

(Arising from Kagadi Grade 1 Court Civil Suit No. 04 of 2018)

Versus

JUDGMENT

- [1] This Appeal arises from the Judgment of the Grade One Magistrate Kagadi Grade One Court, Hoima Chief Magistrate Court dated 19th November, 2020.
- [2] The facts of the Appeal are that the Plaintiff (now Respondent) filed **Civil Suit No. 04 of 2018** in the lower Court against the Defendant (now the Appellant) seeking a permanent injunction to restrain the Defendant/Appellant, her agents and workmen from evicting, harassing, intimidating or in any way interrupting the Plaintiff/Respondent's use and enjoyment of the suit Plot of land and house thereon; a declaration that the Defendant/Appellant is a trespasser on the suit land and finally an eviction order against the Defendant/Appellant.
- [3] It was the Plaintiff/Respondent's Case that he bought the suit property comprising of a Plot measuring **84 X 142 ft** and a house on it situated

at Kitemba LCI, Kiryanga Sub-County, Kagadi District from a one **Mbenawe Enock**, a husband to the Defendant/Appellant at a consideration of UGX. 10,000,000= (ten million shillings only).

- [4] On or about the 2nd day of May, 2017 the Plaintiff/Respondent found the Defendant/Appellant occupying the house on the suit Plot claiming that she is the wife of **Mbenawe Enock** (the seller of the suit Plot and the house on it). At the time the Sale Agreement of the suit Plot was made, she was no where and the seller disappeared hence this suit.
- [5] On the other hand, it was the Defendant/Appellant's Case that she was customarily married to **Mbenawe Enock** with whom they bore 4 (four) children/issues. That they utilized their land at **Bufunjo** for agriculture and used the proceeds from agriculture plus the sale of the land and were able to purchase the suit land at Kitemba East where the family is now situate and derives livelihood/sustenance. That the Defendant/Appellant and her husband constructed a permanent house on the suit land and they have since enjoyed quiet possession of the same until the Plaintiff/Respondent came and ordered the Defendant/Appellant's family to vacate it.
- [6] It is the Defendant/Appellant's contention that she contributed towards the purchase of the suit land and construction of the permanent house thereon and that the claims by the Plaintiff/Respondent that he purchased the suit land was illegal and unlawful. That the Plaintiff/Respondent connived with the Kitemba Policemen who violently threatened the Defendant/Appellant to vacate the suit land or else be arrested and detained.

[7] The trial Magistrate heard the suit and upon evaluation of the evidence before him found that the suit land belonged to **Mr. Mbenawe Enock** who executed a sale agreement of the suit land in favour of the Plaintiff/Respondent. That the Defendant/Appellant's claims that she is married to **Mr. Mbenawe Enock** from whom consent had to be sought before the sale of the suit land and that they together bought the suit land, were not supported by any evidence. The trial Magistrate concluded and held in favour of the Plaintiff/Respondent that the sale of the suit land by **Mbenawe Enock** was lawful and valid and that the Defendant/Appellant's stay on the suit land was therefore, unlawful, illegal and amounted to trespass.

[8] Being dissatisfied/and or aggrieved by the decision of the learned trial Magistrate Grade One, the Defendant/Appellant filed this Appeal to this Court on the following grounds of Appeal which initially were five as she was unrepresented but were later amended to **three** by Counsel upon representation;

- 1. That the learned trial Magistrate erred in law and fact when he held that there was a valid sale of the suit land by Mbenawe Enock and thus occasioning a miscarriage of justice.*
- 2. That the learned trial Magistrate erred in law and fact when he held that the Appellant's stay in the suit land is illegal and amounts to trespass and thus occasioned a miscarriage of justice.*
- 3. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thus occasioned a miscarriage of justice.*

Counsel Legal Representation:

- [9] The Appellant was represented by **Counsel Allan Arekaho** of **A. Marvin & Co. Advocates, Hoima** while the Respondent was represented by **Counsel Akankunda** of **Lubega, Babu & Co. Advocates, Masindi**. Both Counsel filed their respective written submissions as permitted by this Court.

Duty of the Appellate Court:

- [10] This is the first Appeal from the decision of the learned Magistrate Grade One. In **Sanyu Lwanga Musoke vs Sam Galiwango, S.C.C.A. No. 48 of 1995**.

Justice A. Karokora (J.S.C. as he then was – RIP) held that:

“...It is settled that the first Appellate Court is under the duty to subject the entire evidence on the record to an exhaustive scrutiny and to re-evaluate and to make its own conclusion while bearing in mind the fact that the Court never observed the witnesses under cross examination so as to test their veracity...”

See also **Fr. Narcensio Begumisa and three others vs Eric Tibebaga: S.C.C.A. No. 017 of 2017**.

- [11] The Appellate Court may interfere with the finding of fact if the trial Court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial Court. In particular the Appellate Court is not bound necessarily to follow the trial Magistrate’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or

probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally; **Dima Dominic Poro vs Inyani Godfrey and Another: H.C.C.A. No. 17 of 2016.**

- [12] This Court is therefore duty bound to review the evidence of the case, reconsider materials before the trial Magistrate and make up its own mind not disregarding the Judgment appealed from but carefully weighing and considering it so as to avoid any miscarriage of justice.
- [13] Both Counsel submitted and argued grounds 1 and 3 together and ground 2 separately. I do follow suit in determination of this Appeal since grounds 1 and 3 relate to how the trial Magistrate evaluated the evidence a record before him.

Preliminary Point of Law

- [14] Counsel for the Respondent raised a preliminary objection to the admission of **Annextures “A” and “B”** to his submissions as the same were not tendered in the Appellant’s evidence at the Lower Court.
- [15] Counsel submitted that the Appellant ought to have filed an Application under **0.43r.22 CPR** in case she wanted to rely on additional evidence in this Appeal. That **annextures “A” and “B”** to the Appellant’s submission and the letter (with its English translation) purportedly written to show evidence of payment of UGX. 800,000= intended to prove the customary marriage of the **Appellant and Mbenawe Enock**. Counsel prayed that **annextures “A” and “B”** be declared inadmissible in the Appeal to this Court and uphold the trial Magistrate’s finding and holding that the Appellant failed to present any evidence of being married to **Mbenawe Enock** by customary marriage.

[16] Counsel for the Appellant did not rejoin to this objection. He had submitted that the Appellant was already a spouse/wife to **Mbenawe Enock** (Appellant's missing husband) by customary marriage as confirmed by **annextures "A" and "B"** to his submissions by the time the purported sale of the suit land occurred on the 27th day of February, 2017.

[17] Indeed, on perusal of the Appellant's pleadings in the lower Court, it is clear in paragraph 5 of the Written Statement of Defence (WSD);

"(a) The Defendant was customarily married to Enock Mbanawe (hereinafter referred to as the Defendant's husband) around 2005 and her husband paid off the bride wealth in monetary terms in the presence of my parents, uncle and my brothers and our marriage started from there".

No reason is available to explain why the Defendant, though not legally represented could fail to introduce the evidence (**annexture "A" to submission of her Counsel**) during the trial yet she had it in her possession as now claimed by the Counsel on appeal. It was the Appellant's evidence that she got married in 2015 when she was 15 years old, UGX. 800,000= was paid to her parents by her father-in-law **Munibi** who was given a letter handing her over to him. It is again her father who wrote or drafted the sale agreement with one **Tibesigwa** when selling the suit plot to her husband **Mbenawe Enock** which she signed in 2013.

[18] However, she neither presented the said "letter" by her father handing her over to her father-in-law **Munibi** nor a copy of the Sale Agreement written/drafted by the father which she signed. She claims the agreement was stolen.

0.43 r.22 CPR prohibits production of additional evidence whether oral or documentary on appeal to the High Court save for exceptions there under which are not applicable to the instant case. Production of additional evidence on appeal require leave of Court which has to determine first whether the evidence fall under the exceptions of **0.43r.22 CPR**.

- [19] In the present case, no leave was sought by Counsel for the Appellant for production of additional evidence in form of **Annextures “A” and “B”** on appeal which evidence as the record shows, was surely available and in the Appellant’s possession as she claimed but chose not to introduce/present it for consideration. For Counsel for the Appellants to merely attach and have the evidence as annextures to his submission when the trial Magistrate had held that the Appellant failed to present any evidence of being married to **Mbenawe Enock** by customary marriage amounts to Counsel adducing additional evidence from the bar.
- [20] In the premises, I find as observed by Justice Mubiru in **Aluma Michael Bayo and 2 Others v Said Masur Okoti; H.C.M.A. No. 012 of 2016 Arua** that it is an invariable rule that if evidence which either was in the possession of parties at the time of trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given on appeal. As the result, I uphold the preliminary objection and declare **annextures “A” and “B”** inadmissible in the appeal before this Court.

Grounds 1 and 3:

[21] Counsel for the Appellant submitted that it was the Appellant's unchallenged evidence that the suit land belongs to her missing husband where the family derived livelihood and that the trial Magistrate therefore ought to have considered the status of the Appellant and her missing husband and hold that the suit land was a family land where the family derived their livelihood. That the trial Magistrate overlooked that material feature thus occasioning an injustice to the Appellant. That the suit land the Respondent purport to have purchased from the missing husband to the Appellant is a family land where the consent of the spouse was required under **S.39 as amended by S.20 of Land Amendment Act of 2004** before the sale.

[22] Counsel for the Respondent on the other hand submitted that there was no need of spouse consent before the sale of the suit land and the Appellant failed to prove the customary Marriage with **Mbenawe Enock** the seller as rightly held by the trial Magistrate.

[23] The 1st trial Magistrate of the suit and the parties in the Court below never framed the issues for determination of the suit during scheduling. It was during the determination of the suit by the succeeding trial Magistrate who framed the issues. The relevant issue for these grounds of appeal was:

Whether there was a valid sale of the suit land between the Plaintiff (then Respondent) and Mr. Mbenawe Enock.

[24] While determining the issue, the trial Magistrate correctly noted that the Defendant/Appellant did neither tender in Court the purported letter which was written for her by the parents nor call any witness or

tender any documentary proof in Court as proof of the purported customary marriage.

None of the Appellant's witnesses gave any credible evidence regarding the existence of the purported customary marriage between the Appellant and the said **Mbenawe Enock** save for stating that the two, lived as husband and wife.

[25] **S.39 of the Land Act Cap. 227** as amended provides thus:

“(i) No person shall.....

(a) sell, exchange, transfer, pledge, mortgage or lease any land;

(b) enter into any contract for the sale, exchange, transfer, pledging, mortgage, or lease of any land; or

(i) in the case of land on which a person ordinarily resides with his or her spouse and from which they derive their sustenance; except with prior written consent of the spouse.

(ii) in the case of land on which a person ordinarily resides with his or her dependent children of majority age, except with the prior written consent of the dependent children of majority age.

*(iii) in the case of land on which a person ordinarily resides with his or her children below the age of the majority except with the prior written consent of the **committee**”.*

[26] **“Committee”** under **S.1 (i) interpretation** means a Land Committee established by **S.64 of the Land Act** and or for purposes of this case, it is a Parish Land Committee consisting of a Chairperson and three other

members appointed by the District Council on the recommendation of the Sub-county Council.

- [27] In the instant case, at locus in quo, the Appellant adduced evidence that she had 4 children with her husband **Mbenawe Enock** and the eldest was 12 years implying that if Court found that the suit land was one where **Mbenawe Enock** ordinarily resided with his children below the age of majority before selling it, required the consent of the “Committee”.
- [28] A child attains the “age of majority” at 18 years (**See S.11 (1) (a) of the Contracts Act 2010, S.2 of the Children Act Cap 59 and In the matter of an Application by Dawn Pittman & Another, for the Legal Guardianship of David Twesige, H.C.M.A. 04 of 2008 (Fort Portal).**
- [29] The issue now is whether the suit land is that land where the seller, **Mbenawe Enock** was ordinarily residing with either the Appellant as a spouse or children below the age of majority.
- [30] According to the Respondent **Bigirwa Noah (Pw1)**, he purchased the suit land with the house from **Mbenawe Enock** at UGX. 10,000,000= as the Purchase Agreement dated 27th February, 2017 (P. Exh. 1 with its English translation). The purchase transaction was witness by among others **Mwesigye Tibesigwa (Pw3)** who had sold it to the seller, **Mbenawe Enock** and the LC I Chairperson of the area. At the time of the purchase, neither the Appellant nor her children were in the suit land and the house thereon. He neither knew whether the seller was married nor had children.
- [31] According to **Tinka Martin (Pw2)** who witnessed the transaction and drafted the Sale Agreement, there was nobody in the house and it was

locked. The Appellant was brought into the house sometime later after the transaction. **Tibesigwa Mwesigye (Pw3)** also witnessed the sale transaction of the suit land to the Respondent and identified the agreement upon which he had sold the suit land to **Mbenawe Enock** who later sold it to the Respondent. The agreement was admitted as **P.Exh2** with its English translation. As per **P.Exh2** dated 25th April, 2015 the Appellant did not feature anywhere as either a witness to the transaction or one of the purchasers. Both **Tibesigwa Mwesigye (Pw3)** and **Murungi Bosco (Pw4)** testified supporting and corroborating the evidence of the Respondent that at the time of the transaction, neither the Respondent nor her children were on the suit land and in the house thereon. After the transaction, **Mbenawe Enock** disappeared.

[32] On the other hand, the Appellant **Tumuramye Noami** as per her pleadings (WSD), at the time of her marriage to **Mbenawe Enock**, they had a piece of land at **Bufunjo** where they lived for ten years and produced thereon 4 children. They utilized their land at Bufunjo in agriculture and used the proceed from agriculture sales plus the sale of that land and were able to purchase the suit land at Kitemba East where the family is now situate.

[33] In her testimony in Court however she departed from the pleadings and stated at pages 8 and 9 of the typed proceedings that:

*“We started working with my husband **Mbenawe Enock** ... in Bufunjo ... we stayed at Kitemba in 2013. We found a man Abel started staying with him. We bought Plot. At the time there was nothing there, we built there ... I know that is my home. It is where I stay. I have only that home I do not have any place” (sic).*

She never adduced or presented any evidence regarding their alleged acquisition or ownership of the land at **Bufunjo** and its sale so as to acquire the suit land.

[34] The Appellant's witnesses **Abel Zairwe (Dw2)**, **Byaruhanga Julius (Dw3)** and **Nahabwe Edison (Dw4)** who all are her brothers in law testified that the Appellant's husband **Mbenawe Enock** sold the suit land to the Respondent and an agreement indicating the purchase price as UGX. 10,000,000= was executed though initially, **Mbenawe Enock** had borrowed UGX. 2,000,000= from the Respondent.

[35] Whereas **Abel Zairwe (Dw2)** testified that he witnessed the sale of the suit land to the Appellant's husband in 2015 (P. Exh.2), he never adduced evidence regarding whether the Appellant endorsed on the agreement as one of the purchasers or a witness. Indeed, **P.Exh.2** does not feature the Appellant as either one of the purchasers or its witnesses as she claimed in her evidence. In any case, she contradicted Dw2 when she stated that:

"they stole the agreement. We bought in 2013. I signed the agreement. We paid UGX. 2,000,000=".

P.Exh.2 clearly shows that the Appellant's husband purchased the suit property from **Omuhereza Mwesigye Tibesigwa** on 25th April, 2015 at UGX 1,530,000=.

[36] The above contradiction is evidence, in my view, that the Appellant had no knowledge and was not party to the transaction of the suit land from her husband **Mbenawe Enock**.

[37] Secondly, it is the evidence of **Dw2** and **Dw3** that during the sale of the suit land by Appellant's husband to the Respondent, neither the

Appellant nor her children were around. **Dw2** and **Dw3** claim that she had had a misunderstanding with her husband and they had separated for the period of about 6-7 months thus confirming the Respondent's assertion that at the time of the transaction, neither the Appellant nor her children were around. None of the Appellant's witnesses alluded to where the Appellant and her children were residing and lastly, none of them adduced evidence that the suit land was the family land where the family was deriving its livelihood/sustenance.

[38] It is clear from the totality of the evidence on record that the Appellant's husband sold the suit property to the Respondent. Apart from mere hearsay, there is no evidence that this was initially a transaction of lending of money. Upon sale of the suit property, the Appellant's husband ended up in prison for stealing or purchase of suspected stolen cattle as was clearly revealed by his brother **Nahabwe Edison (Dw4)**. There is no evidence that the suit land was family land where the Appellant's family was deriving its livelihood/ sustenance.

[39] The suit land was sold when the Appellant's whereabouts were unknown and she only came to either disorganize her husband's sale or was brought to the suit land by her husband with the intention to defeat the Respondent's interest on the suit land. The dictates of justice cannot surely allow her to benefit from such a conduct. As a result I find that the trial Magistrate was justified to find so therefore I find grounds 1 and 3 of this Appeal devoid of merit and they accordingly fail.

Ground 2:

[40] This Court having found that the suit land was not family land and therefore required no spousal content before sale to the Respondent, **S.39 of the Land Act** as amended is not applicable, it follows that the Appellant's stay on the suit land is unjustified and therefore illegal amounting to trespass.

The trial Magistrate justifiably and rightfully found that the Appellant's continued stay on the suit land was unlawful and amounted to trespass. There are no reasons for this Court to depart from his finding. This ground of Appeal is therefore also found devoid of any merit and accordingly fail.

[41] In conclusion, the entire Appeal generally has no merit. It is accordingly dismissed with costs, the Judgment and Orders of the lower Court are upheld.

Dated at Masindi this 12th day of **April, 2022.**

Byaruhanga Jesse Rugyema
Judge