

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-CA-0131-2014
(ARISING FROM CIVIL SUIT NO. 50 OF 2013)**

**WABWALA JOSHUA SANDE.....APPELLANT
VERSUS
KIZAMBA MARTIN WABWOBA.....RESPONDENT**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Plaintiff/Respondent sued the Defendant/Appellant for recovery of land situated at Bamakoya Cell, Bamwangu Ward, Manafa Town Council, Manafwa District. He prayed for general damages, and costs.

The lower court found in favour of the Plaintiff/Respondent.

The appellant raised 3 grounds of appeal namely.

1. The learned trial Magistrate erred in law and fact when she held that the land in dispute belongs to the Respondent.
2. The learned trial Magistrate erred in law and fact when she failed to properly evaluate evidence before her and as a result reached a wrong decision.
3. That the decision of the learned trial Magistrate is tainted with fundamental misdirection and non direction in law and fact and as a result has led to a miscarriage of justice.

This is a first appellate court whose duty is to re-evaluate all evidence and reach its own conclusions per *Kifamunte Henry v. Uganda SCCR 10/1997*.

Appellants in arguments abandoned ground 1, and argued grounds 2 and 3 together.

The gist of the arguments is that appellants are of the opinion that the learned trial Magistrate did not properly evaluate the evidence and hence reached a wrong conclusion.

On the other hand, Respondents contend that the evidence was well examined and court reached a right decision.

I reviewed the evidence on record. I found that the Plaintiff led evidence of four witnesses while Defence was through two witnesses.

PW.1 Kizamba Martin Babwoba stated that he bought land from the defendant located at Bumukoya Cell, Bumwangu Ward, Manafwa Town Council. He handed the defendants/appellants to his brothers **Kitutu Godfrey** and **Wamokya Richard** to handle the transaction. They inspected the land and agreed a price of shs. 10,000,000/= to be paid in installments. On 18.02.2011 they advanced defendant first installment of 2,500,000/=. On 26.04.2011, they advanced defendant the second payment of 1.3 million. A problem arose after second installment due to land wrangles thereon. On 13.11.2011 parties negotiated and agreed that defendant makes one complete agreement, while plaintiff banks the balance on Defendant's bank account. Plaintiff the same day paid 5,000,000/= and promised to bank 1,200,000/= in the bank the following day, since Banks were closed on that day being a Sunday. That amount should total to shs. 6.2 millions given in full settlement of the claim.

Plaintiff claims that he paid Shs 5,000,000/= through his brother **Kitutu Godfrey** and paid the balance through the defendant's account at Housing Finance Bank.

Later defendant declined to formally hand over the land, hence the suit.

PW.2 Kitutu Godfrey confirmed PW.1's account of events. He confirmed that PW.1 and defendant agreed to a price of 10 millions and the plaintiff paid it in installments of first 2,500,000/= then 1,300,000/=. He handed to court agreements in respect of those payments exhibited as "B".

Afterwards a dispute over the plots arose and defendant agreed to sort it out; before being paid the balance. Agreements were tendered in court as "C" in lieu of that settlement. After that

settlement they made an agreement to reflect 6,200,000/=, and shs. 5,000,000/= was paid that day, while shs 1,200,000/= was sent to defendant thereafter. This document/agreement was received in court and marked as D.2.

PW.3 Stephen Mugasa, confirmed that he was present when PW.2 was paying defendant the last payment. He saw him pay the 200,000/=. He also witnessed when PW.2 counted shs. 4,800,000/= and paid it to defendant and defendant received it. This made a total of 5,000,000/= paid by PW.2 to defendant that day. The agreement was then written reflecting shs. 6,200,000/=. He asked PW.2 why this was so and he told him the balance was to be paid on the following day. The Agreement was signed by all present including the defendant and his wife.

PW.4 Wanzala Davies' evidence confirms what PW.3 stated in all material particular. Both of them did not witness the payment of 1,200,000/= though heard that it would be paid the next day.

In defence **DW.1 Wabwala Joshua Sande** said that it was true he sold land to plaintiff; for 10,000,000/=. He however stated that he had only received shs. 2,500,000/= as first installment, and 1,300,000/= as a second installment paid the following morning.

After sometime, plaintiff gave a condition that the defendant should make an agreement for 6,200,000/= and also provide another land as security for settling the land dispute, then he would pay the balance. The defendant agreed, signed the agreement on 13.11.2011 which was written in the book. Afterwards the defendant received shs. 1,200,000/= which he found on his account. When defendant realized this, the attempts to contact plaintiff to rectify the same were futile, resulting into this dispute. It is defendant's case that he only received 5,000,000/= from plaintiffs not 10 millions as agreed.

DW.2 Mary Namakoye confirmed DW.1's evidence.

The learned trial Magistrate from the evidence above found for the plaintiff hence the appeal.

In all civil cases the evidential burden is upon the plaintiff to prove the case on a balance of probabilities. (Section 101-103 of the Evidence Act).

The only contentious matter is whether the shs. 5,000,000/= (Five Millions) was paid by the Respondent to appellants as per his claims or not.

Section 103 of the Evidence Act provides that:

“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence.”

In this case the appellant wishes court to believe that he did not receive the 5,000,000/= while the Respondent asserts he did receive it.

The evidence brought to court in the lower court by plaintiff comprised both eye witnesses who saw, and documentary evidence, as herebelow:

The evidence led by PW.1, PW.2, PW.3 and PW.4 all was to the effect that shs. 5,000,000/= was paid through **Kitutu Godfrey** on the 13.11.2016; and another shs. 1,200,000/= paid directly through defendant’s Bank account at Housing Finance on the 14.11.2016. The above payments of two installments on 18.2.2011 of shs. 2,500,000/= and on 26.4.2011 of 1,300,000/=. When all that is totaled up it finally settles the price agreed of shs. 10,000,000/=. To corroborate the evidence of PW.1, PW.2, PW.3 and PW.4 the plaintiff tendered exhibits of the agreements of sale and payment acknowledgements contained in exhibits marked as “B”, “C” and “D” respectively.

These agreements were not denied by the defendants/appellants. Infact both DW.1 and DW.2 testified that the plaintiff misled them to sign for shs 6,200,000/= and instead paid only 1,200,000/= which was received.

In law a fact asserted must be proved. Evidence of DW.1 and DW.2 on this fact is not conclusively tight proof. This is because the defence assertions are rebutted by PW.2, PW.3 and PW.4, who all informed court that actually they were themselves present when DW.1 was paid the shs. 5,000,000/= cash. During cross-examination PW.3 even was able to tell court the

denominations of the money paid out. He said that monies as “It was two bundles containing 20,000/= (2 bundles was 4,000,000/=) and rest 10,000/= and 5,000/= only.

Also both DW.3 and DW.4 honestly told court that they were concerned that the agreement was for shs. 6,200,000/= yet only 5,000,000/= had been paid.

Both witnesses in cross-examination were honest that apart from the fact that PW.2 told them the 1,200,000/= would be paid on the Bank account of the Defendant next day they were not aware if it was paid. I notice that the evidence of DW.1 and DW.2 confirms that indeed the next day shs. 1,200,000/= millions was sent on their account. This evidence therefore heavily tilts the case in favour of plaintiffs who consistently showed by evidence of witnesses and documents that indeed the defendant received the money.

On the other hand defendant did not produce any other independent evidence save himself and his wife to prove his assertions. From the evidence adduced by plaintiff, on this case including the evidence of land wrangles, attempts to resale the land etc, the evidence of the defendant needs other independent evidence for it to be believed. The defendant has his hand shrouded in a number of conflicts over these lands in his own evidence- with his sisters etc. He told court that he had financial hardships.

From his testimony, it is therefore more probable than not that he received the money and utilized it, but is just avoiding the truth. The agreements he signed are evidence of this. There is therefore enough evidence called by the plaintiff to prove that he paid the money.

I do not find therefore any failure by the learned trial Magistrate in assessing this evidence save the fact that in writing the judgment, the learned trial Magistrate did not go in depth to explain why she believed the plaintiffs and disbelieved the defendants. Her conclusion however was that the evidence by plaintiff had a higher probative propensity than that of the defendants. I do reach the same conclusion upon the re-evaluation of the evidence on record. The appellant seems to suggest that the learned trial Magistrate in assessing evidence should have “read into the case” assumed evidence. Court does not lead evidence for the parties. The parties have a

duty to prove what they assert and to disprove what they contest. Counsel's observation that court simply believed the exhibits 'A', 'B' 'C' and 'D' in favour of Respondents without serious scrutiny, is not born out of sincerity. The record shows that the defendant conceded to these documents, and even refers to them in his own defence, only pleading that he was duped. He did not go beyond that. The court examined these documents and they in effect show that payments were done, and done in presence of PW.2, PW.3, and PW.4. There was no evidence of fraud, or any other false pretences.

There is therefore no merit in all grounds of appeal as raised. The learned trial Magistrate reached a right decision and it is upheld on appeal. The appeal is dismissed with costs to the Respondent. I so order.

Henry I. Kawesa

JUDGE

04.11.2016