

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

**HCT-04-CV-CA- 0090 OF 2015  
(ARISING FROM LAND CIVIL SUIT NO. 78 OF 2008)**

<b>MRS. RASHID NURU &amp; 8 OTHERS</b>	:::~::~	<b>APPELLANTS</b>
	<b>VERSUS</b>	
<b>JOHN MUTAMBO</b>	:::~::~	<b>RESPONDENT</b>

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

**JUDGMENT**

The matters that gave rise to this appeal are contained in the lower court proceedings as follows. By plaint dated 16.10.2008, the plaintiff **Mutambo John** sued Mrs. Rashid and 8 others vide Civil Suit No. 78 of 2008 for vacant possession of his piece of land; damages for trespass and conversion for mesne profits and for a permanent injunction to restrain the defendants from further similar acts of forceful entry annexation, conversion and for other consequential reliefs. (per paragraph 3 of the plaint).

Plaintiffs contended under paragraph 4 of the plaint that since July 2008 the defendants have without any justification entered upon and encroached upon the plaintiff’s piece of land driving him out and preventing him from peaceful quiet possession and occupation of his piece of land which he has possessed for the last 27 years. The defendants have annexed part of the plaintiff’s land after destroying the common boundary and added the annexed piece of land to the land occupied by the mosque.

The defendants by written statement of defence dated 27<sup>th</sup> November 2008 denied the above facts. By paragraph 5 of the written statement of defence stated that a Tanzanian called Rashid donated the disputed land to the Moslem community of Mutoto mosque by a document dated 22<sup>nd</sup> June 1976 before he left and the Moslem community has been in possession since. Under paragraphs 6 and 7 they pleaded that the claim is *res judicata*.

The case proceeded and the trial court found in favour of the Respondent.

The duty of a first appellate court is to re-evaluate the evidence, and make its own findings, aware that it had no opportunity to observe the witnesses. (See: **Banco Arabe Espanol v. Bank of Uganda SCCA 8/1998**).

This court being a first appellate court will therefore follow the principles above.

The grounds of appeal were as per the memorandum of appeal. They were however combined in two categories and argued as such. These grounds were as per ground 1, 2, 3, 4, 5, and 7 to the fact that the learned trial Magistrate did not properly evaluate the evidence.

The second argument is under ground 6, to the fact that the learned trial Magistrate failed to find that the suit was *res judicata*.

From the above, I will follow the arguments as per both counsel for appellants and Respondent.

According to the evidence on record;

*“PW.1: John William Mutambo told court that he bought the land from one Mutwalibi Wambi, on the 11.08.1980, for shs. 7,200/= . He named Masaba and Patrick Mukwana. At time of buying the mosque there were boundary marks already elected. He exhibited the agreements as P1’A’.”*

He took possession of the land until 2008, when the complaints arose.

**PW.2 Patrick Wakonaya** said he used to till PW.1’s land, till 2008 when PW.1 came back to personally use it; and no one laid complaint on the land for all the time he tilled it.

**PW.3 Waniale John Steven**, said he was aware that Rashid put his land for land for sale in 1975 for shs. 15,000/= . A one **Mutwalib** came and bought it for cash. This witness was present when he bought. This witness was a witness to the sale transaction. He named **Inabire, Fabiano Wataka** and **Haruna Magombe**. Others who died were **Ahyashi Sharif, Umar Mukwana**. After the said Rashid left for Tanzania and **Mutwalib** took possession. Later on Rashid returned

and bought land in Nkoma. This witness is the one who wrote the sale agreement. A dispute arose in 2008 when the children and widow of Rashid that the land had been given to the Islamic community whereas not.

**PW.4 Sosipetri Masaba**, was present when PW.1 bought the said land. There was **Mutwalib, Mutambo, Gidudu** and **Mukwana**. The land was sold for 7,200/= to **Mutwalib Wambi** and an agreement was made. PW.4 is the one who wrote it.

The neighbours signed the agreement.

**DW.1 Nuru Rashid**, stated that the land is hers. She married her husband who owned the land and together they agreed to give the land to the mosque. The first donation was in 1973. In 1976 they told **Mutwalib** to remove iron sheets and give the land to the mosque in 1979 when they returned they found **Mutwalib** still on the land. They took him to LC.I and LC.II in 2008 and won the case. She then handed over the land to the mosque vide DE'A'.

**DW.2 Mangala Fred** said that he had presided over a case between **Rashid (Mrs)** and **Mutwalib** about land for the mosque. She tendered the LC judgment as D Exh.'B' and agreement of 29.08.2008 as DE'C'.

**DW.3 Magombe Abubakari** said DW.1 gave them the land in 2008. However **Mzee Mutwalib** was the one on the land before he handed over.

**DW.4 Ali Kiondo** said **Mrs. Rashid** (DW.1) gave said land to the moslem community. **Rashid** first gave them  $\frac{1}{4}$  of it. Then the other  $\frac{1}{2}$  an acre with a dispute was given by Mrs. Rashid in 2008. This was after moslems had informed her that **Mutwalib** had bought it from her husband, a fact she disputed. She therefore used her authority and added it to them. She sued **Mutwalib** in the LC.I Court, and the court gave back the land to her and on 29.08.2008 she also gave it back to the moslems.

**DW.5 Fabiano Wataka** only knew that there is land with a mosque but did not know it well.

DW.6 said all he knew is that Rashid gave the mosque the land in the 70's.

**DW.7 Abdu Magombe** said the land is for moslems and it is the Tanzania who gave it to them, but in cross-examination conceded that he was not there when the transactions he testified about happened.

**DW.8 Magombe Wagitom** said the land was for Rashid who gave part of it to the mosque. In 1979 Rashid was going to Tanzania and he sold the iron sheets to **Mutwalib**, who later demolished the house. Moslems then remained using the land.

**DW.9 Wangwe Peter**, said Rashid sold his iron sheets and left the land in 1979. Mrs. Rashid came back. He heard **Mutwalib** had sold the land; to a one John **Mutambo**.

From the above evidence court determined the following issues, which were crucial in determining the matters in controversy.

1. Who owns the land?
2. Whether there was trespass.
3. Whether the suit was *res judicata*.
4. Remedies available.

The lower court terminated all issues in favour of Respondents.

I now re-examine the same on the basis of evidence on record, and do make the following findings.

### **Grounds (Res judicata)**

I will begin with a review of evidence on record to ascertain if this suit is *res judicata*.

Appellant's counsel referred to page 21 of the proceedings of the trial Court noting that the LC.I judgment was admitted as DE.3. Counsel attacked the learned trial Magistrate's finding that Mrs. Rashid had no *locus standi* to sue **Mutwalib Wambi**; on basis of her lack of letters of probate or Administration. He was of the view that the widow as a beneficiary of the estate

could sue for recovery of the land. Since there was a judgment against **Mutwalib** who sold to Respondent then the matter is *res judicata*; as respondent was claiming under **Mutwalib**.

The Respondent's counsel on the other argued that though litigation took place in 2008, the parties were different. The Respondent's case was that it is settled principle of law that matters of continuing trespass are not subject to the principle of *res judicata*. They referred to the case of *Maniraguha Gashumba versus Sam Nkondiye CA 23/2005* which held that each action of trespass constitutes a fresh and distinct cause of action. He also referred to *Holmes v. Wilson (1839) A & E 503*, to re-emphasize that in continuous trespass *res judicata* does not apply. Respondent agreed with the learned trial Magistrate's arguments that Mrs. Rashid had no *locus standi* to sue **Mutwalib**.

Under section 7 of the Civil Procedure Act, no court should try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

It was held in the case of *David Kabarebe v. Major Prossy Nalweyiso CACA No.34/03* that to give effect to the plea of *res judicata*, the matter directly and substantially in issue must have been heard and finally disposed of in the former suit.

In the case before me, the matter allegedly heard by the LC.I Court of Mutoto dated 29.08.2008 was a dispute between **Nuru Rashid** and **Mutwalib Wambi**. The issue for determination in that court seems to have been in regard to that where the "mosque is standing" (paragraph 1) and (paragraph 2) of Ruling and whether he bought the "house" and not the land under paragraph (3) and (4) of the Ruling.

It is clear from the Ruling that the issues considered by the LC.I court were narrowed only to the transaction of sale between **Rashid** and **Mutwalib** in 1975. It did not consider the transaction of sale between **Mutwalib** and **Mutambo John** which allegedly occurred in 1980 vide sale

agreement exhibit as P.Exh. 'A'. This aspect of sale introduces a legal principle of "Bonafide purchaser for value without notice" which in law if proved can protect the interests of the Respondent. This aspect was not investigated by the LC.I Court. The said **Mutambo** was not called on to be heard in the LC Court.

The principle of *res judicata* cannot therefore be invoked by the appellant to block the Respondent's pursuit of his rights under this suit.

Secondly as rightly argued, each act of trespass is an independent cause of action. The fact that **Mutambo** was having undisturbed use of the land for 27 years till the year 2008, before the appellants came on the land is itself a ground for a fresh cause of action in trespass. It cannot be subjected to the findings of the LC.I Court- whose limited jurisdiction did not consider the present cause of action.

I therefore find that the learned trial Magistrate was right to find that the suit was not *res judicata*.

Ground 6 of the appeal accordingly fails.

Grounds 1, 2, 3, 4, 5, and 7 – whether the learned trial Magistrate failed to evaluate the evidence. While considering these grounds we shall answer the questions.

Whether:

- There was trespass.
- The land belongs to appellants or Respondent.

From the evidence as adduced. It is trite law under sections 101,102 and 103 of the Evidence Act that whoever alleges a fact must prove it.

It is on record that the Plaintiff/Respondent led evidence through PW.1-PW.2, PW.3, PW.4 and PE 'A' to show that he purchased the land from a one **Mutwalibi Wambi**. He took possession

from 1980 to 2008, when the defendants/Respondents trespassed thereon claiming it was their land. This was after a total period of undisturbed use of close to 27 years.

The defendants/appellants however challenged the title of **Mutwalib** vide the LC.I case of 2008. They alleged that DW.1 Mrs. Rashid gave the land to the Moslem community in satisfaction of the late Rashid's wishes.

I note from evidence that though **DW.1- Nuru Rashid** claimed that she was a widow of the late Rashid and therefore had locus to deal with this property as a beneficiary (widow), no evidence was laid before court in proof of this fact. There was no proof of under type of Administration that this right accrued. Was it testate or intestate? Was there an executor and this property listed as one of those available for distribution? If section 27 of the Succession Act regarding intestate property rights of beneficiaries was to be invoked, is there evidence in court that Rashid died intestate? There was no proof before court under what locus **Nuru-Rashid** acted in order to purportedly redistribute the property which belonged to Rashid. This is more crucial given the evidence from the Plaintiff/Respondent which alleged that Rashid had already sold the said land to **Mutwalib** in 1975.

The defence witnesses all contradicted themselves on **Mutwalib's** title. While DW.1 claimed **Mutwalib** was the chairman of the mosque by 1976 and they told him to remove the house. She said;

*“We were on the land and we were planning to move so that we give away. The person who we had left there we told him to move so that he gives the land to the Moslem community. We came back in 1979 and we found he was still there.....”*

If this is true and according to **PW.3 Wamala John Rashid** sold this land in 1975 to **Mutwalib** for 15,000/= where after he left for Tanzania and *Mutwalib* took possession of this land. Rashid came back in Mbale after two years that is around 1977, lived there and got other land in Nkoma, till IUIU bought him off and compensated him. He did in 2005, PW.3 testified during all this time Rashid never went back to the disputed land to lay claim to it. He was not buried there.

Not even a single relative did claim it- until 2008 when DW.1 (**Nuru**) purportedly showed up to claim the same!

This witness was the one who wrote the agreement of sale between Rashid and **Twalibu**. He named others present as **Aluyeshi Sharif, Umar Mukwana** etc. His testimony was not rebutted by the defence. It is good evidence. The question that arises then is why does **DW.1 Nuru** claim in 2008 what Rashid personally did not claim in his own life time even upon return from Tanzania? No explanation.

All defendants told court they believed that **Mutwalib** owned this land, until when **DW.1- Nuru** came and told them it was theirs and she personally went to the RC court and sued **Mutwalib**. The evidence of DW.1 is not corroborated by any independent evidence.

All that is on record is her own claim that Rashid never sold land to **Twalibu**, but “*only iron sheets.*”

DW.2 had no evidence of ownership he claimed Mrs. Rashid had said the land belongs to the mosque not **Mutwalibi**. His evidence is that because **Mutwalibi** failed to produce the agreement they concluded he did not buy the land. He does not offer to court the basis of his belief or evidence- he relied on hearsay and told court hearsay evidence- so he is not believable.

**DW.3 Magombe** said while still young he used to see **Mzee Mutwalib Wambi** on the land and for them they entered the land in 2008- because DW.1 gave it to them. He had nothing in evidence save DW.1’s word of mouth/claims.

**DW.4 Ali Kidondo** was not aware of how **Wambi** came to own the land because when asked he said he bought it from Rashid.

In 2008, when the moslem community was asked by DW.1 about the land they clearly told her that **Mutwalib** had bought it from Rashid (her husband). She said “since you are chairman of the mosque tell them that this land has been added to them.....” She then sued **Mutwalib** to the LCS.



I however notice that some of these members of the LC.I Court were the same Moslem community beneficiaries and it appears from evidence of DW.5 that they just decided to put in effect DW.1's offer to them of this land. DW.5 stated:

*“So the court gave the land back to Mrs. Rashid who gave the land to the Moslems.”*

DW.5 gave only hearsay evidence and in cross-examination feigned knowledge of how this land exchanged lands.

DW.6 claimed Rashid gave out all the land to the Moslems in 1976. He later changed the story and claimed the wife Mrs. Rashid is the one who gave the land to the moslems. His evidence is contradictory.

**DW.7 Abdu Magombe** feigned lack of knowledge regarding the disputed land; as he was not present when the land was given to the Moslems but knew that Rashid sold the “houses” to **Wambi**. This contradicts DW.1 who said Rashid sold only “iron sheets” to **Mutwalib**.

**DW.8 Magombe Wagitom**, said he knew that Rashid had only given part of the land to the mosque and this was in 1951. He also stated that **Mafumala** was chairman of the mosque and in 1979 he bought only “iron sheets” and demolished the house and the Moslems remained using the land. This contradicts DW.1 and DW.4 who said Moslems were not using the land till 2008.

That evidence is hence unreliable.

**DW.9 Wangwe Peter** said when **Rashid** left-**Mutwalib Mafumala** took over and built thereon a house near the mosque. He said **Mutwalib** demolished the house and sold iron sheets. The place remained with nobody. When Mrs. Rashid came and found **John Mutambo** who had bought from **Mutwalib** she took action. This witness contradicts all other defence witnesses and even concedes that **Mutwalib** as a purchaser was known even to DW.1 by the time she sued **Mutwalib** in the LC Court.

The sum total of the review of evidence above is in my opinion conclusively indicative of the fact that while plaintiff was able to lead evidence before court of PW.1-PW.4 and PE A '1' that he was a bona fide purchaser of the land in dispute without notice from **Mutwalib**, and had unlimited access and use thereof for 27 years from 1980-2008, the defendants failed to show court how they obtained better title to this land than the plaintiff.

By close of evidence, the *locus standi* of DW.1-Nuru Rashid regarding this property is questionable. The evidence on record does not sufficiently explain why she questioned **Mutwalib**'s title as a widow of a deceased's estate. She did not establish if she was holder of letters of Administration/probate, or she was moving under section 27 of the Succession Act, wherefore then specific evidence of this fact ought to have been led; in view of the third party interest laid before court by the plaintiff as a bonafide purchaser for value without notice.

Evidence from PW.1, PW.2, PW.3 and PW.4 shows that the plaintiff/respondent took caution to ensure that the property was not encumbered. The proceedings at LCs were cunningly held without his involvement.

The court also appears to have dwelt on a matter which was procedurally caught up by the law of limitation as regards such land transactions in which case the holding in ***Makula International Ltd v. His Eminence Cardinal Nsubuga & Anor. (1982) HCB 11***, regarding; "Court of law not sanctioning illegalities once brought to its attention would apply, to operate against the enforceability of the LC Court Ruling against the Respondent.

From the findings above I find no merit in the arguments raised by the appellant in grounds 1, 2, 3, 4, 5 and 7. I find that the learned trial Magistrate correctly assessed the evidence and reached the right conclusions.

In the result I do not find any merit in this appeal. It fails, and is dismissed with costs to the Respondent.

I so order.

**Henry I. Kawesa**

**JUDGE**

**09.2.2017**