

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

HCT-04-CV-CA-0088 OF 2011  
(ARISING FROM PALLISA CIVIL SUIT NO. 02/2013)

MUSOGO FRED

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APPELLANT

VERSUS

1. KASAGALYA FRED

2. MPULUMBA WILLIAM

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RESPONDENTS

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGMENT

By plaint dated 17<sup>th</sup> January 2013, the plaintiff/appellant **Musogo Fred** sued the defendants/respondents **Kasagalya Fred** and **Mpulumba William** for recovery of land 2 1/2, acres at Tirinyi zone III in Kibuku District.

The facts constituting the cause of action as per paragraph 5 of the plaint are that **Kasagalya Fred** (D1) sold land to **Musogo Fred** (plaintiff) for an agreed price of 4.500.000/=. The plaintiff paid a deposit of shs 2.500.000/=, with balance of 2.000.000/= payable within a period of 6 months. Later on 28<sup>th</sup> October 2012 plaintiff learnt that D1 had resold the same land to DW2 (**Mpulumba William**).

In defence by written statement of defence, D1(**Kasagalya**) agrees to the facts of sale but avers in paragraph 4(d) that he had put it to plaintiff that the land was subject to a hire purchase transaction between **Abdu Kisagalya** and D2 (**Mpulumba William** for 10 years ). D.1 further states that under 4(f) at expiry of the grace period of 6 months the plaintiff failed to pay the balance of 2.000.000/= whereupon he resold the land to D2 (**Mpulumba W**) for 5.000.000/=.

D2 (**Mpulumba**) by written statement of defence dated 7<sup>th</sup> February 2013 stated in paragraph 5 that he rented the land for 10 years from 1<sup>st</sup> January 2010 to 1<sup>st</sup> January 2020.

He later purchased the land from 1<sup>st</sup> defendant.

At the trial, during scheduling two issues were raised

- i) Who is the rightful owner of the land?
- ii) What remedies were available to the successful party?

During the trial the plaintiff called evidence of PW1, PW2 and PW3, and PE1 (purchase agreement). Defendants called evidence through DW1, DW2, DW3 DW4 and DEX1, DEX2. Court also visited the locus. At the close of the trial, the learned trial Magistrate in his Judgment found for the defendants hence this appeal.

The appellant in the memorandum of appeal raised 8 grounds.

All the grounds complain that the learned trial Magistrate failed to properly evaluate the evidence, thereby reaching a wrong decision.

The appellant did not file submissions, as agreed but only rejoined the submissions by respondents.

Going through the grounds of appeal and submissions, this court has a duty as a first appellate court to review all the evidence on record so as to make its own conclusions thereon, with a caution that it had no chance to observe and listen to the witnesses. (This is the standard in *Uganda Revenue Authority V Rwakasaija Azarious & 2 Ors CACA 8/ 2007* (unreported).

I have duly re-appraised all evidence on record. I agree with its summary as it appears on the facts page and background page of both respondent and appellant's submissions. What I may not agree with is its analysis by either party regarding the issues at stake.

From the facts, and the evidence it is clear that the 1<sup>st</sup> defendant entered a contract of sale of his piece of land to the plaintiff at 4.500.000/=. Plaintiff paid 2.500.000/=

D1 later sold the same land to D2 for Shs 5.000.000/=. By the time D1 bought the land, D2 had been leaving on the same land as a tenant by hire purchase from D1. He was in actual possession, and his tenancy was still running (for 10 years) by the time of sale. Details of these transactions are contained in the evidence of PW1, PW2, PW3, DW1, DW2, DW3 & DW4, PE1, and DEI & DE2.

The only legal question arising from those set of facts is who held better title as between the plaintiff, D1 and D2

It is the appellant's argument that following the principle of law in ***Kari and Others V Ganarani [1997] 2 NWRR 380***, the first land sale transaction takes precedence over the 2<sup>nd</sup> land transaction. He argued that based on the principle of "*qui prior est tempore*" "he who is earlier in time is stronger in law and when equities are equal and neither claimant has a legal estate, the first in time prevails. He argued that there are two competing equities; that is the two land sale transactions. He argued that the evidence on record showed that the 2<sup>nd</sup> respondent bought the land when appellant had already acquired an equitable interest in the same. He argued that the 1<sup>st</sup> land sale transaction between 1<sup>st</sup> respondent and appellant takes precedent over the 2<sup>nd</sup> land sale transaction between 1<sup>st</sup> and 2<sup>nd</sup> respondent.

On the other hand the respondent argues that the learned trial Magistrate was right to find that the 2<sup>nd</sup> defendant had better title.

He argues that basing on the principle of "*qui prior est tempore*", "he who is earlier in time is stronger in law." Referring to ***Hanbury and Martin Modern Equity (Sweet and Maxwell) Ltd 1977***, which at page 27 provides:

*"Prior equitable interest in land can only be defeated by a bonafide purchaser for value without prior notice. Then the equities are equal and his estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does acquire a legal estate, then the first in time that is the prior equitable interest prevails as equitable interests rank in the order of creation."*

I agree with the statements of the law above. My understanding of the above position is that to properly understand who held better title court has to examine the facts in this matter. The rights of the parties all were properly explained by DW4 **Kisagalya Abdu**. He confirmed that he was the original owner of the land. He hired it to D2, and later sold it to D1. He told court that he informed D1 of D2's presence. He also testified that D1 also sold it to plaintiff but still he warned him of D2's interest. He also participated when D2 bought the same. The above

evidence is not at variance with the evidence adduced by either party regarding the fact of purchase from D1.

When the law of equity is applied to the above set of facts, it is not doubttable that D2 has a longer equitable interest on that land, dating to the earlier title of DW4 (**Kisagalya Abdu**) as his tenant, for the agreed period of 10 years. The tenancy period had not lapsed and **Kisagalya** sold his interest to **D1 Kasagalya Fred**- but with the encumbrance of D2 as a tenant. D1 accepted and D2 remained occupying the land as per their tenancy agreement. D1 again also sold his interest to the plaintiff (**Musogo Fred** ) again with D2's tenancy interests undisturbed (as per evidence).

However the evidence shows that plaintiff and D1 **Kasagalya** made a contract whose terms were never fulfilled by them. The consideration price of 4.500.000/= was not paid, and the contract was repudiated by the parties.

In contract either party could repudiate the contract by non performance. The evidence shows that plaintiff did not pay the balance of 2.000.000/= within 6 months as agreed. The defendant **Kasagalya Fred** also went ahead and resold the land (before receiving full price- so title had not yet passed to plaintiff). The facts therefore show that by time D1 sold to D2, plaintiff had not obtained title of the Suitland. His interest was subject to payment which he did not satisfy. Also evidence on record shows from the testimonies of DW1,DW2, DW3 & DW4 that plaintiff indicated that he had lost interest in the purchase of the land since it had a tenant thereon (DW2)- ( Evidence of DW1 **Kasagalya Fred** at page 11 of typed proceedings, DW3- **Gwampula** at page 13 last paragraph), evidence of PW1 **Mugoso Fred** page 8( first paragraph), all confirms the above position.

From that evidence, it is clear that D2 had interests in the land long before it was sold to the plaintiff.

Plaintiff all along knew and was made aware of this tenancy interest. The evidence of DW4 and DW3 convinces me that plaintiff was informed of the sale to D2 when he (plaintiff) failed to pay the purchase price in time. The interests of D2 on the land superseded those of the plaintiff.

I am therefore in agreement with the learned trial Magistrate's assessment of the evidence. He was not in error of law and fact. I do not find merit in any of the grounds of appeal. All fail. This appeal is dismissed with costs to the respondents.

**Henry I. Kawesa**

**JUDGE**

**24.02.2017**