant laid out a list of fifteen points which in his view are the grounds of appeal.

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I will not reproduce the said list for reasons I will give shortly.

Under Order 43 Rule (2) of the Civil Procedure Rules, **“The Memorandum of Appeal shall set forth, concisely and  
25 under distinct heads, the grounds of objection to the**

**Decree appealed from without any argument or narrative, and the grounds shall be numbered consecutively.”**

- 5 Secondly, an Appellant may not raise matters which were not raised or were not issues in the lower Court.

A reading of the Appellant’s Memorandum of Appeal reveals a verbose, narrative, argumentative and repetitive  
10 production which amounts to re-arguing the case that has already been determined. The Appellant seems to believe that quantity is the same as quality.

All the 15 paragraphs of the Memorandum of Appeal can be  
15 summarized under four (4) headings:

1. Evaluation of evidence (Paragraphs 1, 2, 3, 4, 5, 7, 8, 11, 12, 13, and 14).
2. Failure to visit locus in quo (Paragraph 6).
3. General damages and costs (Paragraphs 9 and 15).
- 20 4. Judgment based on issues not agreed upon at the commencement of the hearing.

The Appellant argued his appeal without Counsel. He submitted that the trial Magistrate considered a different

kibanja in her Judgment which was not part of the 3 Bibanja which were mentioned by his witnesses.

5 That she considered Plot 65 Block 162 which was not subject of the suit and that the above was subject of a different case which was even withdrawn. He also submitted that the trial Magistrate had no jurisdiction to order for cancellation of a Title.

10 Further that she considered issues which were not agreed upon in the Scheduling Conference and instead created others on which she based her Judgment.

15 Finally, he submitted that the trial Court failed to visit the locus in quo and hence came to a wrong decision.

Further that a transfer in respect of the suit land had been made in his favour.

20 Respondent's Counsel made a reply wherein he stated that all the **"15 Grounds of Appeal"** raise issues of evidence and procedure as opposed to matters of Substantive Law. He further submitted that Ground No. 1 is a summary of the remaining 14 grounds.

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He then goes into a discourse of each of the 14 grounds which does not deal with the evaluation of evidence as I have pointed out earlier. The Appellant in what he thinks is a rejoinder to the Respondent's reply generates a 22 page document, that goes into fresh arguments, discussing and raising evidence which is uncalled for and is no rejoinder by any means but a fresh submission on the appeal.

I will deal with this appeal under the headings I laid out earlier.

**Evaluation of evidence and matters not agreed upon at Scheduling:**

At the trial, there were 4 issues agreed upon by both parties and these were supposed to form the basis of the Judgment. Both parties also agreed that the Defendant/Appellant owed the Plaintiff Shs.4,000,000/-. I wonder why Judgment for the Shs.4,000,000/- was not entered as an admission under Order 13 Rule 6 of the Civil Procedure Rules.

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The agreed issues were:

1. Whether the suit bibanjas were acquired legally through purchase.
2. Whether the Defendant is a trespasser on the suit Bibanja.

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3. Whether the Defendant breached a contract of 28/11/2007.

4. Remedies available.

5 In respect of Issue No. 1, the Magistrate found that the Plaintiff was co-Administrator of the Estate of his father - Abdukeri Ssali who died in 1996.

That he was duty bound to protect the property left behind  
10 by the deceased. She found that the disputed land forms part of Block 162 Plots 65 and 66 and they belonged to the late Abdukeri Ssali. She also found that in 1992 the late Abdukeri Ssali sold part of his kibanja at Kitega to the Defendant. She also found that there were disputes over  
15 other pieces of Bibanja that were sold to the Defendant, some by the Plaintiff's siblings and some by the deceased himself before he died. Some pieces of Bibanja were sold to the Defendant by Hamidu Gwantamu, Ishaq Musisi, Nulu Nakasim, Ndagire Bitujuma and Konde Musisi. Out of the  
20 payments he made to them, there was a balance of Shs.4,000,000/- which is acknowledged by both parties. They however refused to effect transfer of Title in respect of those pieces of land in the Defendant's favour. The Plaintiff's Counsel confirms this by a letter he wrote to the  
25 Commissioner of Lands requesting that a Title be issued to

the Defendant in respect of land the Defendant obtained from Hamidu Musoke Gwantamu.

The Magistrate then concluded that since the transaction  
5 was not completed, there was no sale therefore of Plot 66 on Block 162 measuring 4.5 acres by Ishaq Musisi, Ndagire Bitujuma and Nulu Nakasi. She goes ahead to acknowledge that the late Abdukeri Ssali sold the Defendant a kibanja of 50 x 100ft, another kibanja was sold to him by Kiggundu  
10 Badru, and by Hamidu Gwantamu. She however held that as regards Plot 65 on Block 162 at Kitega, the Mutation Forms were forged so there was no transfer.

A perusal of the evidence referred to by the Magistrate  
15 establishes that indeed the Defendant bought the various pieces of Bibanja from the various people mentioned.

It is surprising that she found that there was no sale between the Defendant and Ishaq Musisi, Ndagire Bitujuma and Nulu  
20 Nakasi and Konde Musisi. Both parties in their evidence acknowledge the transaction and the balance. The finding by the Magistrate is flawed.

Instead the Magistrate should have found that the Defendant acquired an equitable interest in that particular piece of land once he made part payment.

- 5 The evidence by both the Plaintiff and his mother Bitujuma and that of the Defendant and his witnesses some of whom are the Plaintiff's own brothers is that the late Ssali's land had several Bibanja Holders (bona fide occupants) on it.
- 10 Secondly, that he had given some of his children pieces of land much as there had been no transfer of those interests. It is those same people like Gwantamu, DW3- Hassan Kisulo, who sold their Bibanja interests to the Defendant.
- 15 It appears to me that the Plaintiff seeks to take advantage of being the Title holder as Administrator of the Estate, to dispossess the Bibanja holders (bona fide occupants) of their pieces of land.
- 20 It is questionable why he has not for example sued those who sold to the Defendant as co-Defendants and why he has stubbornly refused to effect transfer of the piece he, his mother and siblings sold to the Defendant and only demands a balance of Shs.4,000,000/-. I also don't understand what  
25 the Magistrate means by claiming the Defendant bought

**“Kibanja”** and not **“land”**. What are the rights of a kibanja holder/Bona fide occupant? Those are the questions the Magistrate should have dealt with.

- 5 There is also the question of Mutation Forms denied by the plaintiff as not having been thumb printed by his late father.

Without any expert evidence, the Magistrate believed the Plaintiff’s version whose duty it was to prove his claims  
10 against the Defendant.

Finally she questions the Titles in the Defendant’s possession. She claims that since the Defendant only bought Kibanja interests from the various vendors, then the  
15 Titles he has in respect of some of the pieces of land were obtained fraudulently.

I have looked at the Plaint. Fraud was not pleaded. Fraud was not proved by evidence and therefore the finding of  
20 fraud by the Magistrate was without basis. There has been no evidence of investigations leading to such a finding. There is no evidence from the Land Office for example to show the background on how the Defendant obtained the Titles.

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It is therefore my finding that the Magistrate failed to properly evaluate the evidence and accordingly came to the wrong decision/findings.

5 **Failure to visit locus in quo:**

Much as the Appellant raised the failure by the Magistrate to visit the locus in quo, this was never an issue before the trial Court.

10 I have looked at the record of the lower Court, the dispute was about acquisition of the suit property by the Defendant. There was no dispute about the boundaries.

It is my finding that the said failure has not occasioned any  
15 miscarriage of justice.

**General damages and costs:**

20 The Appellant contests the basis upon which the trial Court awarded General damages. The general principle is that the claiming party should be placed in as near as possible to the position he was in before the occurrence or violation of the right he complains has been violated.

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In the instant case, the claim for General damages was a prayer, but it was not proved by any evidence. It was incumbent upon the Plaintiff to demonstrate to Court how the Defendant's actions have led to losses and to what  
5 magnitude. The Court would then be in position to determine what the Plaintiff should be compensated with. This was not done.

I find that the Plaintiff did not prove the claims to the  
10 required standards. It is not enough to stand in Court and claim the Defendant has grabbed your land without the necessary evidence or proof. This appeal succeeds. The judgment of the lower Court is set aside together with the orders therefrom.

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The following orders are made:

1. Appellant to pay the balance of Shs.4,000,000/- outstanding as acknowledged by both parties.
- 20 2. The Title to that piece of land referred to in No.1 above should be transferred in favour of the Appellant.
3. Normal procedure in respect of transfer of Title to a purchaser/holder of a kibanja interest be observed by  
25 the parties in respect of the **bibanja's** the Appellant

purchased from the bona fide occupants or Bibanja holders.

4. Respondent to meet costs of the Appeal.

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**Godfrey Namundi**

**JUDGE**

10 **27/04/2015**