

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL NO. 87 OF 2007
(ARISING FROM CIVIL SUIT NO.027 OF 2007)**

WAKOOLI SAMUEL ::: APPELLANT

VERSUS

BATEGANYA ABDALLAH ::: RESPONDENT

BEFORE HON. JUSTICE MICHAEL ELUBU

JUDGMENT

This is an appeal against the Judgment and orders of H/W SUSAN OKENY which was delivered on the 6/7/2009. The appellant is WAKOOLI SAMUEL, the Respondent BATEGANYA ABDALLAH

The respondent (who was the plaintiff in the lower court) made a claim for general and special damages which arose when the Appellants (Defendants) allegedly demolished his house on the 20th of July 2007.

It was the Plaintiffs case, from evidence, that he was a tenant of one RUTH NABIRYE who is an aunt and caretaker of the Appellant. That the appellant and one MUSITWA (who was the 2nd Defendant in the lower Court) are children of JAMES MUGOYA MAKAKA who is the deceased son of NABIRYE'S sister.

That on the 13th of March 2006 NABIRYE sold a 50ft x 70ft plot to the respondent at 400,000/=. That he started to construct a house on the plot. On the 23rd of July 2007 the appellant and his brother Musitwa demolished the house.

Any claim to ownership by the Appellant was denied. It was stated that in 1971 NABIRYE and three others bought the plot jointly from one MOHAMED NGONGOLI.

The area LC I Chairman, HAMZA BAYIAUS, testified that he was present at the sale of the land to the respondent. He also stated that he was aware that the land belonged to NABIRYE before she sold to BATEGANYA.

The Appellant denied the Respondent's claims. He set up a denial in his written statement of Defence where he claimed ownership of the house that was demolished.

That the house was on his plot. His late father JAMES MUGOYA made a will in which he left the plot to one MUSITWA MUSTAFA and to the Appellant, WAKOOLI SAMUEL.

That WAKOOLI demolished a 3 roomed structure because he was ordered to do so by Bugembe Town Council who directed him put up a well-planned building in its place.

That RUTH NABIRYE was simply a caretaker and the Appellant had left the land and property in her care.

That when the building was demolished, Musitwa was arrested and charged with malicious damage. It is alleged by the Appellant that the evidence relied on by RUTH NABIRYE and BATEGANYA ABDALLAH as proof of purchase and sale is not genuine.

One Kibubuka, who testified as DW2, states that he wrote the will of the late James Mugoya Makaka in which the Makaka named the land, including the structures on it, as his.

The defence produced evidence through DW4 that it was the Appellant who bought the building materials used to construct the house.

The learned trial Magistrate in her judgment believed the Plaintiff's case, found that the house was indeed demolished and that the Will relied on by the Appellant here was a forgery. That the sale transferred good title to the respondent, and she also found that the defence witnesses particularly DW4 did not appear truthful.

The Appellant being dissatisfied lodged this appeal with 3 grounds namely:

- i) That the learned trial Magistrate erred in law and evidence when she properly failed to evaluate the evidence on record to the required standard thereby arriving at a wrong decision and occasioning a miscarriage of justice.
- ii) That the trial Magistrate erred in law and fact when she ordered for general damages without any basis.

Mr. Wafula Charles appeared for the appellant while the respondent was represented by Assimwe Anthony of the Legal Aid Project.

The submission of the Appellant is that the respondent claimed that he bought the land from one NABIRYE RUTH but did not produce an original purchase agreement. The photocopy he tendered for identification was questionable. That the pleadings of the respondent in the lower court did not mention an agreement of sale or that it will be relied on.

Even the document that was actually annexed was a copy of an agreement of sale of land to Ruth Nabirye and 2 other ladies. No witness was brought to verify that sale agreement.

That on basis of the evidence of PW2, the learned trial Magistrate arrived at the conclusion that James Mugoya's will was forged. That the trial magistrate did this based on the fact that the name of the village where the land is located was originally Budhumbuli Bugembe but changed in 1989 to Budhumbuli west. That the Trial Magistrate ought to have visited locus to determine this allegation but she did not.

All defence witnesses testified that the land belonged to James Mugoya the father of the Appellant.

Finally that the award of 4 million damages was excessive in the circumstances.

The Respondent opposed this appeal and submitted that the learned Trial Magistrate arrived at the correct decision.

That the respondent adduced evidence of proof of his purchase of the suit land from RUTH NABIRYE.

That there was a witness to that purchase (PW2) and the sale agreement was tendered in court. PW2 was the LC I Chairman and stated that he drafted the agreement. The purchaser RUTH NABIRYE confirmed that she sold the land to the respondent. The Respondent stated he had been a tenant of PW3 who gave part of the land to the hospital and then sold the rest to someone else. That the applicant signed as a witness in that particular sale agreement confirming that he knew Nabirye was the owner of the land. The Applicant cannot now claim the land as his.

That none of the defendant's witnesses stated they were present or had evidence of the alleged ownership by late James Mugoya.

That the structure was built to the ring beam and general damages were justified in the circumstances.

This Court will resolve the grounds in the same manner they have been argued. Consequently I will resolve the grounds jointly.

Firstly, as this court is sitting as the first appellate court, it must subject the entire body of evidence to a fresh evaluation arriving at its own conclusion though due regard should be given that when issues turn on demeanour, it will defer to the trial court which saw the witnesses testify (see *Selle Vs. Associated Motor Brad Company (1968) EA 123*).

As this court sees it, the two grounds and the submissions of Counsel on both sides, the question is who owned the suit land?

I will start with the allegation that the land belonged to JAMES MUGOYA MAKAKA and that he bequeathed it, in his will, to his sons who included the appellant.

It is the evidence of WAKOOLI SAMUEL that the land was his and he derives certainty of this ownership from the will that was made by his father and which was read at the funeral by DW2 KIBUBUKA HENRY WAKOOLI.

The respondent disputes the Will which is said to be false.

The LC I Chairman HAMZA contested that Will based on its content. He stated that the Will refers to Budhumbula West as the village where the testator, JAMES MUGOYA MAKAKA, was staying at the time he made the Will.

It is Hamza's testimony that Budhumbuli West only came into existence in 1991. That if indeed the Will was genuine and made in 1989, it would not make a reference to the village as Budhumbuli West.

HAMZA is the current Chairman of Budhumbuli West and has lived in the Village since 1987 when he became the LC.I. Chairman and can speak authoritatively about the history of the name of his village.

I have seen no evidence to rebut the assertion that indeed Budhumbuli West did not exist in 1989 when the Will was allegedly written.

It is also stated that the suit land was bought by the Appellant's father, who left it with RUTH NABIRYE PW3 as a caretaker. DW1, the Appellant stated that his late father bought the suit land. That one MAGOMO, the son of the original owner denied his father ever selling the land to PW3, NABIRYE. This MAGOMO did not testify.

The Appellant did not produce any evidence of proof of purchase of the suit land by his father. None of the other defence witnesses had any evidence of purchase of the suit land by the appellant's father.

The Respondent stated that he bought the suit land from PW3 who happens to be an Aunt of the Appellant.

PW3 complained that the Appellant had continued to interfere with her quiet possession of the suit land which she owned. That MUSITWA who was the second defendant in the lower court had conceded that the land was hers and had withdrawn.

PW2 HAMZA the area Chairman said that he had lived in the area since 1987. That he knew the land to belong to PW3 and that at one time she had sold a portion of the land and the appellant had signed the sale agreement on that occasion as a witness.

Nabirye testified that she and two others bought the land in 1970. Hamza, PW 3, in addition said that he saw that purchase agreement and his own father is indicated to be a witness at the purchase.

PW3 stated that when she sold the land to PW1 it was in the presence of PW2 who also drafted the sale agreement.

The respondent stated that he bought the land at 400,000/= from Nabirye who confirmed the sale in her evidence to the trial court. They both stated that Hamza was a witness to the sale.

This was untitled land and the respondent obviously first verified the validity of the Nabirye's title to the land before he purchased (**Bamuite Aloni Vs. Nangobi Safina Babirye [1977] HCB 45**)

The Trial Magistrate noted the demeanours of all the witnesses when they testified. She observed that on the whole the defendants did not strike her as truthful and that DW4 in particular resisted answering questions put to him in cross examination.

In matters turning on demeanour of witnesses, the Appellate Court will rely on the assessment of the Trial Court. Here this court will rely on that assessment made by the trial court.

It is also well known in law that in all civil matters even in legal proceedings the standard of proof is on the balance of probabilities and not beyond reasonable doubt (see **K.M. Doukare vs Uganda Revenue Authority (1997) HCB 77**)

On the whole, and having carefully balanced the evidence on both sides, it is the finding of this court that Appellant did not adduce sufficient evidence to show ownership. The Will he relied on was forged and there was no evidence of purchase by his father as alleged. The Respondent proved purchase and PW3 Nabirye showed

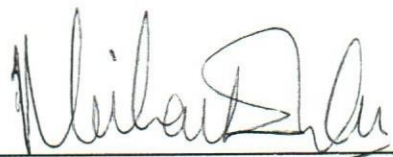
evidence of her ability to pass good title to the land. It is also pertinent that the defendants did not appear truthful as they testified. On a balance of probability therefore I find in favour of the respondent.

On the question of general damages, they are granted at the discretion of the court. But this court has not seen the basis for the award of the 4 million shillings by the trial court to the respondent. The Respondent had built 4 rooms to the ring beam. There was no evidence of actual cost. 4 million appears excessive especially for 2009 when the award was made.

In **Robert Coussens vs. Attorney General, Civil Appeal No. 8 of 1999 (scu)** (unreported) it was held that The law is now well settled that an appellate Court will not interfere with an award of damages by a trial Court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely wrong principles of law or that the amount is so high or so low as to make it an entirely an erroneous estimate of the damages to which the plaintiff is entitled.

Considering the circumstances, the level of construction, the year of construction and number of rooms of the demolished house, I find the award excessive. The award of general damages is accordingly reduced to 2,000,000/-.

This appeal is dismissed with costs save for the order on the reduction in the award of damages.



MICHAEL ELUBU

JUDGE

21/02/2019