

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL APPEAL NO. 80 OF 2009**  
**ARISING FROM CIVIL SUIT NO. 0166 OF 2004**

**DAN LUBEGA**

**.....**

**APPELLANT**

**VERSUS**

**NAMWANDU ROBINAH NTEGE**

**(ADMINISTRATOR OF THE ESTATE OF JOHN NTEGE**

**LIMITED TO THE APPEAL)**

**.....**

**RESPONDENT**

**BEFORE: THE HON LADY JUSTICE LYDIA MUGAMBE**

**JUDGMENT**

**a) Introduction**

1. This is the judgment in an appeal from the decision of Her Worship Nakitende Juliet at Mengo Chief Magistrates Court. In her judgment, the trial Magistrate dismissed the claim in Civil Suit No. 0166 of 2004 with costs to the late Ntege John where the Appellant had sued the late Ntege John and a one Farida Lutaaya for trespassing on the suit lock up shop No. 70B2 at Natete market, sought their eviction from the said lock up shop, mesne profits, general damages and costs of the suit. The Appellant was dissatisfied with the judgment and appealed to this court.

2. The Respondent in this court Robinah Ntege is the wife of the late John Ntege and administrator of his estate limited to this appeal. The Respondent claims that the late Ntege John was the owner of the suit lock up shop No. 70D in Natete market which he built in 1999 and had been in physical occupation of the same since 2000. The Appellant claims ownership of the same lock up shop which was allegedly allocated to him on 14<sup>th</sup> December, 1999 by Natete Market Development Steering Committee (herein after “the Committee”) as lockup No.70B2 at Ug. Shs 2,500,000/= which he paid to Mr. Ntanzi Steven. At the time of allocation, the late Ntege was already in physical occupation of the suit lock up shop.
3. The trial Magistrate found that by the time the Appellant paid the Chairman of the Committee for the suit lock up shop, and at the time of allocation, Lock up 70B2 was the property of the late Ntege and he was therefore not a trespasser. The trial Magistrate also found that the Mr. Ntanzi Steven was the one to blame for the double allocation.
4. The Appellant is represented by Mr. Mbogo Charles of M/s. Mbogo & Co. Advocates and the Respondent is represented by Ms. Doreen Leku of M/s. Mubiru – Musoke, Musisi & Co. Advocates.
5. Based on the grounds of appeal in the Memorandum of Appeal the issues agreed for resolution at scheduling were:
  - i. Whether the trial Magistrate properly evaluated the evidence on record and thereby reached the correct decision.
  - ii. Remedies available.
6. The Supreme Court in **Father Nanensio Begumisa and 3 Ors v. Eric Tiberaga SCCA No. 17 of 2004** observed that the legal obligation of the first appellate court is to re- appraise evidence and is founded in common law, rather than rules of procedure. On a first appeal, the parties are entitled to obtain from the Appeal Court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the Appeal Court has to make due allowance for the fact that it has never

seen or heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions. (Also see **F. K. Zabwe v. Orient bank and others SCCA No. 4 of 2006.**)

7. I will adopt this standard and re- evaluate the evidence in resolution of the issues. The Appellant brought three witnesses at trial. Steven Ntanzi the Chairman of the Committee was PW1, the Appellant who testified as PW2 and Mike Kakande the builder of the suit lock up shop was PW3.
8. Of the Defendants at trial, the late Ntege filed his defence and Farida Lutaaya who was the tenant of the late Ntege in the suit lock up shop did not file her defence. PW1 gave the background of Natete Market saying that Kampala City Council (herein after KCC) was the owner of the market and it tendered its management to Natete Vendors Company Ltd whose management started in April 1994. On 24<sup>th</sup> November 2000 Natete Vendors Co. Ltd lost the tender to Natete Development Company Ltd.
9. However according to PW1 the development of the market was assigned to the Committee to which he was appointed as Chairman. Part of the work of the Committee was the construction of stalls and lock up shops. The Committee invited all people who wanted to buy lock up shops to apply before the construction ended. He said that at the time of allocation of the suit lock up shop, the late Ntege was not a business man in Natete market but in Natete trading centre and did not apply to get a shop in the market.
10. PW1 explained that before November 2000, he had shares in Natete Vendors Company Limited which was in charge of managing the market in 1999 when the late Ntege came to the market. PW1 also testified that while running the market under Natete Vendors Company Ltd in 1999, the Late Ntege's father who was his friend approached him and as a result PW1 allocated the suit lock up shop space to the late Ntege to carry out his business. This is how the late Ntege came to the market.

11. Although PW1 insists that the late Ntege had never been a tenant in the market and that he just helped him to use the suit premises when his father approached him, the first Defendant in his written statement of defence presented that by 14<sup>th</sup> December, 1999 the suit lock up never existed. He also presented that he constructed the suit lock up shop with his efforts and financial input. In conclusion PW1 insists that there is no evidence that the Committee ever became the owner of the suit lock up shop and/or any other shops save when it temporarily rented the suit lock up shop to the late Ntege.
12. PW2 the Appellant identified the location of the suit lock up shop as inside Natete market on KCC land and that it was lock up shop No. 70B2 in Natete market. He further testifies that he owns other lock ups in Natete Market. He explained that by the time he bought the suit lock up the late Ntege was already a tenant of the same. However PW1 informed him that the late Ntege was only a tenant and his tenancy had lapsed. Further that the Chairman (PW1) introduced him to the late Ntege as his new landlord and the late Ntege was to pay him directly. In sum PW2 insisted that he was the owner of the suit lock up shop.
13. PW3 testified that he worked for Famusa Construction Company which constructed the suit lock up shop in issue. He testified that both Mr. Ntanzi and the late Ntege contributed to the construction of the shop. That he constructed it for Mr. Ntanzi from foundation up to wall plate from 1995 to 1996. In 1999 he constructed it from slab to completion and the late Ntege came in after the slab. Further that he built it for the late Ntege after he agreed with Ntanzi. He confirmed that the late Ntege is the one who constructed the structure to a usable state. PW1 explained that this contribution by the late Ntege was to be rent in kind.
14. The late Ntege only had a written statement of defence at trial and filed submissions during this appeal. The Respondent – his wife claims ownership of the suit lock up shop and insists that the late Ntege constructed the suit lock up shop. He explained that the suit lock up shop is No. 70D and not No. 70B2 as claimed by the Appellant. As proof of his ownership he attached two annexures to his written statement of defence. The first is the letter from Natete Market Development Co. Ltd Ref No.

07/04, the second is a set of receipts with which he claims he bought material for the construction of the suit lock up shop.

**b) Analysis**

15. The Appellant seems to present that because the hearing at trial proceeded exparte, without the Respondent (Defendants), his evidence was not rebutted and therefore should be taken to be true. This allusion is not always true. The court in dispensing justice has the liberty to address its mind to whatever is before it in its assessment and determination of the matter at hand. In this case, the trial magistrate had the Respondent's (Defendant's) written statement of defence and annexures thereto. She could therefore utilize them as pleadings. The trial Magistrate also had the benefit of cross examination of the Plaintiff's witness by the Respondent counsel at trial. Of course in considering the pleadings and annexures thereto, the court is mindful that these were not subject to cross examination and exercises extra caution in any kind of reliance on them. However the court is also mindful that what is in the written statement of defence and annexures thereto is also relied on in the submissions of the Respondent during this appeal.
16. PW1 explained that the numbers of the lock up shops changed when Natete Market Development Co. Ltd took over the management of the market. This detail is central to the determination of this appeal. One wonders why in the letter annexed to the written statement of defence from Natete Market Development Co. Ltd, this company which was in charge of management of the market could misrepresent the identity of the suit lock up shop as 70D and not 70B2 when clarifying matters of the said lock up shop.
17. PW1 concedes that Natete Market Development Co. Ltd was the one in charge of management of the market after it took over from Natete Vendors Company Ltd in 2000. Because this company was the one in charge of the management of the market, I am more inclined to believe the explanation in the annexure to the written statement of defence that it was lock up No. 70D and that it was built by the late Ntege or at least partly by Ntege as testified by PW3.

18. It is not disputed that by the time the Appellant bought the suit lock up shop, the late Ntege was already in possession of the same. What is difficult to comprehend is PW1's evidence that the late Ntege was only a tenant in the suit lock up shop. Perhaps the problem emanated from the failure to sign a tenancy agreement between the late Ntege and PW1. Such agreement would have clarified the nature of Mr. Ntege's occupancy more convincingly.
19. In examination in chief at pages 7 to 8 of the record of proceedings, PW1 testified that at the time of allocating the suit lock up shop to the Appellant, the suit lock up shop was already built, he took the Appellant to the late Ntege and introduced him as his land lord in 1990. In cross examination at page 12 of the record of proceedings, PW1 clarified that at the time of allocating the suit lock up shop to the Appellant, it was not yet built and that he was allocated the suit lock up shop after payment.
20. PW1 also said in examination in chief at page 7 of the record of proceedings that when he introduced the Appellant to the late Ntege, they agreed on the amount of Ug. Shs. 50,000/= to be paid as rent per month. The Appellant who testified as PW2 at page 17 of the record of proceedings said that they never agreed on any amount. This kind of testimony demonstrates contradictions in the evidence of PW1 itself and between PW1 and PW2. In circumstances where PW1 dealt with both the Appellant and the late Ntege, his choice to testify for the Appellant against the Respondent may be coupled with a choice to give evidence that is untruthful and prejudicial to the Respondent. Even his testimony on the ownership of the suit lockup shop and its identity are contradicted by Natete Market Development Co. Ltd which was in charge of the management of the market as demonstrated in the letter annexed to the written statement of defence.
21. Moreover the contradictions highlighted above bring his credibility in question. I am inclined to consider that PW1 exaggerated or lied in parts of his evidence. It is difficult to tell without other credible evidence which parts of his evidence is truthful and which is not. I am therefore inclined to exercise extra caution in relying on any part of his testimony. He is simply not a credible witness in this case.

22. In the circumstances of this case, it is difficult to consider that the late Ntege was only a tenant at the suit lock up shop but went on to construct the shop to a usable level. It is also difficult to believe in the circumstances of this case that once the late Ntege had incurred expenses contributing towards the completion of this lock up, it then became available for the Appellant to purchase.
23. It is not clear who was in charge of construction of lock ups between the Committee and Natete Market Development Co. Ltd. It is also not clear from the evidence who was in charge of keeping the records regarding ownership of the lock up shops. What is clear is that once Natete Market Development Co. Ltd took over the management of the market in 2000 both the Company and the Committee had a stake in the market.
24. PW1 said that people would pay for the stalls and the Committee constructs. PW3 who constructed the suit lock up explained that the late Ntege contributed to the construction, completed and entered it. This is not disputed. In fact even the Appellant and Respondent acknowledge that by the time the Appellant came, the late Ntege was in possession and had built the suit lock up. So I am left wondering what the Appellant was paying for and what PW1 was receiving the money for.
25. In circumstances where people would pay for the construction of their lock ups, it is more believable that the late Ntege paid and the suit lock up shop was allocated and/or constructed for him, or that he constructed the same for himself.
26. Based on all the above, I have no basis to say that the suit lock up shop did not belong or does not belong to the Respondent. If the Appellant paid any money to PW1, the same should be refunded. Therefore there is no error in the trial Magistrate's assessment of the evidence. Issue one is resolved in the affirmative and the Appellant has no remedy in this court. Accordingly the appeal is dismissed with costs to the Respondent.

I so order

**LYDIA MUGAMBE (JUDGE)**  
**22/06/2017**