

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT-01-LD-CA-0048 OF 2016

(ARISING FROM KAS-00-CV-CS-LD-031 OF 2014)

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MASEREKA LHUSENGE:.....APPELLANT

VS

1. NYANGOMA RUTH

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2. BWAMBALE ISAAC BWALHUMA:.....RESPONDENTS

BEFORE: HON MR. JUSTICE OYUKO. ANTHONY OJOK

JUDGMENT

This is an appeal against the Judgment, Decree and orders of His Worship **Mfitundinda George** Magistrate Grade I delivered at Kasese on the 16th day of August 2016.

15 **Background**

This matter was first litigated between the Appellant and the 1st Respondent in the Local Council Courts. On December 2 2014, the Appellant then instituted a fresh suit against the Respondents in the Chief Magistrate’s Court at Kasese under **KAS-00-CV-LD-CS-031 of 2014** in which he sought an eviction order, a permanent injunction restraining the Respondents or their agents, general damages, costs of the suit and any other just relief.

The Respondents denied these claims and contended that the 2nd Respondent lawfully purchased the suit land from 1st Respondent who had acquired it from Barnabas Marahi in 2006. The learned trial Magistrate Grade 1, agreed with the Respondents and entered Judgment in their favour.

25 The appellant being dissatisfied with the above decision lodged this appeal whose grounds are;

1. The trial Magistrate Grade I erred in law and in fact in failing to properly evaluate the evidence on record and therefore came to an erroneous decision that the suit land did not belong to the Appellant.
2. That the learned trial Magistrate Grade I erred in law and in fact in generally not giving the Appellants a fair hearing and in also failing to record the evidence of Bwambale Kikoma, the LC I chairperson, Railway Cell thereby denying the Appellant his constitutional right to have his case fairly tried and heard.

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35 3. The trial Magistrate Grade I erred in law and in fact in finding and holding that the agreement exhibited as PE1 was a forgery in light of the clear evidence by PW2, Baluku Simon and other witnesses to the effect that the said agreement was actually written and their names written for them in their presence.

40 **Representation**

M/s KRK Advocates represented the Appellant while M/s Uganda Christian lawyers Fraternity represented the Respondents. They both agreed to file written submissions.

Duty of first Appellate Court

45 It is trite law that a first appeal in the nature of a retrial and the first appellate court is bound to subject the evidence on record as a whole to fresh scrutiny and come to its own conclusions. In reviewing this evidence, the Appellate court has to reconsider the evidence on record and make up its own mind but without disregarding the Judgment appealed from but carefully weighing and considering it. **See Begumisa & Others Vs Tibebaga [2004] 2 E.A**
50 **17.**

Argument of grounds

Ground 1 & 3

1. **The trial Magistrate Grade I erred in law and in fact in failing to properly evaluate the evidence on record and therefore came to an erroneous decision that the suit land did not belong to the Appellant.**
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3.**The trial Magistrate Grade I erred in law and in fact in finding and holding that the agreement exhibited as PE1 was a forgery in light of the clear evidence by PW2, Baluku Simon and other witnesses to the effect that the said agreement was actually written and their names written for them in their presence.**
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Counsel for the Appellant submitted that the trial Magistrate in this case never properly evaluated the evidence on record. He heavily relied upon the weakness in the Appellant's case to fault him and find in favour of the Respondents. The Appellant testified that he purchased the suit land from Baluku Simon on July 6 2007 at Shs 250,000/= See Exhibit
65 PE1. This agreement was witnessed by 7 people including the LC I chairman. This was verified by the seller PW2, Baluku Simon and other witnesses involved. PW2 the seller the other witnesses admitted to signing thereto by expressly asking PW5 Lhusenge Eria Kule to sign for them. As such the said agent was empowered by the principals (witnesses) to act on their behalf. The execution of this agreement was never denied by anyone. There is
70 unequivocal evidence that all the witnesses did not know what was taking place since the agreement was read back to them as stated by PW6Muhindo Evaline at page 10 of the record. This agreement was even certified as such by the LC I chairperson PW4, Masika Janet was never a witness on Exhibit PE1 as stated by the trial Magistrate. This therefore contradicts the

75 finding by the trial Magistrate that they did not witness the sale. Also, the execution of exhibit PE1 was proved without a doubt by one of the attesting witness PW5Lhusenge Eria Kule in line with Section 67 of the Evidence Act. We submit that the admission of PW2 and all the Plaintiff's witnesses was sufficient proof of its execution in line with section 69 of the Evidence Act.

80 Counsel further submitted that it is trite law that if there is one more thing than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and their contracts when entered into freely and voluntarily shall be enforceable by courts of justice. The Appellant's agreement was neither invalid nor illegal nor prohibited by the law governing contracts in Uganda. Therefore it ought to be enforced. The fact that it bore Kasese Municipality in its address did not affect its authenticity
85 and was an honest mistake by the author since it was made in Kasese Town.

Counsel for the Appellants submitted further that with respect to the neighbours mentioned on exhibit PE1, neither Biira Dipolah not Muhindo Steven was called to clarify whether they came to the area before or after the plaintiff. The trial Magistrate mostly relied on hearsay without concrete proof to find that the agreement was a forgery having been made in 2009 or
90 years thereafter. PW4, Masika Janet at page 8 of the record was clear when she stated that she has been a resident in Kidodo for a period of 5 years since 2009. She stated that she found the plaintiff there and stated that her husband came to the area in 2009. He submitted that these discrepancies relied on by the trial magistrate based on hearsay were not supported by evidence at all. The trial Magistrate made his conclusions based on mere assumptions and
95 conjecture yet he or Defendants could have easily verified this fact from the neighbours tot eh suit land during the locus proceedings.

In addition, he submitted that the Respondents' facts did not suit their narrative and any reasonable person could see a misrepresentation of the facts in relation to the land in dispute. There was no concrete evidence showing how Marahi Banabasi or Kasese Town Council
100 came to own the suit land. No evidence of a gazette or Statutory Instrument or even by law was produced to show that the land once belonged to Kasese Town Council. Also, Marahi Banabasi from whom the Respondents claim their title was never called as a witness. DW3 Busimba Patrick's evidence as relied on by the trial Magistrate was never supported by evidence at all. He was never listed as a neighbour to Marahi Banabasi. On the authority of
105 **Kamontho Vs Kenya Commercial Bank Ltd [2003] I EA 108** it can be inferred that failure of the Respondents to call Marahi Banabasi is proof that his evidence would not be favourable to them. Also exhibits De1 and DE2 do not in any way refer to the suit land. No description of the suit land is mentioned in exhibit De1 as such this agreement did not refer to the suit land at all. Exhibit DE2 does not refer to any additional payments or that it was an
110 addendum to the earlier agreement as alleged. No evidence was adduced by the Respondents that the current neighbours of the land were in any way connected to the alleged earlier neighbours named on the Respondent's exhibits none of whom was called. This was further not established at the locus in quo. Both the 1st Respondent and DW3 knew PW2, Baluku Simon who sold land to the Appellant and it was DW3's testimony that he indeed owned land
115 in Kidodo. It follows that the 2nd Respondent having purchased the suit land on August

11,2012 ought to have known of the dispute over the land. As a Legal Officer, he was entitled to carry out due diligence to verify the authenticity of what he was buying. We submit therefore that Marahi Banabasi never sold the suit land to the 1st Respondent. The 1st Respondent without any claim of right or the Appellant's consent illegally sold his land to the 2nd Respondent. This land never belonged to either Kasese Town Council or Marahi banabasi to begin with. The 2nd Respondent is a trespasser thereon having acquired a nonexistent interest.

Counsel submitted that the learned trial Magistrate Grade I erred in finding that the suit land did not belong to the plaintiff. He further erred by finding that the suit land did not belong to the plaintiff. He further erred by finding that exhibit PE1 was a forgery in absence of cogent evidence as to the forgery. Secondly, forgery was never pleaded by the Respondents in their written statement of Defence. Any allegation thereof by the departure from their pleadings which rendered the trial Magistrate's decision and Respondent's submissions a nullity and amounted to leading evidence from the bar. He also submitted that possession of land in dispute does not automatically translate to ownership by the possessor where another has better title like the present case.

However counsel for the Respondent submitted on this ground that the claims that there were discrepancies in the Respondent's evidence and that the PE1 was a legally enforceable agreement do not hold water. The appellant testified that he bought the suit land on 6/7/2007 and that he constructed a 3 roomed house on it in 2009. He further testified that the agreement bears words Kasese Municipality and further that some of his witnesses did not sign the agreement but their names were written for them. The argument that the principle authorised the agent when they were present does not apply. How do you delegate in your presence?

That it is common knowledge that Kasese Town Council became a Municipality in 2010. How does an agreement executed in 2007 when it was a Kasese Town Council bear Kasese Municipality?

PW 2, the vendor to the Appellant did not sign the agreement nor did he thumb print. If he was unable to write his name, he would have thumb printed against his name but this was not done. He further testified that he did not know when the neighbours in the south and north sold and did not know when Kasese Town Council became a Municipality. If he had lived in the Kasese Town Council for 4 years before he allegedly sold to the Appellant, he ought to know when the town council became a Municipality. This deliberate lie by both the appellant who is a head teacher and his alleged vendor that they all do not know when Kasese Town Council became a Municipality when they were living there was intended to hoodwink Court.

On page 9, PW V denied knowing PWIV yet they were all present during the alleged sale. How can this be?

PW II testified that he sold the land to the Appellant in 2007 after using it for 4 years. However, PWIV, says that he gave the land to PW3 in 2007 on page 10 of the record. This

155 shows how the deliberate lies the appellant and his witnesses concocted to tell court but the trial learned Magistrate Grade I discovered their lies.

The 1st Respondent started cohabiting with the appellant in 2007, a year after she had bought the suit land. To make matters worse, the seller did not sign the agreement, the alleged neighbours on the sale agreement of the appellant did not own land neighbouring the suit land
160 in 2007.

Further, the appellant did not acquire land from Kasese Municipality nor Kasese District Land Board and as such, he could not challenge the 1st Respondent's ownership of the suit land. PWI told court that she had been residing in Kidodo for 5 years since 2009. She therefore could not testify on the alleged purchase by the appellant in 2007. PW II told court
165 that he sold the suit land to the appellant in 2007 after using it for 4 years. However, PWVI, the father of PW2 testified that he gave the land to his son in 2007. This evidence does not support the appellant's evidence, meaning that the sale was done in 2011 if we add 4 years as seen on page 10 1st paragraph. PW1 testified on page 5 that one of his neighbours was Muhindo Steven. PW VI on page 10 paragraph testified that Muhindo Steven came to the
170 area in 2008 meaning that she tell lies to the disadvantage of her brother. PW VI further told court that the sale agreement was back dated which the LC I chairman Kikoma disagreed with on the last paragraph of page 10.

This further highlight how there was no agreement executed in 2007 but a conjured up lie with the sole purpose of grabbing the 1st Respondent's land. PW1 told court that Muhindo
175 Steven neighbours that suit land in the West. However, PWV told court that Muhindo Steven came there in 2010. How can a person who went to Kidodo in 2010 appear on the agreement as a neighbour in 2007? PW 3, who neighbours the suit land in the north, told court that Muhindo Steven neighbours the land in the South yet the appellant told court Muhindo is a neighbour in the West at page 5, PW1 said the neighbours the suit land in the North but she
180 did not mention as herself as neighbour on page 7.

It is important to note that the 1st Respondent told court how she acquired that land from Marahai Banabus on 12/11/2007 and completed paying for it on 1/7/2007 on pages 11 and 12 of the record and sold the suit land to the 2nd Respondent and DW3 confirmed how the 1st Respondent bought the suit land from Marahi Banababasi in his presence and he witnessed
185 the agreement. The evidence of the respondents did not have lies nor inconsistencies.

Counsel submitted that the Appellant's evidence was tainted with deliberate lies intended to mislead court and as such, the trial Court did not believe them and prayed that this court also disregards the evidence of the appellant since it is tainted with a lot of lies. In **Adam Bale & 2 Others Vs wily Kumu Civil Appeal No. 21/2005**, it was held that;
190 **“Where contradictions and inconsistencies are major and are intended to mislead or tell deliberate untruthfulness, the evidence will be rejected and if they are minor and capable of innocent explanation, they will normally not have at the effect”.**

He submitted that the deliberate lies, inconsistencies and lies told by the appellant and his
195 witness regarding his acquisition of the suit land, the sale agreement that turned not be signed

by the vendor, back dated with factious neighbours are major intended to mislead the trial court and this appellate court bearing in mind that this court had no benefit of observing the demeanor of witness would be rejected and these two grounds of appeal dismissed wince the learned trial magistrate Grade I properly evaluated the evidence and found that the suit land did not belong to the appellant and that his sale agreement was forged.

Resolution of grounds 1 & 3

In my honest opinion PW1 told Court that in 2007 to 2012 he cohabited with DW1 and had one child. That during that time he bought land from Baluku Simon on the 6/7/2007 at U Shs 250,000/= and the agreement was tendered in as PE1. That in 2009 he constructed there a 3 roomed house with DW1.

The case of **Adam Bale & 2 Others Vs Willy Kumu Civil Appeal No. 12/2005**, it was held that; *where contradictions and inconsistencies are major and are intended to mislead or tell deliberate untruthfulness, the evidence will be rejected and if they are minor and capable of innocent explanation, they will normally not have any effect.*

The deliberate lies/inconsistencies told by the appellant and his witnesses regarding acquisition of the suit land, the agreements not signed or thumb printed, fictitious neighbours are major contradictions that cannot be ignored. Indeed the agreement itself is questionable and appears to have been forged to defeat the interest of DW1.

The case of **St. Mathew Education Centre Ltd Vs Makerere University CACA No. 40/1997** where it was held that conmen should not be allowed to sell or own land parallel to their rightful owner. Grounds I and III miserably fails.

Ground 2 That the learned trial Magistrate Grade I erred in law and in fact in generally not giving the Appellants a fair hearing and in also failing to record the evidence of Bwambale Kikoma, the LC I chairperson, Railway Cell thereby denying the Appellant his constitutional right to have his case fairly tried and heard

Counsel for the Appellant submitted that Magistrate Grade I erred in law and fact in generally not giving the appellant a fair hearing and failing to record the evidence of Bwambale Kikoma LC I chairperson on 8/09/2015, the trial Magistrate wrongly exercised his discretion by refusing to adjourn the matter in the absence of his advocate. The Appellant was forced to go with the hearing and presented 3 witnesses whose evidence the Magistrate relied on in his Judgment. It is well settled that an appellate Court will not interfere with the exercise of discretion by a court unless it was not exercised judiciously. See **Famous Cycle Agencies Ltd & 4 Others Vs Mansukhalal Ranji Karia & 2 Others Supreme Court Civil Appeal No. 16 of 1994 and Nuuru Kaaya Vs Crescent Transportation Ltd Supreme Court Civil Appeal No. 6 of 2002**.as was stated in the Famous Cycle Agencies Ltd case already cited

“Generally speaking, where the necessity for an adjournment is not due to anything for which the party applying for it is responsible, or where there has been little or no negligence on his part, an adjournment would not normally be refused.”

By refusing the adjournment through no fault of the appeal, the trial Magistrate wrongly exercised his discretion and this appellate court ought to correct that wrong. The trial
240 Magistrate's insistence that the Appellant continue with the presentation of his witnesses in absence of his counsel was a contravention of his non derogable right to a fair hearing enshrined in Article 28 of the Constitution. The trial Court in effect usurped the appellant's right to legal representation by a lawyer of his choice. This was derogation from the right to fair hearing prohibited by **Article 44 (c)** of the Constitution.

245 That the trial magistrate erred by failing to record the evidence of Bwambale Kikoma, the LC I chairperson Railway Cell. On May 11, 2016, the Appellant's Counsel did apply to call the chairperson to explain how he came to certify the Appellant's and 1st Respondent's agreements. Leave was granted and the case was adjourned to May 24, 2016. However, on 24
250 August 2016, the trial Magistrate with knowledge that the witness could not make it to court that day adjourned the matter for locus instead. The Appellant was effectively disabled in presenting his case since he was denied a chance to present evidence from a key witness to the matter in dispute. One of the essential ingredients of a fair hearing by a Court of law, tribunal, or anybody exercising Judicial or quasi judicial authority is to ensure that all the principles of natural justice, as they may apply to a matter before it, are strict observed since
255 **article 28 (1)** is, by virtue of **Article 44 (c)** of the Constitution, non derogable. It is sacrosanct. The Judgment and decree issued by a trial Court whose authority was unfairly and injudiciously exercised is thus inconsistent with the fundamental principles of justice embraced within the concept of due process of law. We invite this court to find that the trial court departed from the rules of natural justice to wit the right to a fair hearing. See **Uganda**
260 **Co-Operative Transport Union Ltd Vs Roko Construction SCCA No. 35 of 1995.**

He submitted that the Appellant was injudiciously deprived of his right to property by a court that failed to apply fairness in hearing the dispute

However counsel for the Respondent submitted on this ground that this court should note that the appellant filed a case in the LC I Court of Kidodo Railway Ward, Central Division,
265 Kasese Municipality presided over by the same Bwambale Kikoma and he lost the case. He is now attempting to hoodwink court that Bwambale Kikoma was his witness even when he was not listed.

On 08/09/2015, the plaintiff took his witnesses to court and the Appellant's advocate was absent with no reason advanced to court as seen at page 9 of the proceedings. The appellant
270 went ahead with his case and his witnesses testified and after his witnesses had testified on page 11, he told court that he did not have witnesses to call. He has not shown how the absence of his advocate when his 3 witnesses testified negatively affected his case.

The defendants/Respondents called their witnesses and they testified. When the Respondents closed their case, Counsel for the Appellant sought leave to call Bwambale Kikoma and leave
275 was granted and the case was adjourned to 24/5/2016. On 24/5/2016, Bwambale Kikoma wrote a letter to court illustrating that he was sick and the results are on record. There is no evidence on record that Bwambale Kikoma came to testify and court denied him the opportunity to testify. The Appellant was accorded the right to fair hearing by even reopening

his case when he had closed but he failed to present his witness, Bwambale Kikoma to testify
280 and as such, no right was to fair hearing as submitted by the Appellant that was breached.
One wonder if the appellant wanted to mount a hunt for Bwambale Kikoma who made sure
that he avoided court despite the two chances given to him and he still do not show up to
testify. **Article 44 (c) and 28 (1)** of the Constitution do not come into question here.

He further submitted that the authorities cited by **counsel for the Appellant was Famous**
285 **Cycle Agencies Ltd** case and **Uganda Co-Operative Transport Union Ltd Vs Roko**
Construction SCCA No. 35 of 1995 are distinguishable and do not apply in this case.

Resolution of ground 2

Indeed when the Respondent closed his case, Counsel for the Appellant sought leave to call
Bwamble Kikoma LCI chairperson and leave was granted and the case was adjourned to
290 24/5/2016. Bwambale Kikoma wrote a letter to court saying that he was sick and the case was
again adjourned to 16/6/2016, still Bwambale Kikoma never turned up. Locus was visited on
the 16/6/2016 but still Bwambale Kikoma never turned up.

Be it as it may, this matter was first reported to the LC I Court of Kidodo , Railway Ward,
Central Division, Kasese Municipality presided by the same Bwambale Kikoma and the
295 appellant lost the case. Indeed Art. 28 (1) and 44 (c) does not come to play because the
appellant exercised his constitutional right of fair hearing. Even the authorities of **Famous**
Cycle Agencies Ltd and Uganda Co-operative Transport Union Ltd Vs Roko
Construction SCCA No. 35/1995 with due respect is not applicable in the instant case
because the appellant was given an opportunity to bring his witness but failed to come to
300 court without any explanation. Justice delayed is justice denied. This ground therefore fails.

In a nutshell, this appeal is dismissed with costs since it lacks merit and is an abuse of court
process. Litigation should come to an end. The orders of the lower court is upheld.

Right of appeal explained.

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305 **Oyuko. Anthony Ojok**
Judge

Judgment delivered in the presence of;

1. Kateeba Cosma for the Appellant
2. Both parties.
- 310 3. In the absence of the Counsel for the Respondent
4. Beatrice Court Clerk.

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315 **Oyuko Anthony ojok**
Judge
14/12/2017