

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL APPEAL NO. 38 OF 2020

(ARISING FROM CIVIL CASE NO. 16 OF 2015)

5 ATUHAIRWE PATRICK APPELLANT

VERSUS

1. NAMARA OLIVER

2. BYARUHANGA CHARLES RESPONDENTS

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BEFORE HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

The appellant brought this appeal against the decision of His Worship, Robert
15 Mukanza, Magistrate Grade One, under Fort Portal Chief Magistrate's Court
seeking orders to set aside the judgment of the trial court and to allow the appeal
with costs.

Background:

20 The appellant filed Civil Suit No. 16 of 2015 against the Respondents seeking
recovery of land, a permanent injunction, an eviction order, general damages and
costs of the suit. It was contended by the Appellant that he bought the suit land on
behalf of Rev. Kaserebe and family under the name Patrick Atuhairwe. That the
plaintiff got some misunderstandings with his father over the suit land and went to
25 court and the same was declared family land on the 11th of January 2002 by the
Grade Two Magistrate per the judgment which was attached. He also averred that



in April 2004, the Respondents' daughter, a one Komuhendo was defiled by the church priest during the night youth enjoy and Rtd. Rev. Kasereba, the deceased stood surety for the case not to be taken to police to shame the church priest and the church. That he was informed by Rev. Kaserebe that the priest paid fifty thousand at the home of Rev. Kaserebe where the illegal meeting took place and the balance of three hundred thousand shillings was to be paid later and he was told that the same was cleared by the defiler. That the following day, the 1st Respondent started to dig in part of the suit land hoping that the defiler may run without paying her. That in 2009 after the death of Kaserebe, the appellant opened up a case of criminal trespass which ended in the RDC's office and the Respondents were advised to leave the land. That in 2012, the appellant spent six months out of home and when he came back, he found the 1st defendant/respondent constructing a semi-permanent house which he stopped through the area chairperson and threatened to put her in court and the said house is not complete. That in April 2015, the 2nd Respondent cleared part of the suit land where upon the appellant opened up a case of criminal trespass vide CRB 453. The appellant further contended that the suit land was family land per the judgment of court dated 11th January 2002 and that the late Rev. Kaserebe had no right of misusing the same without the consent of the family members. That the Respondents forged the agreement of sale that they relied on to claim ownership of the suit land. The appellant sought orders that (a) Any transaction made or surety after January 11th 2002 is in contempt of court and therefore illegal (b) a permanent injunction, (c) An order of eviction against the Respondents (d) General damages and costs of the suit.

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In the joint written statement of defense, the Respondents denied the allegation by the plaintiff against them and averred that the Appellant/plaintiff had no cause of

action against them and that the suit was frivolous and intended to unjustly enrich the appellant. The Respondents further contended that the 2nd Respondent was given a plot of land measuring 25 by 100ft by the late Rev. Kaserebe Yosamu in 2002 as a gift *inter vivos*. That later in 2004, the 1st Respondent who is also a wife of the 2nd Respondent purchased a plot measuring 25ft by 100ft from the appellant's father, the late Rev. Kasereba Yosamu and a land sales agreement was executed to that effect and witnessed by the plaintiff. That the Respondents later constructed a house on their land and planted a banana plantation thereon and have been staying on the suit land. That the Appellant has never been the owner of the suit land and that the same was bought by the late Rev. Kaserebain 1995 and not the plaintiff. The Respondents thus asked court to dismiss the suit with costs.

Three issues were framed for determination by the trial court thus:

- (a) Who is the rightful owner of the suit land?
- (b) Whether the defendants are trespassers?
- (c) What remedies are available?

The trial court found that the appellant failed to prove his claim of ownership of the suit land thus had no cause of action against the Respondents and the case was dismissed with costs to the Respondents. The Appellant being aggrieved with the decision of the trial court lodged this appeal and asked court to set aside the judgment of the trial court on the following grounds:

- (a) That trial magistrate erred in law and facts when he based his judgment on forged purchase agreement dated 23th December 2004 which was fraud and illegal.



(b)The trial magistrate erred in law and facts when he based on hearsay and gave the land to the Respondents without proof.

Hearing and Submissions:

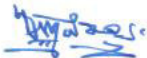
- 5 Both parties were self-represented and filed written submissions in support and opposition of the grounds of appeal.

Duty of this Court:

- As the first appellate court, the duty of this court is to rehear 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 & 3 others vs Eric Tiberaga SCCA 17 OF 2000 [2004] KALR 236*). The first appellate court does re-evaluation on record of the trial court as a whole weighing each party's evidence, keeping in mind that an appellate court, unlike the trial magistrate had no chance of seeing and hearing the witnesses while they testified, therefore this court had no benefit of assessing the demeanor of the witnesses. (*See: Uganda Breweries v Uganda Railways Corporation 2002 E.A*)
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Appellant's Submissions:

- 20 The gist of the appellant's submission is that the suit land was family land and that this was confirmed by the decision of court dated 11th January 2002 delivered by the Magistrate Grade II. That the judicial officer who tried the matter did not find out all the illegalities in the Respondents' pleadings before declaring them the owners of the suit land. That the 1st Respondent bought the suit land from Rev. Kaserebe who was a husband to the appellant's mother Enid Kaserebe in 2004 yet the same was family land and there was an order stopping the late Rev. Kaserebe
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from selling the same without the consent of the wife. That section 39 of the Land Act requires spousal consent before any transaction on land and the same was not sought from the appellant's mother. That this was an illegality that went to the root of the transaction and thus asked court to have the judgment of the trial court set aside.

Respondent's submissions:

The Respondent on the other hand contended that the appellant failed to prove that the suit land belonged to him. That the 1st Respondent clearly testified that he purchased the suit land from the late Rev. Kasereba and the appellant signed as a witness to the purchase agreement. That the plaintiff's witnesses failed to tell Court the exact owner of the suit land. That DW1 (1st Respondent) testified that she was sued for trespass on land located at Kabungo Village, Hakatoma, Kyenjojo Town Council and she told court that she acquired the suit land from the late Rev. Kasereba on the 23rd day of December 2002 and an agreement was made to that effect. That in cross examination she indicated that no family member was present apart from the appellant and the land was 50ft by 100ft. That she also told court that the land belonged to the late Rev. Kasereba and not the Appellant and the late sold it to her in 2004. That the 1st piece was given to the 2nd Respondent in 2002 by the late Rev. Kasereba. That the respondents have two houses on the suit land, one permanent and the other semi-permanent and there are ovacado and jack-fruit trees and *mitoma* trees. That DW1's evidence was supported by that of DW3 who confirmed that at the time of purchase of the suit land by the 1st Respondent, the late Rev. Kasereba was present. That the learned trial magistrate visited locus and found the two houses on the suit land and proper boundary marks. That he was right to hold that the suit land belonged to the Respondents and that the Appellant had no cause of action against the Respondents. The Respondents also submitted



that the learned trial magistrate properly relied upon the evidence on record and the purchase agreement by the 1st Respondent which was not a forgery as alleged by the Appellant and no hearsay evidence was on record. That the learned trial magistrate properly evaluated the evidence and arrived at a proper finding that the appellant had no cause of action against the Respondents. The Respondents in conclusion asked court to dismiss the appeal with costs.

Consideration by Court:

Order 43 Rules and 2 of the Civil Procedure Rules provides thus:

1.1. Every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his or her advocate and presented to the court or to such officer as it shall appoint for that purpose.

1.2. The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and the grounds shall be numbered consecutively.

2. The appellant shall not, except by leave of the court, urge, or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule; except that the High Court shall not rest its decision on any other ground unless the party who may be affected by the decision has had a sufficient opportunity of contesting the case on that ground.



The above rules clearly state the manner in which an appeal from the lower court can be lodged in the High Court which is by way of filing a memorandum of appeal. The Memorandum of appeal should state the grounds of upon which the decision of the lower court is challenged in a concise manner and under distinctive heads and not in an argumentative or narrative way. Further it also provides that an appellant cannot be permitted or heard on any ground or objection not indicated in the memorandum of appeal. That incase leave is granted to add other grounds, then a party to the appeal should be given an opportunity to be heard on those additional grounds. It is also deducible from Rule 2, that the High Court is not restricted to the grounds or objections contained in the memorandum of appeal or those added with leave of court. The rule seems to suggest in my view that court has the discretion to consider the legality and propriety of other issues though not indicated in the memorandum of appeal but do arise in the proceedings in the lower court.

In this case the appellant's submissions are divorced from the grounds contained in the memorandum of appeal. In the memorandum he indicated two grounds that is: **(1) That trial magistrate erred in law and facts when he based his judgment on forged purchase agreement dated 23th December 2004 which was fraud and illegal; (2) The trial magistrate erred in law and facts when he based on hearsay and gave the land to the Respondents without proof.** In the submissions, the Appellant submitted on something different. He argued that the suit land was family land and that per the provisions of Section 39 of the Land Act, the sale of the suit land to the 1st Respondent was illegal since the consent of the family members was not sought. He never made any submissions on the grounds framed for trial. His submissions are completely detached from the pleadings and in my view he seemed to have framed another ground of appeal which was not

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included in the memorandum of appeal. I will thus in accordance with Order 43 Rule 1(2) and 2 disregard the submissions filed by the Appellant and proceed to evaluate the evidence based on the grounds which he framed for trial in the memorandum of appeal.

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Ground One: That trial magistrate erred in law and facts when he based his judgment on forged purchase agreement dated 23th December 2004 which was fraud and illegal

- 10 The appellant in the reply to the Respondents' Written Statement of Defense under paragraphs 3, 4 and 5 contended that the late Rev. Kasereba had no right to dispose of the suit land on ground that the same was family land and there was an order of court stopping the late from selling the same without the consent of the family members (owners). That the Respondents did not present proper documents of title
- 15 and that the agreement relied upon was a forgery. The Respondents on the other hand contended that the agreement was signed by the Appellant. I will thus evaluate evidence on record in regard to the said agreement.

- During trial, the appellant who testified as PW1 during his examination in chief he
- 20 stated thus: "*The agreement they possess between my father and them is a forgery. I reported a case at police CRB No. 120/2018 because they refused to bring the agreement to be verified by a police handwriting expert. Court should just ignore it. That in 1999, my father wanted to sell part of the entire land of 1 acre but my mother took him to court (Grade II at Fort Portal, His Worship Bangirana*
- 25 *Godfrey) ruled in our favour on the 11th January 2002 declaring the 1 acre as family land I tendered in court a copy of the judgment and a letter of to whom it my concern issued by court...*"



The appellant was not cross examined by the Respondents on those facts. PW2 (Enid Kaserebe) in his examination in chief she stated thus: "...My late husband never sold any land to them. I would have known. I was the lay leader in church where he was serving as a reverend. I would have known about the sale. They trespassed on the suit land. We sued them in the L.C courts but they have been adamant. I have never signed on any agreement for these people..... One time my husband attempted to sell part of the family land but I successfully sued him in Grade II Court." In cross examination she indicated that she never signed as a witness for the defendants. PW3 corroborated the evidence of PW1 and PW2 when he stated that his father was successfully sued in the Grade II court and the land was declared as family land.

In response to this allegation, the 1st Respondent who testified as DW1 in her examination in chief she stated thus: "...It's the late Reverend KaserebeYosamu who sold to us that piece of land on 23/12/2004. People present included Stephen Burekemu Byaruhanga Charles (D2). An agreement was made." In cross examination she indicated that it's the late Rev. Kaserebe who sold the land to her. That no family member was present apart from Atuhairwe Patrick. That the appellant signed on the agreement. The appellant denied signing on the agreement. She also indicated that Enid Kaserebe was no. 8.

The agreement was admitted through DW3 who stated that he witnessed the sale of the suit land by Rev. Kaserebe. DW4 testified in examination in chief stated that he signed as No. 7 and the plaintiff and Kaserebe, Byaruhanga Charles, Namara Olive, L.CI Chairperson Manyindo paul were present. In cross examination he indicated that he knew Kaserebe and that by the time of burying Rev. Kaserebe is



when the issue of land came up, the children of Rev. Kaserebe were told to bring the agreement of Olive Atuhairwe signed after together with his mother.

In the judgment of Court, the learned trial magistrate at page 4 noted in relation to this agreement thus: "For DW1 & DWII both being defendants testified that the land in question was sold to 1st defendant by the late Rev. Kaserebe at Ugx 300,000 witnessed by several people including Enid Kaserebe (PWII) approved by Patrick Kaserebe Atuhairwe (PW1) an agreement dated 23rd December 2004. This agreement was unchallenged by the plaintiff. The plaintiff has failed to prove that he is the lawful owner of the suit land and hence presented no cause of action against the defendant. For the defendants they have ably proved that the suit land is theirs as per DE1...."

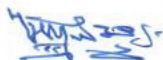
In my view, it is evident from the record that the appellant contested the agreement of purchase of the suit land by the 1st Respondent. The contest was on two fronts, one, that the agreement at hand is a forgery since it was not signed by the late Kaserebe and other people indicated thereon including himself and the second was that the agreement was illegal since the purchase was contrary to the judgment of court that declared all the properties family land requiring consent of the family members which was not sought in this regard.

I will start with the 2nd contention which was the basis of the plaintiff's claim. The plaintiff filed the suit contending that the suit land is family land. That he bought the same on behalf Rev. Kasereba and the family. He attached a purchase agreement for the suit land in the names of the late Rev. Kaserebe dated 29th August 1995. He further contended that the suit land was family land having been declared so by the Magistrate Grade II in FPT 00 CV MA 27 of 2001. That the sale



of the same by the late Rev. Kaserebe without the consent of the family members was in contempt of the orders of the Grade II Magistrate. He thus asked court to declare any transaction or surety after January 11th 2002 to be in contempt of court therefore illegal and void, a permanent injunction, an order of eviction against the Respondents/defendants, general damages and costs of the suit. Further in the reply to the Respondent's written statement of defence he confirmed that the suit land was for the family having been declared so by the Grade II Magistrate. Therefore, in my view, the trial court was to investigate the plaintiff/appellant's assertion as to whether the land in issue was family land and the sale of the same by the late Rev. Kaserebato the 1st defendant after the judgment of the Grade II in FPT 00 CV MA 27 of 2001 was in contempt of court and therefore illegal and void.

Based on Order 6 Rule 7 of the Civil Procedure Rules, that parties are bound by their pleadings and the evidence adduced should be in line with the pleadings and the judgment of court should be in accordance with the pleadings of the parties. In **Muhammed Sempa Vs. Baliraine Saul Civil Appeal No. 022 of 2016**, Justice Eva Luswata (High Court Judge, as she then was) held that: *"A party will not be allowed to succeed on a case not setup by him and be allowed at trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings"*. In **Struggle Ltd Vs. African Insurance Co. Ltd, (1990) ALR 46 – 47** cited with approval in **Kitaba Peter and 12 others Vs. Muhamood Thonabani Civil Appeal No. 020 of 2021**, it was held that: *"The parties in civil matters are bound by what they say in their pleadings which have the potential of forming the record moreover, the Court itself is also bound by what the parties have stated in their pleadings as to the facts relied upon by them. No party is allowed to depart from its pleadings"*.



A judgment that is alien to the pleadings may not properly address the rights of the parties and the remedies sought and it does not ensure that as far as possible, all matters in controversy between the parties are completely and finally determined. Such a trial would be defective as it fails to make a determination in a manner
5 dictated by law.

In this case the Appellant filed a suit seeking court to declare any transaction over the suit land after January 11th 2002 to be in contempt of the decision of the Grade II FPT-00-CV-MA-27 of 2001 and therefore illegal and other reliefs. The basis of
10 the appellant's claim as per the pleadings was that the suit land was family land and was declared so by the Magistrate Grade II in FPT-00-CV-MA-27 of 2001 and any transaction over the same after the decision of court in the said case which was delivered on 11th January 2002 without the consent of the family members was in contempt and illegal and the judgment was tendered in court and admitted as PE1.
15 The appellant contended as per the pleadings that the suit land was family land and the evidence on record partly supports this assertion. However contrary to the pleading, the trial magistrate framed three issues for determination that is:

- (a) Who is the rightful owner of the suit land?
- (b) Whether the defendants are trespassers to the suit land?
- 20 (c) Remedies available.

The trial magistrate went ahead to analyze the first issue in the context as to whether the suit land belonged to the plaintiff or not. In the conclusion on the first issue, he held thus: "*the plaintiff has failed to prove that he is the lawful owner of the suit land and hence presented no cause of action against the defendants. For*
25 *the defendants, the have proved that the suit land is theirs...*" In my view the analysis by the trial magistrate was contrary to what the parties pleaded. The trial



magistrate was to establish or investigate whether the sale of the suit land by the late Rev. Kasereba if any was lawful amidst the ruling of the Grade One in FPT-00 -CV-MA-27 of 2001. He was to do an analysis as to whether the decision in the said case affected the sale in issue or not. He did not do the same but instead
5 evaluated evidence as regards ownership of the suit land by the appellant which was not pleaded.

I will not consider the second ground since the appellant did not point out any hearsay evidence that the trial magistrate relied upon. The said ground therefore
10 fails.

In my view the relevant issues in controversy in this case were not investigated or properly investigated by court. I find that the interests of justice in this case would be best served by a re-trial. I therefore set aside the judgment of the trial court. A
15 retrial is accordingly ordered. Each party is to bear their costs of this appeal.

I so order.



20 Vincent Wagana

High Court Judge

Fort-portal

2.11.2022