THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT ARUA

MISCELLANEOUS CIVIL APPLICATION No. 0012 OF 2017

(Arising from Gulu Chief Magistrate's Court Civil Suit No. 0059 of 2000)

NURU JUMA ……..……..……..……..…… APPLICANT

VERSUS

KASSIANO WADRI ……..……..……..……..… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application made under the provisions of sections 83, 96 and 98 of *The Civil Procedure Act* and Order 51 rule 6 and Order 52 rules 1 and 3 of *The Civil Procedure Rules* seeking the revision of a decision of the Chief Magistrate of Arua by which he entered judgment against the applicant on 31st March 2006, awarding the respondent general, exemplary and special damages for trespass to land, interest and costs. The applicant contends that the decision was erroneous in so far as the trial magistrate, when deciding the suit, did not take into account the fact that the applicant had not been served with summons to file a defence together with the plaint. Further, the court below misdirected itself when it allowed the suit to proceed against the applicant who was neither a party to the agreement of sale of land in question nor had he ever undertaken any activity on the land. He was further not served with taxation hearing notices in respect of the taxation of costs ensuing from that litigation. In the result the trial magistrate failed to judiciously exercise a jurisdiction vested in him or acted in exercise of his jurisdiction illegally and with material irregularity. He therefore seeks to have the judgment set aside with an award of the costs of this application.

In his affidavit in reply the respondent avers that he filed the underlying suit in the High Court at Gulu as civil suit No. 54 of 2000 because at the material time magistrates courts had been divested of jurisdiction over land disputes. Upon the magistrates' courts' jurisdiction being restored in the year 2001, the High Court in Gulu transferred the suit to the Chief Magistrate's

court of Gulu where it was registered as civil suit No. 59 of 2000. The applicant was duly served with court process, he consequently attended the proceedings during which he testified in his defence before the judgment was delivered, which judgment he has never appealed. The applicant was a proper party to the suit since he witnessed the agreement of sale of the land to the respondent yet went ahead to prevent the respondent from developing the land. The applicant was duly served with taxation hearing notices and attended the taxation proceedings. He therefore prayed that the application be dismissed with costs.

Part of the procedural background to this application is explained in the respondent's affidavit in reply. It would appear that following the judgment of the Chief Magistrate in Gulu, the court file was transferred to the Chief Magistrate's Court in Arua by order of the then Resident Judge of Gulu, made on 30th May 2000. However, a search made in the records kept by the Civil Registry of that court did not reveal when, how and under what circumstances the file was transferred to Arua. The file was not even entered in the Civil Suits Register of the Arua Chief Magistrate's Court. The respondent fled a bill of costs at the Civil Registry of the Chief Magistrate's Court of Arua on 25th September 2006 which was taxed and a ruling thereon delivered on 1st April 2010. Before that, on 3rd August 2009, Counsel for the respondent had applied for the opening up of a duplicate file, providing the court at Arua with only copies of the pleadings, judgment, bill of costs and decree. It is only that duplicate file that was availed to this court for purposes of these proceedings. The original file could not be fund by the Registry staff. Throughout the trial and during the taxation of the resultant bill of costs, the applicant had no legal representation. He thereafter unsuccessfully made and defended himself against multiple applications and an appeal, on his part seeking relief from the decision of that court and on the part of the respondent seeking to enforce the decision of the court, until he eventually filed the current application.

At the hearing of the application, he was represented by Mr. Ondoma Samuel who submitted that the applicant was not served with court summons and pleadings in the original suit. He was only surprised when he was served with a taxation hearing notice which prompted him to complain to the inspector of courts. The trial magistrate as well misdirected himself when he held that there had been a sale of the land in dispute to the respondent yet there was no sale; what was in place was borrowing of land and the applicant is not the one from whom the land was borrowed. He

was merely a witness. The land was borrowed from his uncle Adam Aliama. It was not proper that the applicant was sued instead. The agreement speaks for itself as a borrowing and not a sale. The respondent purported to purchase the land from the son of the deceased landlord yet he had no capacity to sell. Under section 83 of *The Civil Procedure Act*, the court should be pleased to revise the decision.

In reply, counsel for the applicant, Mr. Jogo Tabu submitted that the agreement was drawn by lay people and they used the word "borrow" to mean "sale." The circumstances are that borrowing with a consideration is a sale; it cannot be a license. The value of the consideration in 1993 contradicts the nature of the act of borrowing. It was therefore properly construed as a sale by the trial magistrate. The amount paid was too much for a plot at the time. It could not have been a borrowing. Secondly, the son of the deceased who signed the agreement is the seller had capacity to sell to the respondent. His title to the land is derived from custom being a male and son of the deceased, he could sell. Therefore there is no ground for revision. He prayed that the application be dismissed. In rejoinder, counsel for the applicant submitted that the nature of bargain of the parties is reflected in the agreement. The agreement does not mention a sale. There is nothing in the judgment to suggest that the consideration is too high for a borrowing. The custom was not proved and the trial magistrate did not refer to any or even seniority of the son in the judgment. The magistrate acted irregularly. The agreement is not ambiguous and should have been given its proper interpretation. He reiterated his prayers.

Section 83 of the *Civil Procedure Act*, *Cap 71* empowers this court to revise decisions of magistrates' courts where the magistrate's court appears to have; (a) exercised a jurisdiction not vested in it in law; (b) failed to exercise a jurisdiction so vested; or (c) acted in the exercise of its jurisdiction illegally or with material irregularity or injustice. It entails a re-examination or careful review, for correction or improvement, of a decision of a magistrate's court, after satisfying oneself as to the correctness, legality or propriety of any finding, order or any other decision and the regularity of any proceedings of a magistrate's court. It is a wide power exercisable in any proceedings in which it appears that an error material to the merits of the case or involving a miscarriage of justice occurred, but after the parties have first been given the

opportunity of being heard and only if from lapse of time or other cause, the exercise of that power would not involve serious hardship to any person.

It is necessary before consideration of the merits of this application to state briefly the factual background. The background to the application is that a one Adam Aliama (who died in 1997) was the owner of two plots of land situated at Baruku village in Arua Municipality. He had a number of grass-thatched houses and a crop garden on the plots. Before his death, he on the 11th of April 1993 entered into an agreement with the respondent in the following terms;

11/04/93
THE OFFICE OF EXECUTIVE COMMITEE RCI BARUKU
AGREEMENT
Sunday 11th April 1993 3 pm

ADAM ALIAMA (hereinafter referred [to] as the LANDLORD)
ALWI AHMED (hereinafter referred [to] as the BORROWER)

The Landlord referred [to] above in his own free will and sound mind offered to the borrower above also in sound mind, his piece of land of 2 (two plots) for constructing a residential premises.

The plot is situated in Rhino Camp Road in Baruku village.

The Borrower on mutual understanding has compensated him for the grass-thatched houses and shamba in the sum of shs. 1,3000,000/= (Uganda shillings one million and three hundred [thousand] only

This amount is to [be] paid in three instalments. 1st payment [of] shs. 500,000/= (Uganda shillings five hundred thousand only) 2nd payment 30th May 1993 and 30th June 1993.

Signed by Adam Aliama Signed by Alwi Ahmed
Witnessed by:
Nuru Juma
Hassan Jama
Cimari Alwi
Juma Kuri

Alwi Ahmed, mentioned as Landlord in the above agreement, died during the following year, 1994. Upon his death, his son, Jaffar Alwi on 25th March 1996 sold the land to the respondent at the price of shs. 2,250,000/=. In the year 2000 the applicant attempted to develop the land, first by fencing it off. Having met resistance from some members of the family of the late Alwi Ahmed, resistance that included the destruction of the poles and barbed wire he had used in fencing off the plots, he caused the arrest and prosecution of the applicant for the offence of malicious damage to property. He as well filed a civil suit against him in the High Court at Gulu, whose procedural background has been narrated above. The suit was finally decided on 31st March 2016 by the then Chief Magistrate of Arua.

The applicant argued that he was never served with summons to file a defence in the suit and with taxation hearing notices in respect of the respondent's bill of costs. However, perusal of the judgment reveals that the applicant attended the trial, testified in his defence and called three witnesses. The record indicates further that he was present in court during the taxation proceedings only that he chose not to respond to the submissions of counsel for the judgment creditor, instead insisting that he had been wrongly sued. The contention that he was never served with summons to file a defence and the respondent's bill of costs therefore is not borne out by the available record. That argument is rejected.

In his judgment, the learned trial magistrate found that the respondent was the rightful purchaser of the land in dispute. In paragraph two at page two of the judgment it is evident that evidence of the transaction of 11th April 1993 between the late Adam Aliama (as Landlord) and the late Alwi Ahmed (as borrower) was placed before the trial court. The learned trial magistrate correctly observed that the real point in contention was whether that transaction amounted to a sale of the land in dispute and held as follows;

> I have looked at the language of the agreement. The parties in the agreement were referred to as Landlord and borrower and that the payment was meant as compensation for the structures and crops on the land. In interpreting the written agreement we have not only to look at the real intention of the parties but also the court is to take into account the principles of land law for the principles of land law help in elucidating the intention of the parties. It is a well known principle that whatever is affixed on the land is part of them (sic). Thus the said grass-thatched houses and the crops being on the said land and affixed to it are part of the land. You

> cannot sell a house without selling the land upon which it is situated. This is a principle of land law and whatever transaction is being undertaken must be done in the light of that provision. Thus in the instant case, when the so called "Borrower" was compensating for the grass-thatched houses and for the crops on the land, he was not only compensating for the houses and the crops but since those houses and crops were affixed to the land, they were also part of the land and thus the compensation was also for the land upon which they were situated....and the so called "Borrower" became the lawful owner of the land. The Borrower who became the lawful owner of the land in turn sold the said portion of land to the plaintiff.

With all due respect to the learned trial magistrate, he misdirected himself in the above analysis in three aspects of matters of law and of fact; first in construing the agreement of 11th April 1993 as a sale, secondly in his finding that it is the borrower named in that agreement who sold the land in dispute to the respondent and thirdly in failing to properly consider the validity of that sale to the respondent, by the son of the deceased "borrower" named in that agreement. These three aspects manifest material irregularities in the way the trial magistrate acted in exercise of his jurisdiction, which resulted in injustice that calls for the intervention of this court.

The cardinal rule of interpretation of contracts is to ascertain and "give effect to the expressed intentions of the parties," as expressed in the clear language of the contract. The court gives effect to such intention of the parties by construing the unequivocal language or words they have employed in the contract with good sense so as to give effect to, and not to defeat, those intentions. The primary consideration in interpreting a contract is to attempt to fulfil, to the extent possible, the reasonable shared expectations of the parties at the time they contracted. In the first instance, the court therefore must attempt to discern the meaning of a contract and the intent of the parties from the language that they used, as read from the perspective of a reasonable third party.

Intent, not knowledge, is the governing inquiry when interpreting a contract. In interpreting the contract of 11th April 1993, the learned trial magistrate took an approach that deemed the parties to have had knowledge at the time of contracting, of the legal principle that whatever is affixed onto the land forms part of the land, rather than sought to establish their intent as expressed in the clear language of the contract. When interpreting a contract, the intention rather than

knowledge of the parties should control, and the best evidence of intent is the contract itself. Extrinsic considerations, such as the principles of land law, cannot be used to alter the plain language of the contract, or create an ambiguity where none exists in the contract itself. The trial court should not have found the language ambiguous so as to necessitate resort to that principle of land law on the basis of the interpretation urged by one party, where that interpretation would strain the contract language beyond its reasonable and ordinary meaning. While knowledge may support an inference of intent, here the evidence to the contrary is insurmountable. Where parties have entered into an unambiguous written contract, the contract's construction should be that which would be understood by an objective reasonable third party. An inquiry into the subjective knowledge or unexpressed intent or understanding of the individual parties to the contract is neither necessary nor appropriate. Where the words of the contract are sufficiently clear to prevent reasonable persons from disagreeing as to their meaning, the Court will interpret clear and unambiguous contract terms according to their ordinary meaning.

In a dispute over the meaning of a contract, the threshold question is whether the contract terms are ambiguous. The court therefore must determine first whether the contractual language in dispute, when read in the context of the entire contract, is ambiguous or not. In deciding whether a contract is ambiguous, the court looks to see whether it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognisant of the customs, practices, usages and terminology as generally understood in the particular trade or business. Ambiguity is determined by looking within the four corners of the document, not to outside sources. A contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. If reasonable minds could differ about the meaning of the contractual language, such language is ambiguous but no ambiguity exists where the contract language has a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion.

The principles that should guide courts in situations of this nature were explained by Saville LJ and Judge LJ in *National Bank of Sharjah v. Dellborg and Others [1997] EWCA Civ 2070*, thus;

> If the circumstances surrounding the making of the agreement showed to a reasonable man.....would produce a result which the parties clearly could not have intended, the court would (notwithstanding the meaning which the words bear as a matter of ordinary language) interpret the paragraph so as to accord with what a reasonable man, knowing of those circumstances, would understand it to mean. This is said to be justified on the basis that to do otherwise would result in the court interpreting the agreement in a way which, in the light of the surrounding circumstances, simply offended common sense.....[However] where the words the parties have chosen to use have only one meaning, and that meaning (bearing in mind the aim or purpose of the agreement) is not self evidently nonsensical, the law should take that to be their intended agreement, and should not allow the surrounding circumstances to override what (*ex hypothesi*) is clear and obvious. This would enable all to know where they stand without the need for further investigations; and for the court to provide the answer, where the point is contested, without undue delay or expense.

In the absence of ambiguity therefore, a court is required to give the words of a contract their plain meaning except where such meaning would produce a result which the parties clearly could not have intended. Where a contract is unambiguous, the Court looks to the language of the agreement and gives the words and phrases their plain meaning, as the instrument alone is taken to express the intent of the parties. A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.

When the plain, common, and ordinary meaning of the words lends itself to only one reasonable interpretation, that interpretation controls the litigation. I have examined the language adopted by the parties in their contract. I observe that Adam Aliama described himself as the “Landlord” while Alwi Ahmed described himself as the “Borrower.” The borrowing is “for constructing a residential premises” and the consideration given for their contract is for compensating “the grass-thatched houses and shamba” then existent on the land. I find these expressions to be clear and unambiguous. I do not see how parties intending the agreement to be a sale would refer to it as a borrowing. It is as well odd that a seller would specify the purpose to which the buyer will put the land sold. Such language is consistent with a licence, hence a “borrowing,” rather than a sale. Where contract language is clear and unambiguous, the ordinary and usual meaning of the chosen words will generally establish the parties’ intent. Language whose meaning is otherwise

plain does not become ambiguous merely because the parties argue different interpretations in the litigation. Disagreement over interpretation does not render a contract ambiguous.

When reading the contract, the language used by the parties should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated. In other words, the court's primary objective is to give effect to the intent of the parties as revealed by the language they chose to use. In focusing on those operative words and phrases, I have applied the well-settled principles of contract interpretation that require the court to enforce the plain and unambiguous terms of a contract as the binding expression of the parties' intent. Having done so, I do not find that the expressions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. They have only one clear meaning, that is, that by that "borrowing," Alwi Ahmed became a licensee on the land rather than a purchaser of the land. It is presumed that the parties intended the legal consequences of their words. The legal effect of the contract, in other words, was to create a licence on the land rather than a sale of the land.

A sale is a transfer of ownership and to constitute a sale there must be a clear intent of transfer of ownership from one person to another i.e., all rights and interests of the owner as owner of property are transferred by the transferor to another person. I have not found any words in the contract expressing such intent. It does not contain any expression to the effect that Adam Aliama stated that the property in was transferred with full ownership rights or that he was a transferor, transferring full ownership rights in the property in favour of the transferee, Alwi Ahmed. The agreement does not state in clear and express terms that Adam Aliama the owner of the land agreed to sell, was selling or was transferring the full ownership rights in favour of Alwi Ahmed for a consideration of shs. 1,3000,000/=. It instead states that he as Landlord was allowing Alwi Ahmed to "borrow" the land provided he pays compensation for the existing developments on it which apparently had to be removed to pave way for his declared use. The proper interpretation of language in a contract being a question of law, I find that in interpreting that contract as one of sale of land, the learned trial magistrate exercised his jurisdiction with material irregularity.

Secondly, the learned trial magistrate in his judgment erroneously found that "the Borrower who became the lawful owner of the land in turn sold the said portion of land to the plaintiff." The "borrower" in this case is named in the agreement of 11th April 1993 (exhibit P.2) as Alwi Ahmed yet the seller in the agreement dated 25th March 1996 (exhibit P.1) by which the respondent purchased the land is named as Jaffar Alwi. In that agreement, it is stated that "Jafari Alwi has offered his piece of land....to Mr. Kassiano Wadri....." The land is described as being "situated at Rhino Camp, Baruku village in which there are four grass-thatched houses." Therefore, the trial magistrate's finding that there was a sale of the land in dispute to the respondent by the "borrower" is inconsistent with the evidence. A finding of fact that is not supported by the evidence on record is a manifestation of material irregularity in the way the trial magistrate exercised his jurisdiction.

Lastly, there was no evidence adduced before court, at least none is alluded to in the judgment, to explain how Jaffar Alwi obtained capacity to dispose of that land. There is no evidence that he acquired it by purchase, gift, inheritance or transmission by operation of law, neither from the acknowledged original owner, Adam Aliama nor the borrower Alwi Ahmed. Counsel for the respondent's argument that Jaffar Alwi acquired the land by inheritance from his late father Alwi Ahmed is not supported by any evidence on record since in his judgment the trial magistrate did not advert to any. Although a bare license to use land granted to an individual, being a right *in personam*, is automatically revoked by the death of the licensor or by disposition of the land in question except where it was granted to a class of people, in this case this was a contractual licence subject to the principles of privity. Not being privy to the contract of 11th April 1993, Jaffar Alwi could not take any benefit under it.

For all the above reasons, I find that this is a proper case for revision of the decision of the learned trial magistrate. In the result, the judgment and decree are herby set aside. All subsequent proceedings too, including the award of costs and execution are hereby set aside. The application is allowed in those terms with costs to the applicant.

Dated at Arua this 20th day of July 2017. ……

Stephen Mubiru
Judge
20th July 2017.