

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**  
**HCT – 01 – LD – CA – 0011 OF 2019**  
**(ARISING FROM KAMWENG LD – CS – 0034 OF 2017)**

5 **KIIZA DEBORAH ::: APPELLANT**  
**VERSUS**  
**MBARUSHIMAANA JAMES ::: RESPONDENT**

**BEFORE HON. JUSTICE VINCENT WAGONA**

10 **JUDGMENT**

**Introduction:**

The Appellant brought this appeal seeking to set aside the judgment of His Worship Kirya Martins, Magistrate Grade I Kamwenge delivered on 27<sup>th</sup> March 2019.

The Appellant framed the following grounds of appeal:

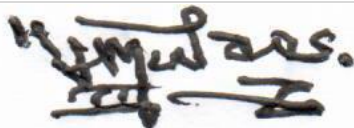
- 15           1. The trial Magistrate erred in law and fact when he failed to properly or otherwise evaluate the evidence on record as a whole thereby reaching a wrong decision of declaring the Appellant as a trespasser on the suit land.
2. The trial Magistrate erred in law and fact when he ordered the Appellant to pay general damages of Ugx 1,500,000/- arising from the said trespass
- 20           which was a decision erroneously arrived at in the circumstances.

**Background:**

The Respondent filed Land Civil Suit No. 34 of 2017 against the Appellant in the Chief Magistrates Court of Kamwenge seeking orders and declarations: a declaration

25           that he is the lawful owner of the suit land; a declaration that the Defendant is a

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trespasser on the suit land; an eviction order; a permanent injunction restraining the Defendant/her agents from committing further trespass and damage to the suit land; general damages for trespass and inconvenience suffered by the Plaintiff and costs of the suit.

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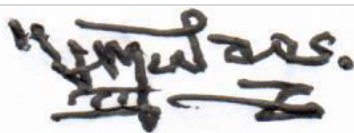
It was contended by the Respondent/Plaintiff that he is the lawful owner of land located at Rugarama, Nkongoro, Kanara Sub County, Kamwenge District which he acquired by way of purchase from Pasikari Moses/Singura Edson in 2013. It was averred that upon purchase, the Respondent/Plaintiff brought his father  
10 Zirimwabagabo Andrew and his sister Kasifa Tabu to stay and cultivate a piece of the same land. That the Respondent's/Plaintiff's father died and was buried on the suit land in 2015 and Kasifa Tabu also died and the land was placed in the hands of a caretaker in the names of David who was to cultivate the land and plant trees on behalf of the Respondent/Plaintiff.

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That in August 2016, the Appellant/Defendant entered upon the Respondent's/Plaintiff's land, chased away the caretaker and started to cultivate the same and employed other people to occupy the land. It was contended that the Appellant/Defendant encroached on the Respondent's/Plaintiff's land claiming it to  
20 be hers. That the Respondent/Plaintiff genuinely acquired the suit land and was using the same until the Appellant/Defendant grabbed the same. That the actions of the Appellant/Defendant constituted trespass and caused the Defendant loss and damage to which the Appellant/ Defendant was liable in general damages. The Plaintiff/Respondent asked court for judgment in his favour.

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In response the Appellant/Defendant denied the allegations of the Plaintiff/ Respondent and contended that she never trespassed on the suit land. That she received the land in dispute from the late Kasifa Tabbu who bought it in 2013 on behalf of his father Zirimwabagabo Andrew (deceased) and that she received it on behalf of the family of the late Zirimwabagabo Andrew and it still remains family land. That she acquired the suit land genuinely from Kasifa and is thus not a trespasser and she had never chased the Plaintiff/Respondent away. That the Appellant/Defendant was the rightful caretaker of the suit land since it belongs to the family of the late Zirimwabagabo Andrew and was it handed over to the Appellant/Defendant to safe guard the same. She asked court to dismiss the suit with costs.

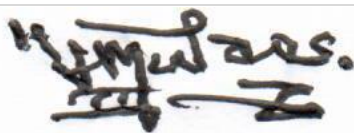
The Trial Magistrate framed two issues for trial that is:

1. Who is the rightful owner of the suit land?
2. What remedies are available to the parties?

The trial magistrate after due consideration resolved both issues in the affirmative declaring the Plaintiff/ Respondent the rightful owner of the suit land and the Defendant a trespasser. He issued an order of eviction, a permanent injunction, awarded general damages of UGX 1,500,000/= and costs of the suit. The Appellant/Defendant being aggrieved appealed against the said decision to this court.

### **Representation and Hearing:**

Both parties were not represented both in the lower court and in this Court. They both never filed submissions. I thus considered the memorandum of appeal and the record of the trial court in this decision.



### **Duty of this Court:**

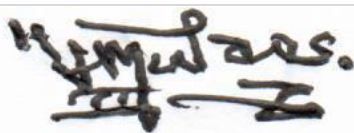
As the first appellate court, the duty of this court is to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re- appraisal before coming to its own conclusion. (*See: Father Nanensio Begumisa & 3 others vs Eric Tiberaga SCCA 17 OF 2000 [2004] 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*)

### **CONSIDERATION OF THE GROUNDS OF APPEAL**

As a first appellate court I will proceed to subject the evidence to a fresh and exhaustive scrutiny and reach my own conclusion. I will consider both grounds together since they relate to the manner in which the trial magistrate evaluated the evidence. The facts of parties in my view had required framing an additional issue as to whether the suit land forms part of the estate of the late Zirimwabagabo Andereya. This was because the Defendant's contention was that the land was family land and it belonged to the estate of the late Andereya and that she was there as a care-taker.

A first appellate court has the same powers as those of the trial court as regards evidence presented at trial to evaluate the same and make its own findings. I will

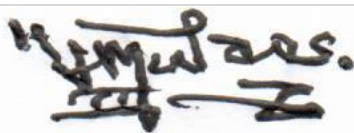
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thus evaluate the evidence on the three issues that is: (1) who is the rightful owner of the suit land, (2) whether the suit land forms part of the estate of the late Zirimwabagabo Andereya, (3) remedies available.

5 I will re-state the evidence of all the witnesses for a sober examination. **PW1 Mbarushimana James** stated in his evidence in chief that he is a resident of Kitego Village, Bujayo Parish, Kalangala Sub County, Mityana District. That he bought the suit land from Pascal Moses who had left it to Singura and later Pascal Moses signed on the agreement. That he paid a sum of UGX 2,000,000 and that by then, Mzei  
10 Andereya Zirimwabagabo was sick in Rwanda. That Andereya was suffering from high blood pressure and diabetes and the Defendant was not nursing him; that as the only son, he bought land and handed it to Kasifa to cultivate it and get food for the father.

15 That his father died and was buried on the suit land and later Kasifa also fell sick and died and she was also buried on the suit land. That he gave someone to take care of the land since he wanted to plant trees and the Defendant chased him. That the matter went to the LC's where the Defendant refused to vacate the land and it was referred to court. That he had an agreement and the people present were Edson  
20 Magezi, Singura but he did not know how to read. It was written by the LC Chairperson. That Singura knew how to read and write. That he decided to go to court so that the matter is decided.

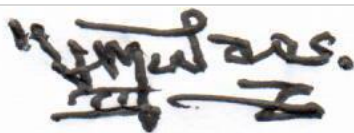
In cross examination he stated that he bought the land when his father was in hospital  
25 and the Defendant was the one nursing him and he used to send her the necessary



assistance. That he was very far and it is the Defendant who brought the father though he did not recall when. That he used to see him in Rwanda. That he was not there when his father died. That he contributed to the coffin and the Defendant used the Mwezikye, a group of people to help in the burial arrangements. That the money  
5 from the sale of the father's house in Rwanda is the one that the Defendant used to pay for the father's medical dues. That he did not want to steal from the Defendant.

**PW2 Magezi Edson** stated that he is a resident of Mirambi, Kanara Sub County. That both parties were his relatives since his father followed theirs. That on 10<sup>th</sup> April  
10 2013, the Plaintiff approached him and said he wanted to buy land and he wanted him to be present. That when they reached Mbongyera, they found Singura Edson who sold the land on behalf of Paskali to the Plaintiff and he signed in the agreement. That the boundaries were a footpath; on the right, Paskali Moses; on the left, Tumwesigye Amos; up, was Kemani's mother Edius who were present. That he  
15 signed as number 8 and mentioned other people who were present.

In cross examination he indicated that he did not know the Chairperson who signed on the agreement. That the Plaintiff was from Mityana and he was from Kanara. That he did not know the reason why the Plaintiff wanted to buy the land. In further  
20 clarification by court he indicated that he signed for Kasifa Tabu because she did not know how to read and write her name and it was him who signed for the Plaintiff since he did not know how to read and write. That he never saw the Chairperson on that day and he never saw him sign on the agreement.



**PW3 Mr. Singura Edson** stated that he resides in Nkongoro, Nkongoro Parish, Kamwenge sub county. That he had a brother called Paskali Moses who shifted to Bwizi and left him a duty to market his land. That the Plaintiff was brought by Mbonabucha that he wanted to buy the land. That they agreed at UGX 2,000,000/=.

5 That they met at the Plaintiff's sister's home and made an agreement but Paskali came and thumb printed the agreement. That they took their agreement. That he did not know whether the land was for the family and later a dispute arose. That those present were Mbonabucha, Obadia and Saratieri and others who were relatives to the parties. That the Chairperson was present. That Tabu Kasifa signed on her own

10 and even the Plaintiff signed on his own.

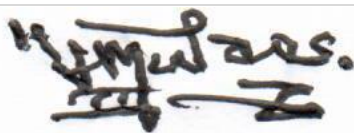
In cross examination he stated that Paskali later came and thumb printed the agreement. That the Plaintiff signed on the agreement, Wilson Musabe signed as Chairperson L.C1. That Rwemera was the Vice Chairperson to Musabe Wilson. That

15 he is the one who received the money and Pascali later came and thumb printed on the agreement.

The Defendant who testified as DW1 stated in his evidence in chief that she resides in Karitusi Cell, Kamwenge Ward, Kamwenge District. That the two had their father called Andereya Zirimubagabo who used to stay in Rwanda. That he fell sick while

20 staying with his son. That it was TusimeKasifa who looked after him. That they decided to bring Mzee from Rwanda to Kamwenge so that they look after him. That he agreed to come to Uganda on 15<sup>th</sup> March 2013 and her sister went to Rwanda and brought him. That their father sold his land in Rwanda and she came to Mbongyera

25 and bought land from Paskali.



That it was Kasifa, James, Caleb, Isiah, NyozaBenard and she was present in the hospital and the agreement was written in the names of their father and he signed as the father was at Kagongo Hospital. That the Plaintiff left after buying the land. That they also signed on the agreement. That their father died six months after and they buried him on the suit land. That later Kasifa fell sick and died. That before she died, she told her that the agreement was with James (Plaintiff) but she also told her that she has another agreement from the LCs which she used so that she could get a loan. That she was also buried on the suit land.

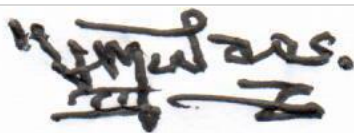
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That the Plaintiff hired the land to David and she found people digging the land and when she called the Defendant, he told her that he did not have transport that is why he had hired out the land. That she told him to use the land for one season. That after 5 months, James informed him on phone that they wanted to sell the land. That he met him and they talked and he informed her that he had a problem. That she took him to the Bataka led by Aroni Mbanzagibwe Ssalongo Kasibwami and they went to the land.

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That she told him that she wanted the side where the graves of her father and sister were and the Plaintiff wanted to sale the entire land. That later the Plaintiff became chaotic and used to take buyers to the land but she refused; that is when he decided to bring her to court. She contended that the evidence is forged. That he stated that her sister signed in the agreement yet she did not know how to sign on her own. She presented the signature of Kasifa contained in her card from Brac as well as the

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agreement she got from Brac and the National Identity Card where Kasifa signed and they were admitted in court collectively as Exhibit 1.

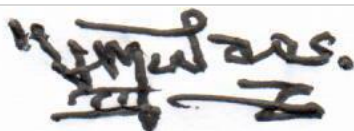
In cross examination, she stated that she never escaped from Prison in Rwanda. That  
5 the Defendant forged the agreement. That Kasifa was the one keeping the agreement.

**DW2, Matsiko Caleb** stated that he was a resident of Mbongyera, Kamwenge. That  
the parties were brothers and sisters and his relatives. That he knew his grandfather  
used to live in Rwanda and Kasifa used to go to Rwanda to see him. That around  
10 October 2012, he was from Malaba and Kasifa told him that she wanted to stay in  
Mbongyera and bring Mzeei. That she was renting a house in Mbongyera. That they  
bought land in Mbongyera and the Defendant was present but the Plaintiff was  
absent. That he was present but never signed on the agreement. That the land was  
bought by his Auntie Kasifa and the Plaintiff from Paskali.

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That before his grandfather died, Kasifa told him that they sold Mzeei's things in  
Rwanda and bought land in Mbongyera. That the Plaintiff topped up with UGX  
1,000,000/= and she also paid UGX 1,000,000/= making a total of UGX  
2,000,000/=. That later the Plaintiff wanted to sell the land and the Defendant refused  
20 and that is how the case came to court.

In cross examination he indicated that for him he was told that they bought the land  
together and he never signed on the agreement.

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**DW3, Byereta Isiah** in his evidence in chief stated that he resides in Nkongoro, Kamwenge District. That the Defendant was his Aunt and she had a father called Andereya Zirimwabagabo and that his mother and Kasifa were the other daughters. That Andereya fell sick while in Rwanda. That Kasifa was working in Mbongyera town. That Kasifa talked to the Defendant and they went in Rwanda and sold Andereya's land and bought another piece in Mbongyera for Andereya. That it was in September 2013 and Andereya later died.

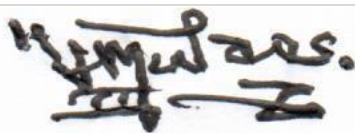
That they buried him on the suit land at Mbongyera in the land that Kasifa bought. That he sat in a meeting where he was told that the Plaintiff was his uncle and he had never seen him. That Kasifa died and was buried on the suit land.

In cross examination he stated that the Plaintiff was a son to his grandfather Andereya although he was not present when the Plaintiff was buying the suit land and he did not sign on the agreement. That the Plaintiff never went to Rwanda. That it was Kasifa who had the agreement for the land.

### **ANALYSIS OF THE EVIDENCE**

In my view from the evidence what was in contention was whether the land belonged to the Plaintiff or to the estate of the late Zirimwabagabo Andereya. The line of analysis adopted by the trial magistrate appeared to limit itself to the agreements tendered by the Plaintiff and that presented by the Defendant whereas in my view, it should have included whether the land formed a part of the estate of the late Andereya Zirimwabagabo.

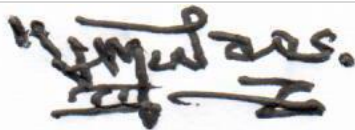
The Defendant did indicate in the pleadings that the land belonged to the estate of his late father. In her evidence she indicated that the two had their father called



Andereya Zirimubagabo who used to stay in Rwanda. That he fell sick and while staying with his son, Tusime Kasifa who looked after him. That they decided to bring Mzee from Rwanda to Kamwenge so that they would look after him. That he agreed to come to Uganda on 15<sup>th</sup> March 2013 and her sister went to Rwanda and brought  
5 him. That their father sold his land in Rwanda and she came to Mbongyera and bought land from Paskali; that it was Kasifa, James, Caleb, Isiah, Nyoza Benard and she was present in the hospital and the agreement was written in the names of their father and he signed as the father was at Kagongo Hospital; that the Plaintiff left after buying the land. That they also signed on the agreement. That their father died  
10 six months after and they buried him on the suit land. That later Kasifa fell sick and died. That before she died, she told her that the agreement was with James (Plaintiff) but she also told her that she has another agreement from the LCs which she used so that she could get a loan. That she was also buried on the suit land.

15 This evidence was not contradicted during cross examination. It was supported by the DW2 who stated that around October 2012, he was from Malaba and Kasifa told him that she wanted to stay in Mbongyre and bring Mzeei. That she was renting a house in Mbongyera. That they bought land in Mbongyera and the Defendant was present but the Plaintiff was absent. That he was present but never signed on the  
20 agreement. That the land was bought by his Auntie Kasifa and the Plaintiff from Paskali. The evidence was further supported by the DW3.

The evidence of the Defendant is supported by the evidence of the Plaintiff. In cross he indicated that he bought the land when his father was in hospital and the  
25 Defendant was the one nursing him and he used to send her the necessary assistance. That he was very far and it is the Defendant who brought the father though he did

A handwritten signature in black ink, appearing to be 'N. M. Kasifa', written over a horizontal line.

not recall when. That he used to see him in Rwanda; that he was not there when his father died; that the money from the sale of the father's house in Rwanda is the one that the Defendant used to pay for the father's medical dues. That he did not want to steal from the Defendant.

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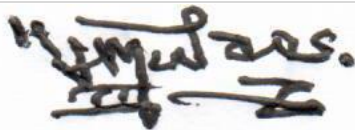
The Plaintiff alleged that he bought the suit land from Paskali in 2013 and an agreement was made to that effect. He indicated in chief that he signed on the agreement and other people signed. That the same agreement was written by the Chairperson and other people who were present signed and the same agreement was admitted as PEX1. PW2 in clarification by court he indicated that he signed for KasifaTabu because she didn't know how to read and write her name and it was him who signed for the Plaintiff since he didn't know how to read and write. That he never saw the chairperson on that day and he never saw him sign on the agreement. PW3, Singura Edson stated in chief that the chairperson was present. That Tabu Kasifa signed on her own and the Plaintiff also signed on his own. The Defendant tendered the agreement and the national identity card of Kasifa to confirm the variance in the signature thereon with that on the agreement relied upon by the Plaintiff. The contradictions regarding the signing of the agreement tendered by the Plaintiff raised a red flag in my view as to the genuineness of the agreement presented by the Plaintiff.

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The Defendant in her examination in chief gave an account on how the 2<sup>nd</sup> agreement which she relied upon came in existence. Stated in chief that later Kasifa fell sick and died. That before she died, she told her that the agreement was with James (Plaintiff) but she also told her that she has another agreement from the LCs which

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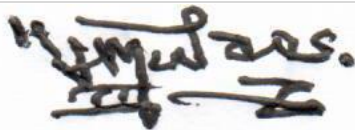
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she used so that she could get a loan. That she was also buried on the suit land. The evidence shows that the second agreement was secured by Kasifa to get a loan and it was not necessarily the agreement on which the land was acquired.

5 I believe based on the available evidence that it was more probable that the land in issue was bought using proceeds from the sale of the land of the late Andereya in Rwanda. Further, the evidence is that the Plaintiff was not living in Kamwenge. The more probable narrative therefore is that the land was identified by Kasifa who staying in Kamwenge. I believe the evidence of DW2 to be credible to the fact that  
10 his Aunt Kasifa had rented a place in Mbongyera and she decided to bring the late Andereya to Uganda and look after him. That she went and sold land in Rwanda and bought land here in Uganda where the late Andereya would stay and that is where he was buried. The Defendant's evidence rimes with the evidence of PW3 who stated that they met at the Plaintiff's sister's place and made an agreement. That he did not  
15 know whether the land was for the family and later a dispute arose. That those present were Mbonabucha, Obadia and Saratieri and others were relatives to the parties.

In my view the making of the agreement at the Plaintiff's sister's place, the late  
20 Kasifa, the purchase of land at Mbongyera and time at which the said purchase was conducted is consonant with the Defendant's evidence that the land was bought after selling the land of the late Andereya in Rwanda and this fact is not denied by the Plaintiff. I believe that this land was meant to be for the family and not for the Plaintiff. I find the Defendant's story more believable regarding the events relating  
25 to the acquisition of the suit land. The evidence on the record in my view

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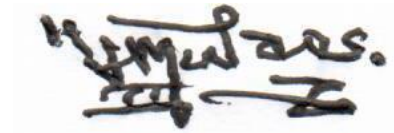
demonstrates that the suit land was bought for the family of the late Andereya and that is where he was buried.

I therefore find that the trial magistrate did not properly evaluate the evidence on record and thus both grounds of appeal succeed. I therefore set aside the judgment of the trial court in Civil Land No. 34 of 2017 dated 27<sup>th</sup> March 2017 and the orders therein and make the following orders:

1. That the suit land located at Rugarama, Nkongoro Parish, Kamwenge District forms part of the estate of the late Zirimwebagabo Andereya.
2. That both the Plaintiff and the Defendant are beneficiaries under the said estate.
3. That for purposes of maintaining harmony in the family, it is ordered that each party bears their own costs.

It is so ordered.

Dated at High Court Fort-portal this 31<sup>st</sup> day of May 2023.



31.05.2023

Vincent Wagana

High Court Judge

FORTPORTAL

