

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

**HCT-04-CV- CA-0067-2016  
(ARISING BUKWO CIVIL SUIT NO. 0022 OF 2016)**

<b>1. MAFABI ROBERT</b>		
<b>2. NAGIMESI FRANCIS</b>	: : : : : : : :	<b>APPELLANTS</b>
	<b>VERSUS</b>	
<b>1. CHEMWAJAR FRANCIS</b>		
<b>2. SIWA CHRISTOPHER</b>	: : : : : : : :	<b>RESPONDENT</b>

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

**JUDGMENT**

Appellants were dissatisfied with the judgment of His Worship **Opio James** Magistrate Grade I of Bukwo of 30<sup>th</sup> June 2016 on 6 grounds as per memorandum of appeal.

The grounds will be considered in the order counsel for appellant argued them.

Background of the Appeal

The facts giving rise to this appeal arose as hereunder.

The Plaintiffs sued defendants for vacant possession of land approximately as ½ plot situated in Suam lower, Suam Sub-county, declarations of ownership and permanent injunction, general damages and costs. Plaintiff/Respondents claimed the land which earlier on belonged to the late **Elizabeth Chemutai**. According to paragraph 6 of the plaint, it was claimed that plaintiff No.1 purchased a plot measuring 10 by 30 strides from **Matayo Yesho** (D.2) and an agreement done. That in 1993 **Elizabeth/Matayo Yesho** (D.2) sold remaining part of the plot to plaintiff No.2 on terms that plaintiff No.2 would build a house on the plot for Elizabeth's use until death. That in 2003 Elizabeth died, and **Matayo Yesho** took over administration of the house. He was to vacate once Plaintiff No.2 finalized developments on the plot as agreed.

That in 2014 people came and began to construct on the plot. These were related to late **Nambale** so matters were reported to court hence this suit.

Defendant 1 and D.2 filed a joint written statement of defence, while D.3 filed a separate defence.

All denied the plaint setting up a different set of facts. The 1<sup>st</sup> defendant averred that the late **Nambale Moses** bought the suit land from 2<sup>nd</sup> Defendant vide agreement annexed as 'B'. D.3 said he is the administrator of the estate of the late **Nambale Moses**.

He claimed the suit property is part of the estate of the late **Nambale Moses** who purchased it from 2<sup>nd</sup> Defendant vide agreement annexed as 'B'.

Defendants therefore denied all the pleadings in the plaint.

In court the plaintiffs led evidence through **PW.1 Chemwajar Francis, PW.2 Siwa Christopher, PW.3 I - Samuel Chelangat, PW.3 II Chepsikor Paul, PW.III 3, Chesang Wilfred, PW. 4 IV Bukose Lawrence, PW.4 V Jonathan Ngoget** and defence was through **D.2- Matayo Yeshe, D.1 Mafabi Robert, D.3 Nagimesi Ismael Wetaka, DW.1 Gisasa Samson, DW.2 Wadea James**.

The court also visited locus and took note of the land and neighbourhood in question.

At conclusion of the case court found in favour of plaintiffs hence this appeal.

As a first appellate court this court must re-evaluate the evidence, make fresh conclusions, and keep in mind the fact that it did not listen to or observe the witnesses. In doing so this court is guided by the legal principles as laid down in ***Banco Arabe Espanol v. Bank of Uganda SCCA 8/1988*** on duties of a first appellate court.

I will now turn to determination of grounds of appeal as presented.

Grounds 1, 2 and 6: failing to test the case of the joint Plaintiffs/Respondents against that of D.3 Specifically the appellants complains under these grounds that.

Ground 1: The learned trial Magistrate erred in law and in fact when he failed to judiciously scrutinize, evaluate and appraise evidence before him thereby arriving at a wrong decision.

Ground 2; The learned trial Magistrate erred in law and fact when he declared the Respondents the lawful owners of the suit land.

Ground 6; The decision appealed from occasioned a miscarriage of justice.

Counsel for appellants in submissions argues that the learned trial Magistrate did not properly evaluate the evidence. He pointed at the following failures:

1. Failing to properly evaluate the documentary evidence.
2. Failing to consider the material/grave contradictions in PW.1, PW.2's evidence on size of land that (10x30) pages as opposed to (9 x 20) pages;
3. Wrongly considering the LC Judgment and from points No.5-10, counsel lists details of what the learned trial Magistrate in his view did not evaluate correctly.

In response counsel for Respondents supported the learned trial Magistrate's findings on all points objected to.

I have found as herebelow.

In court the evidence from the Plaintiffs/Respondents as led through PW.1 **Chemwajar** was that on 6.7.1992 D.2 **Matayo** sold him the land for shs. 350,000/= a plot of 10 strides by 30 strides. The land had on a house. In 1993 he also constructed a house thereon. He stated that one day on 10.7.2014, the said D.2 resold the same plot to **Nambale Moses** and PW.1 complained to police. That was the second time the said **Matayo** attempted to sale the plot to **Nambale** first time being in 2005. **Mafabi** died in the process and **Nambale** took over the powers. Matters were forwarded to LC Court and he handed to court all his documents of claim received as PE.1, PE.2, and PE.3 and PE.3A.

**PW.3 Siwa Christopher** said he got the plot in 1993 from his grandmother **Elizabeth Chemutai** of 25 by 100 feet. An agreement was written by **Matayo Yeshe** with the grandmother. The house of his grandmother was thereon. He constructed a house for the

grandmom to live in until when she died. **Mafabi** was using the front part for operating a video. This was the same plot **Chemwajar** (PW.1) bought (house of video). When the grandmom died DW.2 **Matayo Yesho** took over the house and began renting it to **Mafabi Mudomo**. That when **Nambale** bought in 2005, he warned him that this plot was already sold to **Chemwajar** (see page 6 paragraph 1). He however fenced off the plot covering the entire behind leaving PW.2 with only the front part. He handed in the copy of agreement marked PE.5.

**PW.3 I Samuel Chelangat** rented from PW.1 and learnt the said homes were sold to him by **Matayo**. He learnt that **Nambayo** bought the same Plot in 2004, so he informed PW.1 whom he knew as the owner. That time the hotel was being rented and rent paid to **Yesho Matayo**.

**PW.3 II Chepsikor Paul** said D.2 asked him to write an agreement of selling a plot to 1<sup>st</sup> Plaintiff. The plot was 10 strides by 30 strides. That when PW.1 wanted to construct in 1993, he found another person had constructed so the seller gave him another plot and in 1994 he held a celebration for completing construction. The witness wrote the agreement of 1992.

**PW.4 IV Bukose Lawrence**, said in 1978 they left Riwa due to insecurity and lived in the house of grandmom **Elizabeth Chemutai** and **Matayo** (D.2) upto 1993. She divided her plot into 2 parts one to his mother and to **Matayo Yesho**.

The part of his mother was given to **Siwa Christopher** in 1993 i.e. 25 feet by 100 feet. That while constructing on their part Plaintiff 1 (PW.1) claimed they were constructing on his portion. It was resolved remaining portion be given to plaintiff 1, which was done and plaintiff 1 built his house. He confirmed the fact that **Matayo** rented out the house and also that **Matayo** (D.2) later sold off the plot to **Nambale**, and the Defendants destroyed the house on plaintiffs' plot.

**PW.4 V Jonathan Ngoget** confirmed **Elizabeth Chemutai** gave land to plaintiff 2-25 feet by 100 feet.

In defence D.2 said he sold land (his plot) to 1<sup>st</sup> plaintiff (9 paces by 20 paces). 1<sup>st</sup> Plaintiff got 3 rooms, and plaintiff began to construct. His aunt also gave to 2<sup>nd</sup> Plaintiff 25 by 100 feet. He said **Nambale** was renting from him. He sold to him the house and not the plot of land. He said

they did not measure what he sold to **Nambale** but was about 20 paces. He made an agreement of sale of land to **Chemwajar**.

**D.1 Mafabi Richard** knew nothing of the transactions only heard that **Nambale** died and he attended the family meeting, and DW.3 appointed Administration of the estate.

**D.3 Nagimesi** said he holds letters of Administration to late **Nambale**'s estate.

**DW.1 Gisasa Samson**, said in 2004 his brother said **Matayo** was selling the place of land including an old structure of semi permanent house. He sold and made an agreement for him.

**DW.2 Wadea James** in 2004 he witnessed purchase of the land by **Nambale** the land was inspected but not measured. There was also a house in the land.

Court visited locus and made observations.

From that evidence, I do notice that the sole source of this conflict is the actions of **D.2 Matayo Yesho**. The facts complained of by the Counsel for the appellants counsel regarding failure to properly assess the evidence when compared with what learned trial magistrate's judgment; especially regarding treating the case of Respondents against D.3 Administrator of the estate of **Nambale Moses**.

I do find that the plaintiffs' witnesses led evidence to show that PW.1 indeed bought the land from D.2; and P.2 was given the land by the grandmother. This is contained in purchase agreement marked PE.I dated 6.7.1992 and document of 12<sup>th</sup> November 1993. These when compared with DE.I dated 11.04.2004 tendered by defendants, it is noticed that.

- i) The purchase and gift to plaintiff 1 and plaintiff 2 were first in time. The author of DE.I (seller) testified that the purchase of land under PE.I was valid. D.2 also confirmed that by time of selling which he said "was only the house" not the land, the plaintiffs were already in occupation of their respective parts. This evidence when considered in view of the evidence of PW.3, who said he knew **Nambayo** bought in 2004 yet PW.1 had already

bought it and he informed PW.1 of this. Also **PW.4 Bukose Lawrence** also narrated how the plot which D.2 sold to **Nambale** had already been bought by PW.1. Actually **PW.2 Siwa Christopher** testified that when he learnt that **Nambale** had bought this land (in 2005) he warned him that this plot was already sold therefore not an innocent purchaser for value without notice.

There were some discrepancies in the description of what was sold in terms of ‘paces’ or ‘strides’. This anomaly was however satisfactorily covered on the record by reconciling the documentary evidence contained in the exhibited documents and oral evidence with what parties particularly and practically showed court at locus.

I notice that the learned trial magistrate noted at page 19 of the typed record thus:

*“The area in dispute is bordered by semi permanent houses of 1<sup>st</sup> and 2<sup>nd</sup> plaintiff the house of Plaintiff 1 occupies an area of 0.6 metres in dimension. Plaintiff 1 claimed land if measured goes 20.6 metres up to where Wekesa built.....the land claimed by the plaintiff if measured absorbs this entire land claimed by the defendants.....”*

From the above findings at locus the size of the suit land was easy to ascertain. It was the sum total of all the land that previously was owned by **Chemutai Elizabeth**. By her death she had sold the first portion of 30 by 10 strides to Plaintiff 1. She also gave Plaintiff 2 another portion of 100 by 25 feet. It is an evidence that Plaintiff 2 was to develop a house thereon for her in which she was to reside till death, then Plaintiff 2 would develop it. When she died the house was passed to D.2 to caretake, but along the way he resold without caring about the interest of Plaintiff 1 and Plaintiff thereon. In his evidence D.2 did not deny and he even is recorded on record as having been evasive in evidence choosing not to answer many of the questions put to him.

In his judgment the learned trial Magistrate reviewed all evidence above showing what transpired in court and at locus. He then briefly applied the facts to the evidence on page (Paper No.5 paragraph3) noted that the defendant supplied agreed DE.I dated 11.4.2004 as evidence of purchase of the land. *“Which of these agreements is superior to the other?”*

*“In law if all factors are constant first purchase that the first agreement takes precedent over subsequent ones...”* The learned trial magistrate weighed both sides of the evidence and then concluded at page/paper 7 paragraph 3 *“I have noted that first D.2 who sold land to 1<sup>st</sup> Plaintiff does not deny the sale to 1<sup>st</sup> plaintiff or the giving of land to 2<sup>nd</sup> plaintiff. D.2 further admitted in cross-examination that he signed documents of 2003 involving settling of case with PW.1...”*

These facts are borne out in evidence. Though the appellants complain that the learned trial Magistrate did not consider defence case. I do find that he this so, and raised points 1-10 in the submissions, I do not find them proved as alleged. I have re-examined the evidence and I do find that the onus of proof was upon the plaintiff to prove on balance of probabilities that they own their lands as pleaded in the plaint.

The evidence on record was sufficient and it showed that by the time D.2 purported to resale land to the late **Nambale**, the plaintiffs were already having interests thereon. The questions raised by counsel are explained by the oral evidence of PW.1, PW.2, and all their witnesses, and D.2's evidence. All other alleged contractions were minor not going to the root. I did not find any failure in assessment of the evidence. My conclusion is that Plaintiffs/ Respondents led enough evidence to prove ownership of the disputed land/plots of land.

These grounds of appeal therefore are not proved and do fail.

Grounds 3 and 4 were abandoned.

Grounds 5 and 6(Record keeping)

Counsel for appellant commented on poor record keeping of evidence under these grounds. The anomalies pointed out are noted. Courts should be careful in taking down records to avoid such glaring errors and omissions.

Appellant however conceded that the errors do not vitiate the evidence of 2<sup>nd</sup> Appellant. I do agree that the errors did not indeed compromise the accuracy of the evidence recorded. They did not therefore warrant any fatalities though regrettable, court finds that the record in its form was containing a proper record for purposes of appeal. This ground therefore does not amount to

anything and is as well not proved in as it's stated for purposes of the appeal. The grounds fail as well.

In the final result this appeal is not proved. It is dismissed with costs to Respondents. I so order.

**Henry I. Kawesa**

**JUDGE**

**13.07.2017**