

**CIVIL APPEAL NO. 121 OF 2017 - SSALI SAMUEL vs. KATENDE GODFREY
(JUDGMENT)**

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 121 OF 2017

ARISING FROM MISCELLANEOUS APPLICATION NO.117 OF 2016

ARISING FROM CIVIL SUIT NO.115 OF 2012

SSALI SAMUEL:::APPELLANT

(Suing through his lawful Attorneys)

Byamukama Wilson & Katumba Edward):

VERSUS

KATENDE GODFREY:::RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Appellant brought this appeal against the ruling of His Worship Kule Moses Lubangula of the Chief Magistrates Court of Mengo at Mengo dismissing an application for review of the judgment of His Worship Eremye Jumire James Mawanda.

The brief background of this appeal is; the Respondent instituted Civil Suit No.115 of 2012 in the Chief Magistrate Court of Mengo at Mengo against a one Kayobya George [*hereinafter the Defendant*] claiming;

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- i) general damages for trespass to the suit Kibanja situated at Namugoona II Lubyia Parish, Rubaga Division,
- ii) a permanent injunction, among others.

In the aforementioned suit, the Defendant claimed that he was in possession of the suit land since 1975 upon the authority of the Appellant whom he claimed to have bought the same from a one William Kumalirwa in 1970. The suit was determined on merit and Court passed judgment against the Defendant.

In what seems as a spillover effect of the original suit, the Defendant lodged an appeal in this Court vide Civil Appeal No.15 of 2015, by notice of appeal, which was struck out in 2016 for failure to follow proper procedures.

Having failed at that, the Appellant, through his lawfully Attorneys; Byamukama Wilson & Katumba Edward, instituted a suit in this Court against the Respondent vide Civil Suit No.311 of 2016. Before trial, the Respondent successfully raised a preliminary objection and the same was also struck out on ground of *res judicata*. Subsequently, through the same Attorneys, the Appellant lodged Misc. Appl. No.117 of 2016 in the lower Court seeking for the review of its judgment. This application was also dismissed hence the instant appeal.

The grounds of the appeal according to the memorandum are;

1. The learned trial Magistrate erred in law when he misapplied the law relating to review thereby arriving at a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when he failed to find that the Respondent had sued a wrong party in Civil Suit No.115 of 2012.
3. The learned trial Magistrate erred in law and in fact when he failed to evaluate the evidence on record thereby arriving at a wrong conclusion.

Both Counsel filed submissions in support of their clients' cases which I shall consider in the resolution of the grounds. In his submissions however, Counsel for the Respondent raised

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objections concerning the competency of the appeal which I wish to deal with beforehand. The substance of his arguments was in tripartite that is;

1. That the appeal is incompetent on ground that it was filed out of time.
2. That the appeal was overtaken by events on ground that the suit land was sold to a third party in execution of the decree in the original suit.
3. That the appeal is *res judicata* on ground that the Appellant is and was privy to the Civil Suit No.115 of 2012 and Civil Appeal No. 15 of 2015 and Civil Suit No.311 of 2016.

Upon perusal of the record, however, I found no merit in either of the arguments. According to the record, the ruling against which this appeal was brought was delivered on the 10th October 2017 and this appeal was lodged on the 9th November, 2017; within the time allowed for filing of the appeal.

Secondly, there was no evidence before me that the suit land was sold to a third party in execution of a decree of the lower Court. In his submissions, Counsel for the Respondent referred me to a sale agreement to that effect as attached to the Respondent's affidavit in reply to the Appellant's application for review in the lower Court. This was however not attached to the same. There was instead an agreement of sale of land attached to the Respondent Counsel's submissions to that application. Because this was not evidence properly before the lower Court, I found no reason of considering it in the instant appeal.

Additionally, this Court granted an application for stay of execution pending this appeal vide Misc. Appl. No.1772 of 2018 on the 2nd of April 2019.

Concerning *res judicata*, I note that this appeal originates from a ruling of the lower Court concerning review of its own judgment. It is thus inconceivable how it is *res judicata* in the absence of proof that the ruling of the lower Court has once been a subject of an appeal. For those reasons, I was constrained to reject Counsel's objections in one blanket.

I shall now consider the appeal on its merits. From the perusal of Counsel for the Appellant's submission, my impression is that the first and the third ground seem to interrelate especially

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since they all lead to the same conclusion. In the resolution, therefore, I shall combine both grounds.

Resolution of the grounds

Ground 1 and 3

- 1 The learned trial Magistrate erred in law when he misapplied the law relating to review thereby arriving at a wrong conclusion; and

- 3 The learned trial Magistrate erred in law and in fact when he failed to evaluate the evidence on record thereby arriving at a wrong conclusion.

Counsel for the Appellant relied on the case of **NPARTS versus S.R Nkabula & Sons Ltd Civil Appeal No.34 of 2005** to rightly submit that this Court has a duty to review and reappraise the evidence on record and draw its own conclusions. He then submitted that the trial Magistrate failed to consider the Appellant's documents SEK'3', '4' and '5' which clearly showed the Appellant as a neighbor to PW4, the Respondent's witness.

In his view, this evidence was material for the Court and; that had Court had the opportunity to look at the same, it would have made a contrary holding. That the trial Court also failed to consider that this was an application for review which did not require the Appellant to disclose the source of the documents; and that in doing so, the trial Magistrate placed a higher burden of proof on the Appellant. He further faulted the learned Magistrate for opining at page 7 paragraph 6 of the ruling that: *"The Appellant only states that he has new evidence but has not disclosed anything to persuade Court to grant the Application."*

In Counsel's view, the Appellant only needed to show that he discovered cogent evidence which was not available at the time the suit was being heard but not to persuade it on the evidence he had. He added that the documents that the Appellant adduced proved that he was an immediate owner to the neighbouring kibanja being sold in the same location which was contrary to the Respondent's evidence at trial. Additionally, that this evidence [documents] went to the root of the Respondent's ownership especially the evidence of PW4.

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On the other hand, the Respondent's Counsel supported the learned trial Magistrate's finding. He quoted O.46 r3(1)(2) of the Civil Procedure Rules to submit that the learned trial Magistrate was right to dismiss the Appellant's application. The basis of his submission was that the Appellant failed to prove what prevented him from producing the alleged sale agreements during the trial of the main suit. He also queried why the Appellant could not have passed the alleged agreements onto the Plaintiff to enable him defend the main suit despite managing to give the latter documents including the authority to care take the suit land and driver's license. In Counsel's view, the alleged documents were suspected to have been forged by the Appellant or his agent in order to mislead Court.

In rejoinder, Counsel for the Appellant reiterated his earlier submissions. He also submitted that the Appellant clearly averred in the lower Court that the documents, SEK3, 4, and 5, were not in the possession of the Defendant during the trial of the main suit; and that had he had the same, the Court would have decided otherwise.

I have had the benefit of appreciating the evidence on record and the submission of both Counsel. I now resolve as follows.

According to the lower Court record for the original suit, the Defendant adduced an authority to care take of the suit land and a driver's license which he claimed to have obtained from the Appellant. It also indicates that these were obtained by the Defendant from the Appellant after the institution of the main suit by the Respondent. However, the Defendant adduced no evidence as proof of ownership of the suit land by the Appellant despite claiming that the same belonged to the latter who left him in its care.

Having been convinced in the Plaintiff's case (Respondent), the trial Magistrate adjudged in favour of the Respondent. Being aggrieved by the judgment, the Appellant instituted a review application of the judgment of the lower Court. That application was based on the ground of, *if I may quote paragraph 5 of the affidavit in support of the application that;*

"...new important matter of evidence has been discovered which was not within the knowledge of Kayombya George and as such could not be produced at the time when the decree was made or passed."

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This evidence was ‘SEK3’ an alleged suit land sale agreement between the Appellant and Kumalirwa; ‘SEK4’ another sale agreement indicating the Appellant as a neighbor to the parties thereto; and ‘SEK5’ another land sale agreement between other parties also indicating the Appellant as their immediate neighbour.

In considering the application, the learned Magistrate ruled at page 7 paragraph 6, that: *“This was again emphasised on locus visit. This fact was not challenged. It is trite law that he who alleges must prove. The Applicant only states that he has new evidence but has not disclosed anything to persuade Court to grant the application.”* Later on, the learned Magistrate is seen concluding in total disregard of the substance of the Appellant’s application. If I may quote the conclusion;

S.33 of the Judicature Act empowers Court in its administration of justice to as much as possible, avoid multiplicity of suits. The Applicant filed an application No.117 of 2016, in this Court before the concluding (certainly conclusion), the Applicant went on to file another suit in the High Court which clearly is an abuse of Court process. Therefore Court is not convinced by the argument of the Applicant, and has adjudged this issue in favor of the respondent since lots of questions have been dogged by the Applicant, which raised doubt in his interests to the suit land.

The above conclusion was devoid of reasons why the learned Magistrate found no merit in the Appellant’s application. It appears to me, that the learned trial Magistrate was so much swayed by the fact that the Appellant had instituted a fresh suit against the Respondent in this Court thereby ignoring the issues before him. With due respect to the learned Magistrate this was so inappropriate. In my view, the learned Magistrate ought to have considered the issues before him and furnished reasons on the conclusion thereof rather than being swayed by matters beyond his scope.

That aside, Section 82 of the Civil Procedure Rules and O.46 r1 Civil Procedure Rules. O.46 r1 Civil Procedure Rules allows Court to review a judgment upon application by an Applicant on the ground of *“discovery of new and important matter or evidence which after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order was made...”*. There is no doubt that the

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Applicant's application for review in the lower Court was premised on the ground of discovery of new evidence.

To this end, I must add that O.46 r3(2) of the Civil Procedure Rules which is to the effect that no application for review *"shall be granted on the ground of discovery of new matter of evidence which the Applicant alleges was not within his or her knowledge or could not be adduced by him or her when the decree or order was passed or made without strict proof of the allegation."*

My deduction from these two provisions is that there must be new and important evidence adduced by the Applicant before Court and; that the Applicant must strictly convince Court that such evidence was not within the Applicant's knowledge or could not be produced by him or her at the time when the decree was passed. According to the record, I am convinced the Applicant adduced fresh evidence (SEK3, 4 and 5) pertaining to the ownership of the suit land. Having managed to do so, the Applicant crucially had to convince the lower Court that this evidence was not within his knowledge or could not be produced by him at the time when the decree was passed. This was done. The evidence before the lower Court is in Misc. Appl. No. 115 of 2012 was by way of Notice of Motion and affidavit. Paragraph 5, 6a,b,c,7,8,9,10,11 of the affidavit of Byamukama offer these explanations. The Applicant was not the one sued in Civil Suit No. 115 of 2012. He was representing interests of Sali who was not party to the suit. Therefore the documents which relate to Sali as shown in 'SEKI' and 'SEK2' could not logically be within the knowledge of Kayombya George who was sued.

The Respondents in submissions concede that Kayombya George, though served was just an agent/caretaker (not even an Attorney of Sali). He was sued in his personal capacity as Kayombya George, not on behalf of Sali. The explanations therefore offered by Kayombya George at that time were given without knowledge of these documents.

I do agree with Counsel for the Appellant therefore that the trial Magistrate never addressed his mind to this fact and hence reached a wrong evaluation on the evidence before him. I find that this issue has been proved by the Appellant.

Having found as above, I now decide the rest of the issues as follows:

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Ground 5:

Whether the learned trial Magistrate erred in law and fact when he failed to find that the Respondent had sued a wrong in Civil Suit No. 115 of 2012.

Looking at the plaint, the plaint described the Defendant for trespass and prayed for a declaration that the Plaintiff is a lawful/bonafide occupant on the suit kibanja. In the written statement of defence under paragraph 6(iii), it is defended that;-

“the suit kibanja originally belonged to a one William Kumalirwa and in 1972, the said Kumalirwa sold the suit kibanja to one Ssali Samuel a.k.a Pastor Samuel Ssali

iv) *That in 1975, he left the Defendant as the caretaker of the suit kibanja...*”

Clearly from the defence, the ownership of the kibanja in dispute was pleaded to be in Ssali, though the trespass could be visited on the Defendant, since in paragraph (v), he pleads being in possession and occupation. The fact that Court, in its judgment went at length to discuss Ssali’s ownership, viz viz both the Plaintiff and the Defendant and even concluded that; *“Samuel Ssali was therefore negligent and if at all, he had interest in the suit kibanja, he would have given the sale agreement to Kayombya George better still he should have applied to join the suit as a co-defendant (page 5 of Kule Moses Lubangula’s judgment)”*, quoting the judgment of Eremye Jumire Mawanda James.

Lots of questions arise here. Ssali was not sued. How could he have presented his case? The case in Court was for trespass against Kayombya George, who in defence made reference to Ssali and even alluded to the sale transactions. Why was Court quick to dismiss this defence even when the said Ssali resurfaces and provides this evidence by way of the documents contained in SEK3,4 and 5?. This makes me agree with the Appellants that had the Respondent sued the right party the result would perhaps be different.

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I therefore find that this ground succeeds in part, in that for purposes of determining ownership, Sali ought to have been made a party to these proceedings, since the written statement of defense revealed that the Defendant is a mere caretaker, while Ssali is the owner. I so find.

Ground 6 is answered already. The learned trial Magistrate did not correctly evaluate the evidence and hence reached a wrong conclusion.

In conclusion, I find that this appeal succeeds on the grounds shown above. I do set aside the lower Court judgment on review with a finding that the judgment of Eremye Jumire Mawanda James of 31st March 2015 be reviewed and as pleaded in the affidavit in support of the motion under paragraph (1) thereof, the Applicant should be added as a party to the retrial proceedings.

I therefore make an order under Section 80 & 82 of the Civil Procedure Act, that this matter, having been considered by this Court on appeal hereby sets aside the lower Court decision, this Court having been made aware of the irregularities committed as discussed herein.

This Court orders a fresh retrial of this matter with the Appellant being added as a co-defendant. The retrial should be conducted by another competent Magistrate to be appointed/selected for the purpose by the Chief Registrar.

Costs granted to the Appellant.

I so order.

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Henry I. Kawesa

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Owori Moses holding brief for Opio Moses for the Applicant.

Applicant present.

Respondent absent.

Court:

The judgment is delivered to the parties above.

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Henry I. Kawesa

JUDGE

8/05/2019

I so order.

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Henry I. Kawesa

JUDGE

8/05/2019