

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MASAKA  
CIVIL APPEAL NO. 04 OF 2017  
(ARISING FROM RAKAI CIVIL SUIT NO. 07 OF 2021)

KASAANYA DENIS ..... APPELLANT

VERSUS

KAWEESI PRO ..... RESPONDENT

*Before; Hon Justice Victoria Nakintu Nkwanga Katamba*

**JUDGMENT**

The Respondent/Plaintiff instituted Civil Suit No. 007 of 2016 against the Appellant/Defendant seeking a declaration that the Respondent is the lawful owner of the suit plot situate at Kibuuka Village, Kibuuka Parish, Lwamagwa Sub-county in Rakai District and that the Defendant/Appellant is a trespasser thereon, an order for vacant possession, permanent injunction, general damages and costs of the suit.

The Respondent's case was that he acquired the suit plot together with a piece of kibanja by purchase from on Daudi Sekyewa on 3<sup>rd</sup> September 2015 at Ugx. 2,000,000/=. The suit plot and kibanja measured 150ft by 25ft and 10 yards by 24 yards respectively and a sale agreement was executed to which the Defendant/Appellant was a witness. The suit plot is boarded by a road/path to the north, one Nabisere Cate to the south and West, Lukube to the East. The Respondent took possession upon the purchase and continued to have undisturbed possession until February 2016 when the Defendant trespassed on the suit plot and started putting building materials thereon. The Defendant/Appellant refused to desist from trespassing on the land despite several warnings.

In his Written Statement of Defence, the Appellant/Defendant denied the claim and contended that he bought the suit plot from a one Nabisere Cate on 4<sup>th</sup> June 2014 at Ugx. 1,200,000/=. The Plot measures 30ft by 50ft and the boundaries are; Nabisere Cate to the South and East, Regina Nakayemba aka Maama Allan to the West and a road in the north.

The Parties raise three issues for determination by court;

1. Whether the suit plot belongs to the Plaintiff
2. Whether the Defendant is a trespasser thereon
3. What are remedies available to the Parties

The Plaintiff/Respondent`s case open with the evidence of Kaweesi Komuhanda, the Plaintiff, PW1 who stated that the Defendant trespassed on his plot measuring 25x250ft which he bought from his brother . The Plot borders Lukube Joseph – east, Nabisere Cate – West and North, Masaka-lyantode road – south. A sale agreement dated 3<sup>rd</sup> September 2015 was executed to that effect, and the Defendant poured materials on the plot in February 2016. He prayed for court to evict the Defendant from the plot.

PW2, Lubega Isma, the Chairperson of the village testified that he was once called by the Plaintiff to witness when the Plaintiff was lending money to a person at Daudi Sekyewa`s home. He was told the Plaintiff was lending Ugx. 700,000/= to one Daudi Sekyewa but they agreed that the agreement should show that he had sold a plot. They toured the kibanja and signed the agreement dated 03/09/2015 for Ugx, 5,000,000/= the said agreement was a sale agreement and the alleged borrower had failed to pay. He doesn`t know if the Defendant/Appellant bought the plot.

PW3 Karugaba Richard stated that in September 2015, Daudu Sekyewa called him to his home where PW3 found the LC1, the Plaintiff, Sekyewa and his wife. Sekyewa told him that he wanted to write a security agreement to protect the money (700,000/=) that Kaweesi (the Respondent) was lending to Ssekyewa but that he should make an agreement for 5,000,000/=. The agreement was signed and he witnessed.

PW4 Lukube Joseph, stated that he is a neighbor to the suit plot and was present when the Plaintiff was buying. The Plaintiff brought him an agreement with signatures of the Defendant, the mother and their witnesses confirming the sale. They wanted him to sign as the immediate neighbor and he called the chairperson who confirmed that the plot had been sold. Later the Defendant came and poured bricks on the same plot.

That was the Plaintiff's case.

The Defendant/Appellant Kasanya Denis stated in his evidence that he bought the suit plot from his mother Nabisere Cate at Ugx. 1,200,000/=. Agreement for the sale was identified as DE1. The plot neighbors Najemba Regina to the West, Nabisere Cate to the south and north, and the Lyantonde road to the south.

DW2 Nabisere Kate stated that the Plaintiff who is her neighbor lent money to her son, the Defendant. The Plaintiff had lent money to Daudi Sekyewa. They made an agreement for sale of land but he was borrowing money. The plot she sold to the Plaintiff is different and was bought in 2014.

The learned Magistrate relied on Sections 91 & 92 of the Evidence Act to the effect that when the terms of an agreement are reduced into writing, oral evidence cannot be adduced to alter their contents. The trial Magistrate held that the agreement for sale and the subsequent agreements alluded to by the Defendant and his mother, are an afterthought. The trial Magistrate found the Plaintiff to be a bona fide purchaser and the Defendant to be a trespasser on the land. The trial court issued orders for the immediate vacation of the Defendant, a permanent injunction against the Defendant, general damages of Ugx. 5,000,000/= and costs of the suit to the Plaintiff.

Being dissatisfied with the judgment and orders of the trial court, the Defendant/Appellant filed this appeal on the following grounds;

1. The Trial Magistrate erred in law and fact when he failed to compound his mind that the issue was on a mailo land where there was need for consent by the landlord in writing to transact any sale land in default, the kibanja (customary tenure) is rebuts to the land as it is in this case even the measurements are wrongly stated so the issue was a soft loan from the Respondent by the Applicant;
2. The Trial Magistrate erred in law and fact when he ignored the corroborative evidence of PW2 and PW3 (Karugaba Richard) that this was a loan transaction but not purchase deal;

3. The Trial Magistrate erred in law and fact when he failed to adduce that in the event of selling the Appellant would have handed over his purchase agreement to the Respondent but he retained the same as its on record;
4. The trial Magistrate erred in law ad fact when he failed to evaluate the evidence on record hence reaching a wrong decision.

The Appellant prays for this court to quash the judgment of the lower court, allow the appeal and award costs to the Appellant.

Both Parties filed written submissions and they are on the court record.

Counsel for the Appellant submitted that the Plaintiff's evidence shows that he did not purchase the suit plot from the said Daudi Sekyewa, the Defendant/Appellant's brother. Counsel argued that there was never a sale of any plot to the Respondent but simply a money lending transaction. Counsel submitted that the plaintiff's own evidence shows that it was a money lending agreement. S.92 of the Evidence Act provides for the exclusion of oral evidence where there is a written contract but gives exceptions to the rule where (a) *any fact may be proved which would invalidate any document , or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation,illegality, want of due execution, want of capacity in any contracting party, want or failure of consideraion or mistake in fact or law. (b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document.*

The evidence of the witnesses as to a separate oral agreement of lending money is not in the agreement PE1 and is therefore inconsistent with the terms of PE1 and the oral agreement is therefore admissible under Section 92(b) of the Evidence Act. Moreover it is the Plaintiff's witnesses who testified to that effect. Further, that there is no evidence that Daudi Sekyewa was ever the owner the suit plot and he therefore did not have capacity to contract in the suit plot which belonged to the Defendant. Counsel relied on Section 92 (a) of the Evidence Act

which allows admissibility of oral evidence of want of capacity to contract. Counsel invited court to find that there was no transaction of sale of the suit plot but simply a money lending transaction which should not be visited on the Appellant.

Counsel for the Respondent argued that the Evidence Act under Sections 91 and 92 is very clear that when the terms of any agreement are reduced into writing, there is no amount of oral evidence that can be adduced to alter their contents. Counsel argued that the sale agreement dated 3<sup>rd</sup> September 2015 (PE1) shows that a contract between the Respondent and one Daudi Sekyewa was reduced into writing and there is no money lending agreement therefore the acts of the Appellant are just an afterthought meant to defeat the interest of the Respondent. Counsel relied on the doctrine of estoppel and argued that the terms of the agreement are binding, and further, counsel relied on evidence of DW2 who stated that the plot she sold to the Appellant is different from the suit Plot. Respondent's Counsel prayed that court finds that indeed there was a sale of the disputed plot between the Respondent and a one Daudi Sekyewa that the Appellant is trying to defeat.

### **Determination of the Appeal;**

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (*see Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (*see Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

I will resolve the grounds of the appeal concurrently just as they were argued by Counsel for the Parties.

The Appeal is against the judgment of the trial Magistrate in which the Respondent was found to be the owner of the suit plot and the Appellant was held to be liable in trespass and ordered to vacate the suit plot.

The issue in contention is ownership of the suit plot. The Appellant's evidence is that he purchased the suit plot from his mother one Nabisere Cate DW2 and it is also his evidence that the Respondent never purchased the Suit Plot as he alleges but rather entered into a money lending transaction with one Daudi Sekyewa using the suit Plot as security.

The Respondent adduced evidence of sale agreement dated 3-9-2015 which shows that the Respondent purchased the suit plot from a one Daudi Sekyewa and corroborates his evidence as to the measurements, borders and other terms of the purchase.

PW2 testified that he was called to witness an agreement for money lending but the parties agreed that it shows that the seller sold a plot. PW2 indeed identified PE1 as the agreement he witnessed and stamped. In his words, PW2 testified, "I know why they are in court. What I know is that the Plaintiff came to my home and told me that he had come to call me as a witness when he was lending money to a person...They told me that they had agreed the Plaintiff was lending money to Daudi Sekyewa Shs 700,000/- but they agreed that the agreement should show that he had sold a plot. We went to the kibanja and toured it. I asked them why they had made an agreement of 5,000,000/- yet they had told me 700,000/- and they said it's ok. I signed an agreement of 5,000,000/-." I note from the proceedings that at the hearing of the suit in the lower court, the Plaintiff had failed to summon his witnesses and he applied for a warrant of arrest. It was after summons was issued by the Court that the plaintiff/Respondents witnesses attended court. I am inclined to believe that they knew that there was another agreement and that the agreement for sale of land was a sham and a cover up of the money lending agreement.

When the Plaintiff's witnesses testified, Pw2 and Pw3 informed court that what they were witnessing was a money lending agreement even though the terms that were reduced into writing spoke to an agreement for sale of land. These were the Plaintiffs own witnesses testifying to the illegal dealings they entered into. This court cannot condone an illegality and will not give credence to a transaction whose integrity is questionable. The Plaintiff/Respondents witnesses as well as the Defendants testified that there was an oral

money lending agreement. The agreement presented as PE1 was a cover up of the money lending transaction.

Pw2 also testified that Daudi Sekyewa failed to pay the money, they tried to mediate and failed. It was Dw2's evidence that those who were present at the time of making the agreement testified that it was a money lending agreement. Both the Plaintiff's witnesses and the Defendant/Appellant's witnesses testified that there was a separate oral money lending agreement and the agreement for sale was a cover up.

Secondly, the evidence presented in PE1 shows a sale of land (plot) transaction between Daudi Sekyewa and Kawesi Pro. The suit on the other hand was instituted by the Plaintiff/Respondent against Kasanya Denis in trespass. The question that begs an answer at this point is, if the Plaintiff/Respondent had purchased the kibanja as he purports why did he not take immediate possession?


I therefore agree with the Appellant's Counsel that this transaction falls under the ambit of the exceptions to the Parole Evidence Rule. There was illegality on the part of the Plaintiff/Respondent and Daudi Sekyewa which the neighbors and local authorities condoned.

There was never a sale of land transaction and the Plaintiff/Respondent should pursue recovery of money and not land.

The Appeal is allowed for the reasons stated with costs to the Appellant.

I so order.

Dated at Masaka this 1<sup>st</sup> day of October, 2021.

  
**Signed;**  
**VICTORIA NAKINTU NKWANGA KATAMBA**  
**JUDGE**