

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**HCT-04-CV-CA-0066-2012  
(ARISING FROM LAND SUIT NO. 445-2012)  
(ORIGINAL CIVIL SUIT NO. 151-1996)**

**P.R. PATEL.....APPELLANT**

**VERSUS**

**JOHN NALEMU.....RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

This is an appeal against the judgment and decree of Chief Magistrate **Lillian Bucyana** of 20.4.2012.

The Memorandum of appeal raised 6 grounds of appeal and prayed that the appeal be allowed, decision below be set aside, judgment be entered for appellant and costs be granted to the appellant.

The duty of this court as a first appellate court is to re-evaluate the evidence, give it a fresh scrutiny and reach its own conclusions (*Pandya v. R (1957) EA 336*).

From the lower court record, the appeal arises from Civil Suit 151/1996. This suit had proceeded upto 25.Dec.2006 when it was dismissed. The respondent appealed the dismissal and **Hon. Justice Muhanguzi** reinstated the suit in 2007. The matter was heard as Land Civil Suit 0445/2012; but a one **J.W. Matanda** was added as a second plaintiff.

The lower court is full of various pleadings that took place around this matter since 1996, which gave rise to the order for retrial by Justice Muhanguzi, which have a bearing on the issues that were set down for determination in Civil Suit 151/1996/Land Civil Suit No. 0445/2012.

I will not reproduce them here but it is pertinent to note the following facts which are evident on the entire lower court record.

1. Complaint dated 29<sup>th</sup> October 1996- J. Nalemu v. 1. P.R. Patel  
2. Peter Oyugi
2. Mbale Civil Suit No. 213 of 1991.
3. Civil Appeal No. 66/2006.
4. High Court District Registry Suit No. 23 of 1983- UCB V. John Matanda T/a Nkokonjeru Constructors.
5. List of Exhibits for Plaintiffs "A- "F".
6. List of Exhibits for Defendants "I- "4".

Having the above background to the lower court proceedings this court will now consider the grounds of appeal in the order they were argued by the parties as herebelow:

**Ground 1: The Learned Trial Magistrate erred in law when she held that on the evidence adduced the plaintiff had proved his case on the balance of probabilities**

Appellant's counsel argued that in civil trials, the burden to prove the case is on the plaintiff. Counsel argued that whereas the plaintiff relied on the lease offer granted in 1982 (Ex. 'D') and Certificate of Title Ex.'A' and called 4 witnesses **Nalemu (PW.1), Matanda (PW.2), Mabelle Harrison (PW.3), Matanda Brian (PW.4)**, the evidence was discredited in cross examination and was unreliable.

He pointed out that **PW.1 Nalemu** had testified that he was a tenant to **Matanda (PW.2)** and that he didn't know the appellants. However that during cross examination, he had conceded that he knew appellant as a former boss at the textile Mills where he was working.

Counsel pointed out that PW.2 (**Matanda**) contradicted himself that he did not know the true landlord, but when cross examined, he accepted having signed a tenancy agreement with the Counsel for the appellant. He denied knowledge of Civil Suit No. 23/1983, and maintained that he was PW.1's witness. (Page 42 of proceedings).

Basing on the evidence above counsel argued that the learned trial Magistrate ought to have found in favour of the appellants. He further pointed out admissions by PW.2 regarding **Counsel Odhimbe**'s role as his lawyer, whom he later abandoned in favour of **Counsel Tsekoko**. He also admitted filing application to set aside the sale of his property by a one Patel, though he didn't know the outcome of the application. He attacked evidence of PW.3, and PW.4 as hearsay.

He faulted the learned trial Magistrate for failing to evaluate evidence brought by the defendant/appellant showing that he had bought the property from a Court Broker **Sulaimani**, through auction. It had been advertised by UCB and he bought it on 21.12.1983. He tendered in documents in his defence. The documentary evidence showed that the High Court Registrar **H.E. Okalebo** had determined an application by **Matanda** to recover his property which was dismissed, (Exhibit D.2).

He argued that the sum of all evidence on record showed that plaintiff failed to prove his case. It was further proved by the fact that **Matanda** was added as a co-plaintiff only after the order for retrial; and he clearly told the court that he was a witness in the case not a plaintiff. He couldn't therefore have been decreed the suit property under those circumstances. Counsel prayed that this ground should succeed for those reasons.

In reply Counsel for Respondent argued that the appeal is bad in law, because whereas as the Decree extracted has four parties **Ngobi Nalemu** and **Matanda** as plaintiffs versus **Patel** and **Oyugi** as defendants, the appeal only has Patel as appellant versus **Nalemu** as respondent.

Counsel argued that the lower court made findings that **Nalemu** is a tenant of **Matanda**. The suit property and issues related thereto were the concern of **Matanda**, and the grounds of appeal are specific on this. He argued that since **John Nalemu Ngobi** was not decreed the suit property then as a tenant, court was right to find him as such, and the current appeal has nothing to do with him. Counsel referred to the case of Peters v. Sunday Post Ltd 1958 EA 424 CA which held that an appellate court should act with caution while assessing conclusions reached by the lower court.

Court should only interfere if there is no evidence to support a conclusion, where the learned trial Magistrate has failed to appreciate the weight of evidence, or where he/she has plainly gone

wrong. Counsel in specific reference to submissions by Counsel for appellant, invited the court to review the evidence and make its own independent conclusions.

Having the above arguments in mind, the first question to determine here is whether for reasons stated by Counsel for respondents this appeal is bad in law.

It is true that the lower court case had four parties where the appeal has 2 parties. In rejoinder to this point, **Counsel Obedo** clarified that this was an oversight but the appeal is against the entire judgment of the lower court. He clarified that his arguments were in respect of both plaintiffs in the lower court. He further prayed that the case of *Peters v. Sundays*, is distinguishable from their situation which was caused by a typing error.

It is a settled principle of law that mistakes and omissions by counsel should not be visited on the litigant.

This was the position in *Mary Kyamulabi versus Ahamad Zirindomu 1980 HCB 11* where the Court of Appeal for Uganda noted that;

*“A mistake by Counsel may not necessarily be a bar to his obtaining of extension of time. The administration of Justice normally requires that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuit of his rights. It would therefore be deplorable for a vigilant litigant to be penalized by refusing him to appeal because of the negligence of his Counsel over whose actions he has no control.”*

The same view was earlier on held by the Court of Appeal for East Africa in *Gurdial Singh Dhillon versus Sham Kaur and Others [1960] E.A.795*.

In the present case, a notice of appeal was filed and the memorandum of appeal filed indicating that the appeal is “*appeal 66 of 2012 from Land Suit 0445/2012 (Original Civil Suit No. 151 of 1996). Appeal from the decision of Her Worship Bucyana Lillian given on 20.4.2012 in Mbale Civil Suit 151 of 1996. As decides that judgment be and is entered for the plaintiff with costs.*” It further states that; “*the appellant P.R. Patel being dissatisfied with the decision in reference appeals to the High Court of Uganda on the following grounds.....*”

The above is a reference to the decision in Civil Suit 151/1996/044/2012 where the parties were **John Nalemu** and **J.W. Matanda** as plaintiffs. The entire pleadings were in my view drawn with both plaintiffs in mind.

As per the cases above the mistake by Counsel not to name **Matanda** as a co-respondent is excusable and since in their arguments they make specific reference to him, this court hereby invokes its inherent power under Section 98 of the Civil Procedure Act and Section 100 of the Civil Procedure Act to rectify the record by having the name of **Matanda** added on the pleadings as a Co-Respondent. This is not at all prejudicial to him since he has been all along represented by **Counsel Nagemi**. Also O.43 r. 3 of the Civil Procedure Rules covers this. I therefore find that with the above arithmetic correction this appeal is not bad in law.

I now turn to the substantive issues raised under this ground regarding the burden of proof by the Plaintiff/Respondents of their case in the lower court.

As rightly pointed out by Counsel for appellant, Sections 101,102,103 of the Evidence Act all provide for the Cardinal rules of proof in that “*whoever asserts a fact must prove it.*” “*Whoever wants court to believe in the existence of a given set of facts, must have the burden to prove their existence.*” The standard of proof in all civil cases is such on the “*balance of probability.*”

A review of the evidence as a whole in my view shows that the parties (plaintiffs) went to court with only one question of who was the right Landlord for the property comprised in Plot Registration Vol. 231, Folio 2 Plot 11 Republic Street.

The evidence that was led by PW.1 was inconclusive as to why he was in court as plaintiff. His evidence was grossly discredited in cross examination, which showed that he was not reliable in his evidence to court. His evidence in chief is on page 2 of the proceedings. He began by denying knowledge of P.R. Patel. He then testified that he acquired the Plot in question from **Matanda** in 1987. He later was given papers showing cases between him and **Owori**, and others for rent claims, then he acknowledged knowledge of **Matanda** as his Landlord not Patel. He concluded his testimony that the two (**Matanda** and **Patel**) were both claiming the property as Landlords and hence he wanted court to declare who was the right Landlord.

In cross-examination at page 3 and 4 of the pleadings, it is shown that the witness conceded that Patel was known to him as a former Manager at ATM. He denied ever paying rent to Counsel for **Patel (Owori)**. He then again said the Landlord he recognizes is **Matanda** whose Certificate he has and he gave him the keys.

This was contradictory to PW.2 (**Matanda**) who testified in his evidence in chief at page 36 that PW.1 was his tenant since 1987, and has been paying rent to date, the current rate being 350,000/= monthly.

PW.2's evidence also was grossly contradicted in cross-examination. While at first he denied knowledge of the transactions between himself and Uganda Commercial Bank in his evidence in chief, when cross examined, at page 41 of the proceedings he concedes that he had instructed his lawyers **Odhimbe** and **Tsekoko** to reply to Patel's claims that he had bought his land. The denials were however contradicted by the defence producing documentary evidence of the said transaction (see page 42) as D Exhibit 1 and D. Exhibit 2. He then conceded at page 42 that "*I heard the property was sold by Court to Patel. I have a witness. Nalemu sued Patel for throwing him out of his business. I was brought as a witness not a plaintiff.*"

Strangely though, during re-examination again PW.2 changed and denied knowledge of the matters he had earlier conceded to.

The above type of evidence coming from Plaintiffs cannot be taken as reliable. Such oral testimony which seems to shift positions is always best tested by other evidence, especially documentary evidence where it can be available. In this case such documentary evidence was exhibited by all parties as seen on the list of exhibits.

PW.3 and PW.4 sons of PW.2 were all giving hearsay evidence. They could not collaborate PW.1 and PW.2's evidence.

In defence DW.1 Chandra Patel informed court that he bought the property through an auction following an advert by UCB. He tendered the sale agreement as D. Exhibit 4. He also told court that a transfer was made in his names- he tendered a copy as "D- IDI."

He told court he couldn't transfer because a dispute arose with plaintiffs, and court made rulings over the matter. He informed court that **Mr. Matanda** tried to set aside the sell but the ruling was given in his favour.

In cross examination he told court that he has been contesting the property for over 29 years. **Nalemu** had refused to pay rent. He clarified that he has caveated the title.

It is on record that court requested for a copy of the advert from the witness, and he requested for time to chase for it. (Page 48) of proceedings.

A court witness **Nakayenze Ann** the Secretary to the District Land Board clarified that the Land Board received the Decree transferring land under decree of execution Mbale District High Court Registry Civil Suit No. MM.23/1983 UCB V. John Wasike Matanda.

From all evidence, it was the finding of the learned trial Magistrate that;

*“taking exhibit 1 and A-4 for plaintiff together with evidence of especially PW.2 and his sons and that of PW.1 since 1987, court finds that evidence of plaintiffs establishes to the required standard that PW.2 is the lawful Landlord on Plot 11 Republic Street.”*

The above conclusion is not supported by the evidence I have reviewed above. At close of their case the plaintiffs did not satisfy the burden of proof. There was evidence from the defendant showing that the said plot had been subject of an auction which led to his purchase of the same. I find it difficult to comprehend the learned trial Magistrate's reasoning regarding the comments in his judgment at page 4 of the judgment, second last paragraph that:

*“I didn't believe evidence of the defendant that he attempted to register the property in his names and failed since 1983 to date for all this time.....”*

The court was aware that since 1983, under Civil Suit MM.32 UCB V. John Wasike Matanda, this property has been subject of court process. The learned Trial Magistrate was presiding over a retrial of a matter filed in the court in 1996. Documents on these matters show that the parties were disputing this property hence the failure to have it registered. CW.1 told court why the Land Board did not register the two warring parties. Court was aware of a series of other

exhibited documents, both from plaintiffs and defendants showing that among other things there were caveats, letters etc written to the Land Board stopping any such registration. This shows that the learned trial Magistrate misdirected herself on the evidential value of the plaintiff's evidence. She even failed to realize that PW.4 and PW.3 gave hearsay. She also ignored the contradictions in PW.1 and PW.2's testimonies. I am therefore in agreement with counsel for appellants that the learned trial Magistrate erred in law when she held that on the evidence adduced the plaintiff had proved his case on the balance of probabilities. This ground succeeds.

**Ground 3: That because the learned trial Magistrate erred in law and on the facts when she held that documents, defendants' exhibit 2 Ruling in Civil Suit No. 23/1983, the order in the same suit declaring sale to DW.1 absolute, did not have any evidential value because they formed part of previous records quashed by courts before this retrial was ordered.**

In arguing this ground, Counsel for appellants alluded to the learned trial Magistrate's failure to correctly assess the exhibits tendered in evidence by defendants/appellants. He referred to the fact that DW.1 told court that he purchased the property as a result of a court auction. He had tendered in these documents but the learned trial Magistrate rejected them on grounds that they were of no evidential value having been quashed in CA.66/2006. Counsel pointed out that whereas CA.66/2006 quashed the dismissal order of CS. 151/1996, it reinstated it to be heard to its conclusion. By time of the hearing of CA.66/2006, the defendant/appellant had not even testified so the learned trial Magistrate was in error to hold as she did.

Counsel for the Respondents conceded that the learned trial Magistrate was in error to dismiss the exhibits as quashed.

Without being academic, this court in resolving ground 1, found that the learned trial Magistrate was wrong in her assessment of the defendant's documentary evidence viz that of the plaintiffs. It is again inconceivable that the learned trial Magistrate could find defence documents exhibited as D. Exhibit 2 (ruling in Civil Suit 23/1983) and D. Exhibit 1 as of no evidential value. As rightly pointed out by Counsel, Appeal 66/2006 was challenging a dismissal of civil suit 151/1996. The decision therefore quashed the order of dismissal but did not quash the exhibits therein. I do not agree that because the learned trial Magistrate was not accorded a copy of the Judgment she therefore committed the error ignorantly. I have perused the lower court record and found these documents documented as exhibits before court. The learned trial Magistrate



would have been more careful in her evaluation of the evidence before concluding the way she did albeit erroneously. This ground is proved.

**Ground 4: The learned trial Magistrate erred in law and fact when she attempted to quash the ruling in Civil Suit 23/1983 when she had no jurisdiction.**

It was appellant's contention that the learned trial Magistrate- a Chief Magistrate attempted to quash a ruling of **H. Okalebo** a decision of the High Court, when she held that it was of no evidential value as it had been quashed by CA. 66/96. He also referred to Section 11 Judicature Act where it is stated that appeals from High Court are appealed to the Court of Appeal. He also referred to the case of *Magomu v. Autum Bank 1968 EA. 136* where Spry held that;

*"It's only an appellate court can set aside judgment of a lower court. The Respondent left it to court to examine and make findings."*

This ground has been covered by the earlier arguments whereby it has been shown that the exhibits above were never quashed by any court. The Chief Magistrate was in error therefore to purportedly quash a ruling of the High Court in the decision exhibited under D. Exhibit 2 (ruling in Civil Suit 23/1983); referred to under paragraph 4 on page 3 of her judgment. This ground therefore succeeds.

**Grounds 2 and 6: (Failure to carefully weigh evidence by the learned trial Magistrate).**

It was argued by Counsel for appellants that there was overwhelming evidence that though 2<sup>nd</sup> plaintiff was owner of suit property he lost it after his case with UCB. Evidence was produced to that effect by DW.1 showing that he bought the suit premises following a court auction. The learned trial Magistrate however according to appellants ignored all that evidence and instead found for plaintiff. She therefore acted with grave irregularity and her decision ought to be set aside.

In reply Counsel for Respondents as earlier argued that the findings that Respondent 1 **Nalemu** is a tenant was justified. He found no merit in the rest of the arguments since to him they were moot and referred to a non existing Respondent 2 (**Matanda**).

It has already been found by this court that this appeal covers both respondents who were plaintiffs in Civil Suit 151/1996 from which this appeal arises. The findings by the lower court greatly affected the rights of appellant who went to court in answer to a plaint filed by Respondent 1-Nalemu in the first place. He however neglected to prosecute it to conclusion

whereby it got dismissed. He appealed and had the case restored for retrial. When the defendant/appellant appeared, the original plaintiff **Nalemu** amended his pleadings and included **J.W. Matanda** as a co-plaintiff. The subject matter remained the same plot Vol. 231 Folio 2 Plot 11 Republic Street.

It is therefore not tenable for Counsel to invite this court to close its eye to these glaring facts and concentrate on **Nalemu**'s tenancy in isolation of the interests of the appellant whom he dragged to court and caused court to enter an erroneous finding thereof regarding ownership of this property from the facts and evidence at the time before court.

I therefore agree with appellant that both grounds 2 and ground 5 are proved. There was ample evidence before the learned trial Magistrate to prove that the appellant had purchased this plot by auction and hence had an interest in it as a bonafide purchaser for value. The assessment of the evidence by the learned trial Magistrate was therefore not balanced as per ground 2, and was irregular and was not exhaustive in its scrutiny of the evidence as per ground 6. This court therefore finds that ground 3 and 5 are proved.

Ground 6 was not argued.

In the final analysis for all reasons stated, I find that this appeal succeeds on grounds 1-5. The appeal is upheld. The judgment and orders of the lower court are set aside and replaced with the following orders that judgment is entered for appellant in this court and the court below, with costs for the appellant both here and below. I so order.

**Henry I. Kawesa**

**JUDGE**

**28.05.2015**