

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
LAND DIVISION  
CIVIL APPEAL NO. 09 OF 2014**

**(Arising from original Land Claim/Civil Suit No. 078 of 2008, at Nabweru Chief Magistrates' Court)**

**TAMALE SULAIMAN & 13 OTHERS..... APPELLANTS**

**VERSUS**

- 1. NDUGWA JANE NALONGO**
- 2. ABBY SALONGO NDUGWA.....**

**RESPONDENTS**

- 3. SSENTONGO MUSOKE P.**
- 4. PADDY MUSOKE**

**JUDGMENT ON APPEAL**

**BEFORE HON. JUSTICE EVA K. LUSWATA**

This is an appeal from the decision of Her Worship Natukunda Janeva Grade I Magistrate in the Chief Magistrates Court of Nabweru at Nabweru delivered on 20<sup>th</sup> February 2014.

**Background:-**

The Appellants instituted Civil Suit No. 078/2008 against the Respondents, seeking *inter alia*, a declaration that they are the beneficial owners of a developed Kibanja at Kazo Muganzi Lwaza LCI, Nabweru (hereinafter called the suit land) currently occupied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, a permanent injunction restraining the respondents and/or their agents from dealing/ interfering with the suit land, an order for payment of mesne profits, general and exemplary damages for trespass and costs of the suit with interest.

It was the appellant's case that the suit property, which is a Kibanja and residential houses, measuring approximately ½ an acre was purchased by their father the Late Sulaiman Lukwago (hereinafter referred to as the deceased) in 1975 at UGX 27,500/= from one Hamidu Sebyala. That in 1994 upon the deceased's death, and while the appellants were still in infancy, the 3<sup>rd</sup> and 4<sup>th</sup> respondents became caretakers of his estate and illegally sold the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

It was the respondents' case that the suit Kibanja originally belonged to one Hussein Musa having purchased the same from Hamidu Ssebyala (now deceased) on 26/2/75. That Hussein Musa thereafter relocated to Sudan and left the suit land under the care of the 3<sup>rd</sup> respondent. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants initially purchased the suit land from the 1<sup>st</sup> appellant in March 1996 which sale was contested by the 3<sup>rd</sup> respondent who reported the matter to Kawempe Police as a result of which the 1<sup>st</sup> Appellant refunded part of the price he had received. Thereafter, Hussein Musa authorized the 3<sup>rd</sup> respondent to sell the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> respondents which he did.

In her judgment, the Learned Trial Magistrate found that the appellants failed to prove on a balance of probabilities that the suit property now occupied by the 1<sup>st</sup> respondent belonged to the deceased. She also found that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not trespassers having bought from the right agent of Hussein Musa the owner of the suit land.

The appellants being dissatisfied with the judgment appealed against it on the following grounds:-

- 1. The Learned Trial Magistrate Grade I erred in law and fact by failing to properly evaluate the evidence on record and further by basing her judgment and orders upon the respondents and their witnesses' testimonies which were false, contradictory in nature and manifestly unreliable and this occasioned a substantial miscarriage of justice upon the appellants.**
- 2. The Learned Trial Magistrate Grade I greatly misdirected herself when she rejected PEX7, which was manifestly self explanatory under sheer and irrelevant**

considerations and instead relied on the 1<sup>st</sup> and 2<sup>nd</sup> agreement of purchase and also Hussein Musa's agreement of purchase, which were suspect.

3. **The Learned Trial Magistrate Grade I misdirected herself and hence erred in law and fact when she ignored the evidence/findings unearthed at the visit-to-the *locus in quo* and most particularly the 1<sup>st</sup> appellant's evidence and that of his witnesses thereat, which was not rebutted in any way, whatsoever.**
4. **The Learned Trial Magistrate Grade I erred in law and fact when she relied on the evidence of the Defendants' DW6 who was manifestly unreliable and moreover with a personal vendetta with the Respondents' father.**
5. **The Learned Trial Magistrate Grade I erred in law and fact and based herself on mere conjecture and surmise when she un-judiciously entered judgment in favour of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants who had earlier on been adjudged by the Chief Magistrate in the same court, liable for intermeddling in the Appellants father's estate, who pronounced upon them a sentence, which they duly served.**
6. **The Learned Trial Magistrate Grade I wrongly exercised her discretion to award costs to the Respondents in this suit.**

I noted that in his submissions, counsel for the appellant attempted to abandon the fourth ground. This was correctly contested by counsel for the respondent and I agree. A ground of appeal can only be abandoned with leave and its erasure would require a formal amendment of the memorandum which was not done. I shall thus proceed to consider that ground as it appears on the record and make my findings on it.

**Resolution of the grounds of appeal;-**

My duty as the first appellate court is to re-evaluate the evidence and findings of the trial judge and draw my own conclusions. See for example **Sanyu Lwanga Musoke Vs Galiwango SC Civil Appeal No.48/95**. In this, I have critically perused and shall give due consideration to submissions of both counsel which for constraints of time and space will not be reproduced in this Judgment.

Counsel for the appellants argued the grounds of appeal together and in his submission, grouped them into five heads which include whether the suit is time barred, whether the suit land belonged to Hussein Musa, whether PEX7 afforded no relevance to the merits of the case, submissions for the defence and remedies. Instead, I choose to consider the grounds as they were formulated.

However, before resolving the grounds of appeal, I noted that much was submitted by both counsel as to whether the suit was time barred and whether it was a legal point on which the court should have relied even when it was never raised as an issue to be resolved. Such a decision would not have been misplaced for as the court in **Adonia Makundi Vs Christ Mukasa SCCA No.2/98** held; a court on its own motion may consider a point of law not argued by counsel. I have confirmed from the record that this point of law although raised in their written statement of defence, the respondents appeared to have abandoned it. It was never an issue but only raised for adjudication as a preliminary point in submissions for the respondents. This in my view was a wrong and indeed unfair manner in which to present that objection for it is trite that objections that could dispose of a suit entirely are ordinarily raised at and resolved at the commencement early on in the hearing. See Order 15 Rule 2 CPR. Nonetheless, the trial court considered the objection and appeared to have resolved it in favour of the respondents, but as counsel for the respondents has rightly pointed out, it was not on the basis of that objection that the suit was finally decided. Be that as it may, that legal point was not a ground raised in the memorandum of appeal or even counter-appeal. The appellants should be, and are bound by their pleadings. I accordingly decline to make any finding on it.

I now turn to the grounds of appeal as presented.

Although six grounds of appeal were raised, I summarized Grounds 1-4 generally to be objections against the manner in which the trial magistrate evaluated the evidence both in court

and at the locus in quo, *how she* awarded attention to some witnesses against their counterparts, and admitted certain documents. I will therefore consider those four grounds collectively but for clarity, consider each piece or pieces of evidence as contested in the memorandum of appeal.

The strength of the appellant's case lay in PEX7 which is the sale agreement purportedly by which the deceased purchased the suit land from one Hamiidu Sebyala. In rejecting it the trial magistrate had this to say on page three of her Judgment.

*“...bearing in mind that the plaintiff's have burden of proving ownership on balance of probabilities I find difficulty in believing exhibit PEX7 when the only two surviving witnesses to it contradicted each other...DW3 and DW4 stayed at the home of late Lukwago from mid 1970s and this is the period when both sides claim the suit property was acquired. Even upon the death of Lukwago they were called upon to identify the property of the deceased and they left out the suit property well knowing it did not belong to the deceased...it is also of concern why the agreement- exhibit PEX7 never surfaced in 1996 when the sale took place...then I cannot rely on it to hold that the suit property belonged to late Lukwago. I also note the concern of DW7 that Shs. 27,500/= was way too much money to buy a kibanja...it is more probable that the suit land was for Hussein Musa than for Lukwago...”*

The above statement was substantially in agreement with respondents' counsel on this point who in addition had argued that DW7 denied ever signing PEX7 and that photocopy PEX3, (which was the sale agreement between Hamidu Sebyala and Hussein Musa) was properly admitted in evidence.

The appellants adduced evidence of PW5 who was present in February 1975 when the deceased purchased the suit land, and indeed witnessed the sale agreement (PEX7) between the deceased and Hamidu Sebyala. He identified his name to be No. 16 on the list of witnesses out of 20 witnesses, one of them being DW7. This evidence was complimented by that of PW1 and PW2 who had testified that the suit land belonged to the deceased. The other piece of evidence in corroboration is that of DW1 who at page 59 of the record in cross examination stated that *“before I bought the plot...the LCs told me the plot was for Tamale's family...”* DW2 also testified in cross- examination at page 62 of the record that *“True the chairman confirmed to us*

*that the plot was for Tamale's family.*" DW4 also testified in cross examination at page 72 that *"...True Lukwago's family was cultivating the suit land since 1975..."*. The latter statement was confirmed by DW3 on Pg 75 of the record. This in my view would be strong evidence that the deceased's family were in uninterrupted occupation of the suit land since 1975, until the purchase by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The other person alleged to a witness to the sale between Sulaiman Lukwago and Hamidu Sebyala was DW7, who denied ever witnessing the sale giving reasons that he was not present, he doubted Sebyala's signature and the fact that twenty people could have been witnesses (but he admitted knowing some of them) and also, that the price quoted was too high considering the size of the land and sale date.

PW7 specifically denied the signature on the agreement purported to be his, and counsel for the respondents rightly submitted that at that point, the burden shifted from them to the appellants to prove its authenticity. His signature was procured at the hearing as PEX8 I note that at page 82-83 of the record, counsel for the appellants dispensed with procuring expert evidence to verify the signature but did request the Court to compare the two signatures (which in his view were very similar). Such a request is acceptable under Section 72 of the Evidence Act but I see no evidence that the magistrate obliged the request; and if at all the trial magistrate discarded PEX8 as claimed by the appellants, then it would tantamount to tampering with the record.

Therefore, in the absence of any attention being given to comparison of the signatures by the magistrate, it would be correct for counsel for the respondent to call it evidence from the bar, when attempts were made in the submissions for the appellants to confirm similarity of the two signatures. That notwithstanding, I would agree that going by Section 133 of the Evidence Act, the evidence of PW5 as a single witness would be sufficient to support the fact that an agreement was ever made between the deceased and Sebyala to purchase the suit land. That piece of evidence was corroborated by other evidence as this Judgment will show.

On the other hand, in support of their assertion that the suit land belonged to Hussein Musa, the respondents adduced evidence of DW3 who stated that Hussein Musa gave him 5,000/= in 1975 and authority to purchase for him the suit land which he paid to Hamidu Sebyala. That the authority was verbal and not written.

The sale agreement between Hussein Musa and Sebyala was admitted in evidence as PEX3. DW3 testified that he solicited the assistance of the deceased to approach Sebyala the vendor and conducted the purchase on the authority of Hussein because by then, Hussein was allegedly stationed in East Acholi. However, he was unable to give concrete evidence that Shs.5,000 was paid for the suit land. Again, he claims his directions to sell the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> respondents were oral and he was unable even to show that Hussein ever received the purchase price paid by the former in 1996. Therefore in my view, much of what is stated by the 3<sup>rd</sup> respondent on the facts of the purchase for and sale of the suit land by Hussein Musa was merely hearsay that should have been excluded.

As pointed out by counsel for the respondent in his submissions, it would be strong evidence for the respondent that although aware of the existence of the sale agreement, PW1 did not mention it in 1996 when he was accused and even arrested for wrongfully selling the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. However, he did explain that there was considerable amount of duress in the process of his arrest and he made a refund of the purchase price while still in custody which were facts supported by both DW3 and DW4 who at pgs 66 and 72 of the record stated that the 1<sup>st</sup> appellant handed over money to the police. This in my view would have compromised his judgment and would amount to intimidation. That notwithstanding, I would not put much emphasis on that sale for it appears it was made when PW1 was still a minor and thus, unable to contract.

Also DW7 appeared to have had a grudge with the deceased born of previous disagreements. For example, in cross examination at page 80 of the record of appeal he states that, “... *Sulaiman Lukwago was a cunning person for example he would come and take our things...*” The trial magistrate should have given that statement serious consideration because if she had done so, coupled with the other evidence before her, she would have taken evidence of that witness with much caution and restraint. I am aware that courts have on occasion cautioned that the evidence of a witness which connotes a grudge (against an accused person) cannot be ignored as it could mean that the witness concocts evidence against the accused. See for example; **Sabitti Vincent and Others Vs Uganda CACA 140 of 2001**. Quoted with authority in **Chesaki Matayo Vs Uganda Ca.No.95 of 2004**. Although this is not a criminal case, the rationale in

**Sabiti Vincent & Others Vs Uganda (supra)** would be relevant and useful to the circumstances here.

Further, the evidence of DW7 that he purchased a similar plot of land at Shs. 4,000/= was wrongly taken in favour of the respondents. This is because, firstly, he did not furnish court with a sale agreement to prove this point and secondly, it was not shown that he also purchased from Sebalya. More important though, was the evidence available on the face of PEX7 that the purchase price for the suit land was Shs.27,500/-. In my view, the latter was the more credible evidence to that presented by DW7.

Conversely PEX3 which is a very important piece of evidence for the respondents was only a photocopy and despite resistance from the appellants' counsel at page 65 and 66 of the record, the trial magistrate first withdrew, and then without furnishing reasons, allowed the document back into evidence. In my view, this was contrary to Section 63 of the Evidence Act which stipulates that documents must be proved by primary evidence. I see no explanation given at page 66 of the record as to why the document should have been accepted in evidence as an exception under Section 64 of the same Act. Since DW3 knew or should have known the whereabouts of Hussein Musa who was believed to be the owner of the suit land, he should have shown court his efforts to collect the original agreement from him or for Hussein himself to appear and testify. It was therefore wrong for the court to have re-admitted the copy into evidence. I would also give minimal or no weight to the testimony of DW3 that a sale agreement made in 1975 was stamped for authentication by an LC official in 1996 and again, it is disturbing that the LC official was never called to testify.

The appellant also picked offence against the manner in which the evidence at the *locus in quo* was unearthed and treated. The trial magistrate states at page 3 of her Judgment that;

*“Court visited the suit property and there was an argument as to what was the suit property. But I will agree with Mr. Wetaka that the suit property was the one which was sold to the 1<sup>st</sup> and 2<sup>nd</sup> defendants only because the defendants are not claiming the adjacent property of late Lukwago. Court confirmed that at least the 1<sup>st</sup> defendant is in occupation with a residence thereon and it was also confirmed that she constructed the same immediately after purchase...”*

A brief account of the locus visit is to be found Pages 82 to 85 of the record of appeal.

Much of the evidence provided by the 1<sup>st</sup> appellant consisted of portions of land that the deceased had ever owned but sold off or gifted to other people, e.g. Rashid, Benjamin and Kyobe Mohammed. Counsel for the respondent argued that no documentary evidence was presented to prove that the deceased was the predecessor in title to those plots. That may be so but, several witnesses e.g. supported the evidence of PW1 PW4 (see sketch map on Pg 180 of the record) and DW4 who stated at Pg 69 of the record that before his death, the deceased had sold to some people. DW6 also confirmed that it was the deceased who gave Kyobe his plot. This was relevant because when compared to the sketch plan appearing on page 85 of the record, it is clear that the portions of Rashid, Benjamini and Kyobe boarded the disputed plot and the deceased's plot. Going by the details of the extent of the boundaries given by Hamidu Sebyala in PEX7, it would be credible to say that at some point, all this was at one point one piece of land.

I noted the positioning of the suit land right in between the deceased's land. Counsel for the respondent argued that considering the high value of land, this is possible, but I prefer to take a contrary review. Considering the evidence of PW5 that the deceased purchased but did not develop the whole of his Kibanja, the portion of the suit land could most likely be that portion left vacant by Lukwago. Indeed, it remained undeveloped (save for the agricultural activities of the deceased's family members) until it was purchased by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in 1996. The map bears a boys' quarter, marked by the magistrate as '*boys qrt*' appearing at the western most point of the disputed plot. It is not shown whether this was the boys quarter belonging to the deceased in which both the 3<sup>rd</sup> and 4<sup>th</sup> respondents repeatedly testified they once resided, or one built by the 1<sup>st</sup> respondent.

In my view the court should have taken note of all those facts, most importantly, the measurements given in PEX7 (and supported by PW5) as well as the current positioning of the disputed plot vis a vis the rest of the land that was indisputably then and formerly owned by the deceased's estate. She did not do so.

Again, DW3 did admit on Page 66 of the record that the disputed plot boarded that of the deceased, and no measurements were taken when the sale to Hussein Musa was made. I would

thus be in doubt of what was sold to Hussein Musa, if any land at all. In my view, the findings at the locus, would not by themselves lead to a conclusion that the deceased owned the suit land, but considered together with all the other evidence presented for the appellants, it should have topped the balance in favour of the appellants' testimony as against that of the respondents.

I do hold therefore that the trial magistrate erred in law and fact by holding that the suit land belonged to Hussein Musa. This without doubt also illustrates that the sale of the suit land by DW3 to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was wrongful and void and the 1<sup>st</sup> and 2<sup>nd</sup> respondents are currently trespassers on the suit land. Grounds 1, 2 and 3 therefore are allowed.

In relation to ground 4, I concur with counsel for the respondent that there was no point in branding DW6 as having had a personal vendetta with the deceased since none was highlighted in his evidence. In any case, apart from the trial magistrate stating at page 3 of her judgment that *"...the evidence of the 3<sup>rd</sup> and 4<sup>th</sup> defendants plus DW4, DW5 and DW6 all prove that the suit property was for one Hussein Musa. DW3, DW4, DW5 and DW6 all told court that Hussein Musa left it under care of DW3..."* nowhere else in her judgment does she strongly rely on the evidence of DW6. I thereby find no merit in ground 4 and it is dismissed.

In ground 5, the appellants complained that the magistrate wrongly relied on evidence of the 3<sup>rd</sup> and 4<sup>th</sup> defendants who had been tried and convicted for intermeddling with the deceased's estate. The evidence of that conviction was introduced by the 1<sup>st</sup> appellant and admitted by the 3<sup>rd</sup> respondent on page 68 of the record. Counsel for the respondent argued in reply that the conviction of those two witnesses was irrelevant as each case must be tried and determined on its own facts, and I do agree. The details of the criminal case were never in issue at the hearing but even if they were, in my view, its outcome would not necessarily have any bearing with determining the civil matter. The fact of the 3<sup>rd</sup> and 4<sup>th</sup> respondents' criminality was never in issue in the lower court and as such, under Section 41 of the Evidence Act, the trial magistrate had no reason and was not bound to follow the decision in the criminal case. In fact, nothing was done by the appellant's counsel to have the two witnesses disqualified on account of their conviction. Under such circumstances, the trial magistrate was bound to record, evaluate and make a decision on their evidence and all other pieces of evidence put before her which she did. In my view, a conviction of the two respondents in a criminal matter would certainly not

disentitle them to a judgment in a civil matter. Therefore although I have found that the evidence was not properly evaluated, the trial magistrate was correct to restrict herself to the evidence before her when she entered judgment in favour of the 3<sup>rd</sup> and 4<sup>th</sup> respondents. Ground 5 thus fails.

The appellants also raised issue in the sixth ground over the award of costs to the respondents in the suit. Costs in the lower court were awarded to the respondents which would be correct judging that the appellants lost the claim entirely. No reason was advanced for the appellants to deny the respondents, (who were the successful party) costs of the suit. Such an award would be in line with Section 27(2) CPA that provides that the successful party is entitled to the costs, except, where the court for good reason thinks otherwise. There would be no merit in ground 6 either, and it is also dismissed.

In conclusion this appeal succeeds on grounds 1, 2 and 3, and fails on grounds 4, 5 and 6 of the memorandum of appeal. However, since the appeal has substantially succeeded on grounds attacking the manner in which the evidence was evaluated and principally on the main issues raised for adjudication, its effect is that the decision of the lower court is fully set aside. However, because this appeal has only succeeded in part, the appellant shall be entitled to one half of the costs of the appeal and the full costs in the lower court

I so order.

**EVA K. LUSWATA**

**JUDG**

**12/5/2015**

