



the 3<sup>rd</sup> -7<sup>th</sup> Defendants without the Respondent/Plaintiff's consent, an act she deemed was illegal and amounted to trespass.

- [3] On the other hand, in their joint written statement of defence, the Appellants/Defendants denied the Respondent/Plaintiff's allegations and contended that they and the Plaintiff's husband are sons of the late **Buteyo Francis** and his land was divided amongst his seven sons inclusive of the Plaintiff's late husband in 2002 and the pieces of land the Appellants/Defendants sold were their own shares and not for the Plaintiff's late husband.
- [4] The trial Magistrate found that the suit land formed part of the Plaintiff's late husband, **Wepukhulu's** estate because, the purported sale of the suit pieces of land by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in 2005 and 2006 could not have occurred when the purported distribution took place in 2010 way after the sale had taken place.
- [5] The Appellants were dissatisfied with the decision of the learned trial Magistrate and appealed to this court on the following grounds as contained in their memorandum of appeal.
- 1. The learned trial Magistrate erred in law and fact in that she did not evaluate the evidence properly or at all.*
  - 2. The learned trial Magistrate's orders and decision is train riddled with fundamental misdirections and non-directions in law and fact as a result has led to a miscarriage of justice.*
  - 3. That the learned trial Magistrate erred in law and fact when she ignored inconsistencies and contradictions in the Respondent's evidence.*
  - 4. Further, that additional grounds of appeal were to be filed upon receipt of the certified copies of judgment and proceedings of the lower court.* However, in his submissions, Counsel for the Appellants adopted and maintained the 3

grounds of appeal which this court also considered in this appeal.

### **Counsel legal representation:**

- [6] On appeal, the Appellants were represented by **Counsel Wamimbi Jude of Wamimbi Jude Advocates, Mbale**, while the Respondent was represented by **Counsel Kyabakaya (RIP) of Kyabakaya & Co Advocates, Mbale**. Both Counsel filed written submissions as permitted by court. Counsel for the Appellants opted to argue all the grounds of appeal together but Counsel for the Respondent did not follow suit. This court shall nevertheless resolve all the grounds raised consecutively.

### **Duties of the Appellate court:**

- [7] As a 1<sup>st</sup> Appellate court, this court is expected to subject the evidence to a fresh and exhaustive scrutiny, weighing the conflicting evidence and drawing its own inference and conclusion from it. In so doing, however, the court has to bear in mind that it has neither seen nor heard the witnesses and should therefore make due allowance in that respect; **SELLE VS. ASSOCIATED MOTORBOAT CO. [1968] E.A 123** and **SANYU LWANGA MUSOKE VS. GALIWANGO S.C.C.A NO. 48 OF 1995**.

### **Preliminary Objection**

- [8] Counsel for the Respondent raised an objection concerning the framing of the grounds of appeal. That they were too general and they therefore offended the provisions of **Order 43 rules 1 and 2 Civil Procedure Rules** which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. That properly framed grounds of appeal should specifically point out errors observed in the course of the trial

including the decision which the Appellants believe occasioned a miscarriage of justice. Counsel relied on the authorities of **KATUMBA BYARUHANGA VS. EDWARD KYEWALABYE MUSOKE, CIVIL APPEAL NO.2/1998 (C.A)** and **A.G VS. FLORENCE BALIRAINA, CIVIL APPEAL NO. 79 OF 2003 (C.A).**

- [9] I do agree that as per **Order 43 rules 1 and 2 Civil Procedure Rules**, properly framed grounds of appeal should specifically point out errors observed in the course of the trial including the decision which the Appellants believe occasioned a miscarriage of justice. However, considering the fact that this court has the general duty to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny, I proceed by regarding the failure by the Appellants to comply strictly with **Order 43 rules 1 and 2 Civil Procedure Rules** as a mere technicality of which **Article 126(2) (e) of the Constitution of Uganda** dictates that this court should not place undue emphasis since this is a matter of form than substance of the pleadings (see **NYERO VS. OLWANY & ORS. H.C.C.A NO. 50 OF 2018 [2010] UGHC 161**). In **TARLOL SINGH SAGGU VS. ROAD MASTER CYCLES (U) LTD CACA NO.46/2000**, the Court of Appeal held that court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of the most fundamental nature. It was concluded that the matters of procedure are not of a fundamental nature.
- [10] In the instant appeal, since the Appellants specifically pointed out errors observed in the course of the trial including the decision which the Appellants believe occasioned a miscarriage of justice in the submissions, I think, it is necessary for this court to consider the arguments by Counsel for the Appellants on the merits of the appeal.

## Consideration of the appeal

**Ground 1: That the learned trial Magistrate erred in law and fact in that she did not evaluate the evidence properly.**

[11] Counsel for the Appellants submitted that the learned trial Magistrate erred in law and fact when she ignored the Appellants and their witnesses' evidence because the evidence of DW<sub>1</sub> was to the effect that the suit land originally belonged to their father, the late **Buteyo Francis** who died in 1979 and his heir **Wanyakala Siverio** took over in 1989. That by the time the witness (DW<sub>1</sub>) became the heir, the said land had not been distributed amongst the children of his late father till around 2010 and 2014, when various meetings were held and agreed on the distribution of their late father's estate. That the distribution evidence is **D. Exh. 1**.

[12] He submitted further that on distribution, the late **Wepukhulu**, husband to the Plaintiff got a share which is different from the suit land. That **Defence witness 10 - 12** all confirm that the suit land is not the property of **Wanyakala** but for the late **Buteyo**, who died and left the suit land undistributed till when it was distributed recently. That the evidence of **DW<sub>3</sub> - DW<sub>7</sub>** show that at the time of purchase of their respective pieces of land, the Respondent was aware and never made any objection to the sales but the trial Magistrate ignored this.

Counsel for the Appellants concluded that the learned trial Magistrate ignored the evidence of the Appellants and their witnesses. He implored this court to consider the evidence of the Appellants which prove that the suit land is still the property of **Buteyo Francis** family but not the estate of **Wepukhulu** as held by the learned trial Magistrate.

[13] The Respondent's Counsel on the other hand submitted that the Respondent/Plaintiff got married to **Wepukhulu John Francis**,

brother to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Defendants in 1996 and she stayed with him in **Mulyuli village** until 2004 when her husband died leaving her and 3 children. The land they were staying on in **Mulyuli** was given to her husband by his father **Francis Buteyo** and they were therefore in physical occupation.

- [14] The Respondent/Plaintiff's evidence was corroborated by the evidence of PW<sub>2</sub> and PW<sub>3</sub> who both testified that the suit land belonged to the late **Wepukhulu**, the Respondent/Plaintiff's husband who had acquired it from his father, the late **Francis Buteyo** in 1978.
- [15] Counsel for the Respondent argued that the trial Magistrate properly evaluated and considered the Respondent/Plaintiff's evidence against the evidence of the Appellants/Defendants who through DW<sub>1</sub> testified that the suit land belonged to their late father who died before giving his land in 1979. That in 1989, DW<sub>1</sub> took over the heirship and started giving out his father's land in 2016. DW<sub>2</sub> testified in support of DW<sub>1</sub>. DW<sub>3</sub> stated that the suit land was sold to him in **2005**, DW<sub>4</sub> stated that the land he owns was sold to him in **2012**, DW<sub>5</sub> stated that he bought the land in **2006**, DW<sub>6</sub> stated that he bought his in **2005** while DW<sub>7</sub> stated that he bought his in **2011**. At the same time, DW<sub>9</sub> during cross examination revealed that the land was distributed in **2012** (though DW<sub>10</sub> testified that a meeting to distribute land of the late **Buteyo** was on **14<sup>th</sup> January, 2013**).
- [16] Counsel concluded his submissions and arguments that the sale of land to DW<sub>3</sub>, DW<sub>5</sub> and DW<sub>6</sub> took place between 2005 and 2006 as per their evidence adduced in court including land sale agreements and therefore, wondered how the Appellants sold their purported shares of land to DW<sub>3</sub>, DW<sub>5</sub> and DW<sub>6</sub> at the time when the distribution of the land had not occurred! The distribution of the land took place between 2010 - 2013.

[17] Upon perusal of the lower court record, from the totality of the Respondent/Plaintiff's case and the Appellants/Defendants' case, the following facts appear not to be in dispute.

- a. The disputed land is situated in **Mulyuli village at Angalia Trading Centre, Masese Parish, Busiu Sub county, Mbale District.**
- b. The Respondent/Plaintiff is a widow and administrator of the estate of the late **Wepukhulu John Francis**, brother to the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Defendants. The 5<sup>th</sup> Appellant/Defendant referred to the plaintiff's husband as uncle. The said Plaintiff's late husband, **Wepukhulu John Francis** passed on in **2004**.
- c. The Respondent/Plaintiff married her late husband, **Wepukhulu John Francis** in **1996** on the suit land which they occupied and utilized as their matrimonial home.
- d. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Defendants sold pieces of the suit land to **DW<sub>3</sub>** and **DW<sub>5</sub>** while **DW<sub>6</sub>** claim to had purchased a piece of the disputed land from the Plaintiff's husband himself and **DW<sub>7</sub>** also claim to had purchased a piece of land from a one late **Florence Khainza** who had in turn purchased it from a one **Tongoi Moses**.

[18] It is the Appellants/Defendants' case that their late father, a one **Buteyo**, died in **1979** before distribution of his property/land. It was from **2010 - 2013** when **Wanyakala Desterio** (**DW<sub>1</sub>**) who took over the heirship of his late father did the distribution of their father's land to the beneficiaries who included the Plaintiff's late husband, **Wepukhulu John Francis**. The distribution was done and recorded in a counter book that was admitted in evidence as **D.Exh.1**. The Appellants/Defendants assert that the suit property did not form part of the estate of the late **Wepukhulu John Francis**. It was their father's property and the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Defendants sold their respective shares acquired upon distribution of the property.

- [19] The million dollar question posed by the learned trial Magistrate and the Respondent's Counsel is; How could the Appellants be said to had been selling their shares of the land to **DW<sub>3</sub>**, **DW<sub>5</sub>** and **DW<sub>6</sub>** between **2005** and **2006** as per their evidence adduced in court and their sale agreements (**D.Exhs.5 and 8**) when the purported distribution took place in **2010 - 2013** as per **D.Exh.1 Nabende Bosco Busiku** (**DW<sub>4</sub>**) and **Wetonya Thomas Munyafu** (**DW<sub>7</sub>**) claim to derive their interest from the purchasers of the pieces of the suit land from the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Defendants.
- [20] The Respondent/Plaintiff's case on the other hand was that in 1996, when the plaintiff got married to **Wepukhulu John Francis**, she stayed with him on the suit land until 2004 when he, the husband died and left her on the suit land with 3 children. The suit land had been given to the Plaintiff's late husband by his late father **Francis Buteyo**. The land was about  $\frac{3}{4}$  of an acre.
- [21] It was after the death of her husband that the Plaintiff found and saw **Desterio Wanyakala**, 1<sup>st</sup> Defendant/**DW<sub>1</sub>** sell a portion of the suit land in 2006 to **Tongoi Paul** (**DW<sub>6</sub>**), **Wamutinyi Paul** (**DW<sub>3</sub>**) and **Mweru Isaac** (**DW<sub>5</sub>**) while **Minafu Thomas** (**DW<sub>7</sub>**) brought building materials on other remaining portions of land.
- [22] Though the Plaintiff had no written document to show that her husband had been given the suit land by his father, she asserted that she settled in the suit land since **1996** with her husband without disturbance till **2004** when her husband died and the disturbances started.
- [23] **Mabonga Mesulam** (**PW<sub>2</sub>**), a Chairperson L.C III of the area and a cousin brother to **Buteyo**, the father of the Plaintiff's husband, **Wepukhulu John** also asserted that the suit land belonged to the Plaintiff's late husband and therefore it formed part of his estate.



He explained how in 1978 when he was a clan leader of the Bangoho Bamegani clan, **Buteyo** called him in his home in Raasa village and in the presence of all his children; **Wanyakala Severio**, **Sundwa Charles** (DW<sub>2</sub>), **Wanyakala Robert**, **James Kundu**, **Desterio Wanyakala** (DW<sub>1</sub>), **Andrew Mweru** and **John Wepukhulu** (the Plaintiff's late husband) and then his brothers; **Khauka** and **Mupyana** and other people, announced his distribution of land to his children and the Plaintiff's late husband **Wepukhulu John** was given the suit land in **Mulyuli village**.

- [24] However, though nothing was put in writing, it is undisputed that in 1996, when **Wepukhulu** married the Plaintiff, they went and stayed in the suit land until 2004 when he died. This evidence was supported and corroborated by that of **Buteyo James** (PW<sub>2</sub>) brother to the Plaintiff's late husband, **Wepukhulu**.
- [25] The trial Magistrate was under duty to weigh both the Plaintiff's case and the Defendants' case and determine the pending issue before her of whether the disputed land formed part of the estate of the late **Wepukhulu John**. She reviewed the Plaintiff's evidence and that of the Defendants and found that PW<sub>2</sub> knew the suit land very well both during the distribution of **Buteyo's** land in **1978** and during the purchase of the suit property in **1971**. Then the Defendants' evidence which was to the effect that the land was sold to the 3<sup>rd</sup> - 7<sup>th</sup> Defendants in **2005** and **2006** as per **D. Exh. 1** before the purported 1<sup>st</sup> Defendant's distribution of **2010 - 2012**. Yet the 1<sup>st</sup> and 2<sup>nd</sup> Defendants testified that they sold their shares which they got after the distribution. She correctly concluded in my view that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only came up with the issue of distribution to cover up their acts of grabbing the Plaintiff's land because there was no property to distribute from 2010 and onwards. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants had no good title to pass to the rest of the Defendants; **3 - 7**.

- [26] The 3<sup>rd</sup> - 7<sup>th</sup> Appellants/Defendants cannot even be given the benefit of being bonafide purchasers when in their joint written statement of defence claim to had purchased the suit pieces of land upon distribution by the 1<sup>st</sup> Defendant to himself and the 2<sup>nd</sup> Defendant in **2010 - 2013** yet in their evidence to court and as per their purchase agreement, the purchases took place **2005** and **2006**.
- [27] As regards **Nabende Bosco** (DW<sub>4</sub>) who purchased a piece of the suit land in 2012, he claimed that it is the current husband of the Plaintiff a one **Ngaga Bernard** who brokered the sale of the land. However, in the circumstances where DW<sub>4</sub> does not deny that the suit land had become the Plaintiff's matrimonial property, in my view, the missing endorsement of the plaintiff on DW<sub>4</sub>' s purchase agreement (**D. Exh. 3**) is sufficient proof that DW<sub>4</sub>'s facts regarding the role of **Ngaga Bernard** are not authentic.
- [28] As regards **Tongoi Paul** (DW<sub>6</sub>), at **page 20 of the typed record** stated thus;
- "We have been friends to the Plaintiff and the late husband Wepukhulu. I even participated in the construction of their residential house when her husband was still alive and gave me one room on the commercial house to use for 11 years. Time came when the husband fell sick. The brother came and shared land. The late having got his share stared selling land, so, I went and bought the land at shs. 300,000/- in 2005 on the 20<sup>th</sup> of February. The Plaintiff was also present, she did not sign the agreement."*
- [29] The above clearly show that **DW<sub>6</sub>** as a liar and cannot be regarded as a bonafide purchaser. He could not have purchased the piece of the suit land from the Plaintiff's husband **Wepukhulu** on 20<sup>th</sup> February, 2005 when it is an undisputed fact that **Wepukhulu**

died in 2004. No purchase agreement between him and **Wepukhulu** could also be presented by **DW<sub>6</sub>**.

- [30] I find that the learned trial Magistrate properly evaluated the evidence before her and arrived at a right and correct decision that the suit property formed part of the estate of the Plaintiff's late husband **Wepukhulu John Francis**. This ground of appeal in the premises fails accordingly.

**Ground 2: That the learned trial Magistrate orders and decision is train riddled with fundamental misdirection and non-directions in law and fact as a result has led to a miscarriage of justice.**

- [31] Counsel for the Appellants did not enumerate or point out the specific fundamental misdirection and non-direction in law and fact complained of. However, as I have already observed, I found that the learned trial Magistrate correctly assessed the evidence before her and came to a good conclusion. The Appellants have not been able to point out for me any miscarriage of justice that could have therefore occasioned the Appellants. This ground of appeal therefore fails accordingly.

**Ground 3: That the learned trial Magistrate erred in law and fact when she ignored inconsistencies and contradictions in the Respondent's evidence.**

- [32] Again Counsel for the Appellants did not point out and specify in his submissions the alleged inconsistencies or contradictions in the Respondent's evidence. I was also not able to notice or identify any inconsistencies or contradictions in the Respondent's evidence. The Respondent/Plaintiff's evidence was consistent and corroborative with each other of **PW<sub>1</sub>** and **PW<sub>3</sub>**.

- [33] Instead, as correctly put by Counsel for the Respondent/Plaintiff, it is the evidence of the Appellants which had contradictions and inconsistencies;
- a. At **page 20 of the typed record, Tongoi Paul** (DW<sub>6</sub>) testified that it is the Plaintiff who came and told him that her husband was selling land, so, he went and bought the land at shs. 300,000/- on the 20<sup>th</sup> day of February, 2005. In cross examination, he stated that he bought the suit piece of land from the Plaintiff's in law Wanyakala.
- b. At **page 25 of the typed record, Nalyerise George** (DW<sub>9</sub>) testified that all the Defendants came onto the suit land when **Wepukhulu** was still alive. That the distribution of the land was made when **Wepukhulu** was still alive. In cross examination he revealed that **Wepukhulu** died in **2004** yet according to **D. Exh. 1** and evidence of **DW<sub>1</sub>, DW<sub>2</sub>, DW<sub>10</sub>, DW<sub>11</sub> and DW<sub>13</sub>** the distribution took place from **2010 - 2013** though **DW<sub>13</sub>** solely extends it backwards to **2002**. **DW<sub>9</sub>** asserted that the distribution of the suit land took place in **2012**. The distribution of the suit property, if at all occurred, it could not have taken place when **Wepukhulu** who died in 2004 was alive. This ground also accordingly fails.
- [34] All in all, I find this appeal lacking any merit. In the premises, I find no basis to interfere with the learned trial Magistrate's judgment and orders and as a result, I uphold her decision and dismiss the appeal with costs.

**Byaruhanga Jesse Rugyema**

**JUDGE**

**13<sup>th</sup>/09/2021.**