

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
CIVIL APPEAL NO. 05 OF 2021
(ARISING FROM CIVIL SUIT NO. 142 OF 2015)

BYAKATONDA FRED ::: APPELLANT

VERSUS

1. SSEBUTURO GODFREY
2. KAVIRI VIANNEY
3. NAKYANZI GETRUDE ::: RESPONDENTS

Before; Hon Justice Victoria Nakintu Nkwanga Katamba

JUDGMENT

The Plaintiffs/Respondents herein filed Civil Suit No. 142 of 2015 against the Defendant/Appellant herein and one Ntambala Andrew on a claim for trespass seeking a declaration that they are the rightful owners of the suit land comprised in LRV 2968 Plots 7, 8, 9 & 11 situate at Kayoro, an order for specific performance, a permanent injunction, eviction order, general damages and costs of the suit.

The Plaintiffs' claim was that the Respondents contacted one Ntambala Andrew 2nd Defendant, a land broker, to purchase land on their behalf and paid him 14,500,000= as the first installment and on the 28th April 2010, the Appellant and 2nd Defendant entered into a sale agreement for land comprised in LRV 2968 Plots 7,8,9 & 11 at Butamu LC1 to the 2nd Defendant. On 28th October, 2010, the Appellant entered into a sale agreement for the suit land with the Respondents at a consideration of 39,600,000= and the Respondents paid 23,000,000= as part payment. The Respondents later paid 2,100,000= to complete the

purchase price. The Appellant refused to give them vacant possession hence breaching the contract.

In his Written Statement of Defence, the 1st Defendant/Appellant denied the claim and stated that he owns the suit land comprised in Block 934 Plots 7,8,9, and 13 together with one Sam Mushaija his share being 88 acres. He contended that he never entered into an agreement to sell land to the Respondents and the agreement dated 18/1/2010 bearing his thumb print was a forgery. He averred that the 2nd Defendant defrauded the Respondents and acknowledged the fraud and made a refund of 5,000,000=.

The matter proceeded exparte against the 2nd Defendant Ntambala Andrew.

The Plaintiffs/Respondents' case opened with the evidence of the 1st Respondent, Ssebutuuro Godfrey PW1 who stated that they bought the suit land located at Butano LC1, Zimwe Parish, Kyanamukaaka Sub-county measuring 888 acres through a land broker called Ntambaara Andrew. An agreement dated 18.10.2010 was executed between PW1, the Appellant and the land broker (2nd Defendant), and another between the land broker and the Appellant admitted as PEXs dated 25.4.2010. The other agreement between the land broker and the Appellant dated 25.4.2010 was identified as DID1. The purchase price was paid in three installments of 14,500,000=, 23,000,000= and 2,100,000=. The agreement dated 18.10.2010 between PW1, the 2nd Defendant and the Appellant was admitted as PEX1 and the Appellant denied them vacant possession. The Appellant denied the Respondents vacant possession and they sought legal mechanisms for assistance. Justice Centers wrote to the Appellant vide letter dated 19.5.2015 admitted as PEX3. He also stated that he knew the Appellant and that the Appellant introduced the 2nd Defendant as his land transaction agent.

PW2 Yawe Lawrence an advocate of Nyanzi and Nyanzi Advocates stated that he drafted and witnessed the sale of land agreement between the Respondents and Appellant for consideration of 39,600,000= for 88 acres each at 450,000= and 23,000,000= part payment was paid in his presence. The seller told him that he was illiterate.

PW3 Kibambanyi James stated that he witnessed the agreement dated 25.4.2010 for 14,500,000/= which money was paid to the 2nd Defendant to receive on the Appellant's behalf. The land is 88 acres and it was sold at 39,600,000/=.

That was the Plaintiffs'/Respondents' case.

The Appellant Byakatonda Fred DW1 stated in his evidence that the Respondents are his neighbors at Butaano, Simwe, Kyanamukaaka Masaka and he has known them for about 8 years. He owns a leasehold interest which he has never sold to anyone and has never executed an agreement for sale nor visiting lawyer's officers to make an agreement. He denied signing an agreement for sale of land to the Respondents and his specimen thumb print was adduced and admitted as Exp1 of 11.9.2017.

DW2 Calingom Pius Superintendent of Police attached to the Department of Forest Science Naggulu-Kampala testified that he holds an Advanced Talent Finger Prints Comparison Certificate from Russia State USA 2005 – Russian Forensic Academy and he analyzed and compared the agreements PEX1 and the finger print sample and discovered that the two thumb prints do not agree in the formation, relative position and coincidence sequence in their ridge details. His report dated 5th July 2019 was admitted as DEX1.

That was the Defendant's/Appellant's case.

In his judgment, the trial Magistrate rejected the evidence of DW2 for being inconsistent with the rest of the evidence and held that PW2 Yawe Lawrence's evidence was substantive in proving that the Appellant indeed appended his thumb print to the sale agreement. The trial Magistrate found that there was consent of the parties, considerations, the parties had capacity to contract and there was intention to be legally bound. The trial Magistrate entered judgment for the Respondents and ordered the Appellant to deliver vacant possession upon receipt of Shs. 16,600,000/= that was allegedly paid to the 2nd Defendant. An alternative order was also made for the Appellant to refund Shs. 23,000,000/= which was part payment of the land and the Respondents to pursue the 2nd Defendant for recovery of Shs. 16,600,000/=.

Being dissatisfied with the judgment of the trial Magistrate, the Appellant brought this appeal on the following grounds;

1. That the learned trial Magistrate erred in law and fact when he held that there was a valid sale of the suit land between the Appellant and the Respondents thus causing a miscarriage of justice;
2. That the learned trial Magistrate erred in law and fact when he selectively evaluated evidence of the Respondents against the overwhelming evidence of the Appellant thus causing a miscarriage of justice.

The Appellant prays for the appeal to be allowed with costs and that the judgment and orders of the lower court be set aside.

Both Parties filed written submissions.

Counsel for the Appellant submitted that PW2 was not certain in his evidence as to the person who allegedly appeared as a seller in his chambers. Counsel further sought to challenge the sale agreement for lack of a jurat since the Appellant is an illiterate. Counsel argued that the requirement of a jurat is mandatory and failure to comply makes the document in question of no value. To support this argument counsel cited and relied on the case of *Kasaala Growers Co-operative Society Vs Kakooza & Anor SCCA No. 19 of 2010*. Counsel submitted that there was no valid agreement and prayed for the appeal to be allowed.

Counsel for the Respondents argued that the Respondents' evidence in comparison to the Appellant's evidence, it was proper for the trial Magistrate to enter judgment for the Respondents. Counsel cited and relied on the case of *Stanbic Bank Uganda Ltd Vs Ssenyonjo Moses and Nakibuuka Nusurah CA No. 147 of 2015* and submitted that the Appellant is not protected as an illiterate and the Illiterate Protection Act since he benefitted from the agreement. Counsel prayed that the appeal be disallowed and the Respondents be allowed to pay the balance of 16,600,000= since the 2nd Defendant could not be found.

In rejoinder, Counsel for the Respondents argued that the trial Magistrate erred in holding that there was a valid sale yet the agreement had no jurat. Counsel argued that since the Appellant is an illiterate, the agreement cannot be relied upon to hold that the agreement was valid.

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 Tibebaga 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 appeal concurrently since they both relate to the main contention on appeal that the Appellant as an illiterate could not have executed a valid agreement without a certificate of translation.

The Appellant in his evidence stated that he has never sold his land and that he does not know Ntambara Andrew, the 2nd Defendant. He had however stated in his Written Statement of Defence that the said Ntambara Andrew had defrauded the Respondents and that the matter was resolved at police. I therefore find that his evidence that he did not know the 2nd Defendant was deliberately false and he intended to lie to the court. Why did he lie to the court if indeed he had not instructed the 2nd Defendant to be his agent?

The Appellant sought to challenge the thumb print on the agreement and relied on evidence of an expert witness DW2 who examined the documents and found that the thumb print thereon does not confirm with the Appellant's thumb print. This evidence was rejected by the trial Magistrate for having contradicted all the other evidence adduced by the other witnesses.

In *Divie v. Edinburgh Magistrates (1953) SC 34 at 40*, it was held that:

"The duty of the expert witnesses is to furnish the Judge with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

The principles of dealing with a handwriting expert were laid down in the case of *Kimani vs Republic (2000) E.A 417*, where it was stated as follows: ".....it is now trite law that while the courts must give proper respect to the opinion of expert, such opinions are not as it were, binding on the courts.....such evidence must be considered along with all other available evidence and if a proper and cogent basis for rejecting the expert opinion would be perfectly entitled to do so....."

Besides his evidence, the Appellant relied on evidence of DW2 Calingom Pius Superintendent of Police attached to the Department of Forensic Science. DW2 in his evidence stated that the finger print did not belong to the Appellant and relied on DE1 the report of the finger print analysis which shows that the finger print on the agreement was not originated by the person bearing the finger prints on the samples taken.

Evidence of expert opinion like hand writing experts although relevant, might be biased and corrupted especially since it is usually the party seeking to disprove or prove a fact that calls the expert to give evidence. For this reason, Courts have to exercise due caution in admitting expert evidence and it must not be relied on in isolation of the rest of the evidence on record. Reports of experts must be very descriptive and if necessary, must contain graphics of what was relied on to reach a certain analysis. That is why it is called expert evidence, mere narration of what was observed by the expert does not give much weight to the evidence sought to be relied on by the court.

In the instant case, DW1 adduced a report in which he narrated his findings and stated that, "*...the questioned fingerprint with the reference ...sample fingerprints was carried out with*

negative findings (not identical in the formation and coincidence sequence of their ridge details.” I do not find such to be sufficient to support expert opinion and further be relied on by the court to reach a conclusion as to whether or not the fingerprint belongs to the Appellant. The trial Magistrate was therefore right to reject the evidence of DW2.

The Appellant faults the trial Magistrate for relying on evidence of PW2 who was uncertain of the seller in the impugned agreement that is subject to this matter. The Appellant further faults the trial Magistrate for holding that the sale agreement which did not have a jurat was valid yet the Appellant is an illiterate.

PW2 Yawe Lawrence in his evidence stated that the parties walked into his chambers and he drafted a sale agreement for them, that they did not tell him about an earlier part payment and further that the seller told him that he was illiterate which is why he appended his thumb print.

PW2 is an advocate of the court and with due respect, having been told that the seller was illiterate, he had the duty of ensuring that all the necessary technicalities and formalities are followed to legalize the agreement. PW2 in his evidence seemed unsure of the parties that appeared before him to execute the agreement. The agreement was purportedly executed in 2010 and PW2 stated in his evidence that, there were many people involved in the transaction who appeared at his chambers. It was also his evidence that he knows the Respondents although he does not know the Appellant personally. The use of the word “suppose” in his evidence, for a lawyer of his standing discredited his evidence. He stated that, “I suppose this is the seller” which raises doubt as to whether he even met the seller.

It was the duty of anyone interpreting a document for an illiterate to indicate that the documents that its contents were read and explained back to the illiterate person who confirms to have understood them by appending their signature. In this case, Counsel should have clearly indicated on the sale agreement that it was read and explained to the seller especially since Counsel testified that he was informed that the seller was illiterate. Failure to append the necessary explanation/certification renders the agreement void.

Section 54 of the Contracts Act 2010 gives the effect of a void agreement to a party who has received advantage under it. In the instant case, the Respondents claim to have paid monies to the Appellant and the Appellant has successfully challenged the agreement.

Counsel for the Respondent cited and relied on the case of *Stanbic Bank Uganda Ltd Vs Ssenyonjo Moses and Nakibuuka Nusurah CA No. 147 of 2015*. In that case Justice Madrama indeed found that lease agreements without verification that the illiterate parties understood the terms, was illegal. Counsel however, seeks to rely on this case, to argue that the Appellant should not be allowed to benefit from the illegality.

Therefore, I find it important to address the effect of the void agreement which is void for lacking proper explanation as per *Section 3 of the Illiterates Protection Act*.

The Respondent adduced evidence of sale agreements and an acknowledgment of receipt showing that the Appellant was paid for the purchase. PW2 in his evidence stated that Ugx, 23,000,000= was paid at execution of the agreement.

The Appellant has not adduced any evidence to prove that he did not transact with the Respondents or that he did not enter into the sale agreement (although it is void).

Parties enter into a contract with the intention of being legally bound and when they perform their obligations under the agreement, they should not be allowed to benefit at the advantage of the other when the agreement is found to be void. This is meant to avoid unjust enrichment. The case would obviously be different for agreements made for an illegal purpose or with parties without capacity to contract.

In this case, both Parties had the capacity to contract and having considered the evidence on record, I am convinced that the Appellant understood the purpose of the agreement. Save from seeking to rely Section 3 of the Illiterates Act, the Applicant has not adduced any other evidence to challenge the agreement and as I have already observed, he deliberately lied to the court about knowing the 2nd Defendant.

This court is therefore convinced that the Appellant benefitted from the sale agreement and the evidence adduced by the Respondents of acknowledgements of receipt which was supported by evidence of PW2 who stated that part payment was made at execution of the agreement, proves this fact. Sections 101 and 102 of the Evidence Act require parties to prove their allegations and in the instant case, the Respondents proved their case against the Appellant. It is therefore just and fitting that neither Party is allowed to benefit from the void agreement at the expense of the other.

This appeal is hereby dismissed. The Appellant is hereby ordered to give vacant possession to the Respondents upon receipt of the Shs. 16,600,000/= from the Respondents that the Respondents purportedly paid to the 2nd Defendant.

Costs of the Appeal are awarded to the Respondents.

I so order.

Dated at Masaka this 17th day of January, 2022

Signed; _____



Victoria Nakintu Nkwanga Katamba

Judge