

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL APPEAL NO. 099 OF 2020

[ARISING OUT OF C/S. NO. 124 OF 2013 IN THE CHIEF MAGISTRATES COURT OF ENTEBBE]

MALE HENRY

APPELLANT

V

1. EDWARD MUHIGIRWA
2. DR. ALICE HOPE BANGA

RESPONDENTS

BEFORE: HON. LADY JUSTICE P. BASAZA – WASSWA

J U D G M E N T

Representations:

Mr. S Sekonge Gilbert for the Appellant.

Mr. Agaba Justus for the Respondents.

Introduction:

- [1] This Judgment is in respect of an Appeal filed by Mr. Male (the Appellant) against the Judgment and Orders of the Chief Magistrate; **Her Worship Babirye Mary** vide C/s No. 124 of 2013, in the Chief Magistrate's Court of Entebbe, dated December 7, 2020. (The lower court Judgment and Orders shall hereinafter be referred to as *'the impugned decision'*).

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- [2] The subject of the suit in the lower court, and indeed in this appeal, is **a Kibanja measuring 7 acres** (*'the suit Kibanja'*) on land comprised in **Busiro Block 598 Plot 29 at Lugumba in Wakiso District, measuring approximately 25 acres.** (Hereinafter referred to as *'the suit land'*).

Background:

- [3] In the lower Court suit; C/s No. 124 / 2013, Mr. E. Muhigirwa and Dr. Alice Banga contended that they bought the suit land from a one **Mr. Flex Jovan Kawoya Kabuye**, and that they carried out a survey which revealed that there were Bibanja Holders on the suit land, namely; Mr. Ali Musoke and the daughters of the late Bumbakali; a one Ms. Nabakooza and a one Ms. Khadija.
- [4] They contended further that vide a consent Judgment in C/s No. 220 / 2012 dated July 9, 2013 between Mr. Ali Musoke and themselves, Mr. Ali Musoke was compensated for his Kibanja interests.
- [5] They asserted that Mr. Male used forged documents and trespassed upon the suit land claiming to have bought the suit Kibanja from Mr. Ali Musoke on January 25, 2012 and has continually stayed on the suit land, using it for commercial farming and cutting down trees.
- [6] In answer, in his written statement of defence, Mr. Male contended that he owns the suit kibanja and that he acquired it from Mr. Ali Musoke who had owned it for over forty (40) years. He further contended that he is in possession of the suit Kibanja for

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which he gained entry long before Mr. E. Muhigirwa and Dr. Alice Banga came to the village.

[7] He (Mr. Male) also filed a counterclaim against Mr. E. Muhigirwa and Dr. Alice Banga in which he contended that they offered him 39M for the suit Kibanja, which sum he had accepted, but that the draft agreement for compensation contained other terms that he did not accept, and that the agreement failed.

[8] He also contended that the consent judgment between Mr. Ali Musoke and Mr. E. Muhigirwa and Dr. Alice Banga vide C/s No. 220 / 2012, was fraudulent. That by the consent Judgment they connived to handover the suit kibanja that no longer belonged to Mr. Musoke, but to him (Male).

The impugned decision:

[9] In the impugned Decision, the learned Chief Magistrate found in favor of Mr. E. Muhigirwa and Dr. Alice Banga (the Plaintiffs therein) against Mr. Male (the Defendant therein). She awarded them; *inter alia*; general damages of 20M/=-, a permanent injunction, and costs of that suit.

She held;

- i) That Mr. Male was a trespasser on the suit land.
- ii) That Mr. E. Muhigirwa and Dr. Alice Banga acquired legal interest in the suit land and are the registered proprietors thereof.

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- iii) That the sale of the suit Kibanja by Mr. Ali Musoke to Mr. Male in 2009 was an invalid sale on the ground that the landlords were not aware of the transaction. That their consent was not sought for prior to transacting in the suit land.
- iv) That Mr. Male cannot be a tenant on the suit land if his purchase of the suit Kibanja was invalid.

Grounds of Appeal:

[10] This appeal is premised on the following six (6) grounds;

1. That the learned Chief Magistrate erred in law and fact when she declared that the Appellant is a trespasser on the Respondents' land.
2. That the learned Chief Magistrate erred in law and fact when she held that the late Ali Musoke did not seek the consent of the registered proprietor of the suit land when he sold the suit Kibanja to the Appellant contrary to the evidence adduced on the court record.
3. That the learned Chief Magistrate erred in law and fact when she wrongly disregarded the Appellant's evidence thereby reaching an erroneous decision.
4. That the learned Chief Magistrate erred in law and fact when she erroneously declined to admit into evidence the Appellant's Kibanja sale agreement dated 25/01/2012, thereby arriving at a wrong decision.
5. That the learned Chief Magistrate erred in law and fact when she dismissed the Appellant's counter claim in civil Suit No. 124 of 2013 against the Respondents.

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6. That the learned Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence adduced in court and thereby arrived at a wrong conclusion causing a miscarriage of justice.

[11] Although the above grounds of appeal are numbered 1 - 6, they can all be summed up into ground 6. They are essentially all one ground of appeal; ground 6;

'That the learned Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence adduced in court and thereby arrived at a wrong conclusion causing a miscarriage of justice'

[12] The Appellant seeks that the impugned decision is set aside and substituted with Judgment in his favor. He also seeks that he be awarded the costs of this appeal and the costs in the lower court.

Submissions of Counsel:

[13] Learned Counsel for each party filed written submissions that I have duly considered. I have not re-stated all their arguments here in this judgment, but I have made reference to them, where necessary. See paras. [20] – [22] below.

Consideration of the Appeal:

[14] In accordance with settled law and practice (see DinKerrai R. Pandya v R¹), I have dutifully re-evaluated the evidence on the lower court record together with all the exhibits. I have also carefully and dutifully looked at, weighed and considered the

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¹ [1957] E.A at pages 336 - 340

[15] The main contestation in the lower court was **'whether Mr. Male is a trespasser on the suit land?'** Two (2) subsidiary points for determination arose therefrom and circled that main question;

The second point was ‘whether before or during the impugned sale of the suit Kibanja by Mr. Ali Musoke to Mr. Male, the consent of the Registered proprietor was sought and obtained?’

[17] For clarity, here below I have quoted verbatim what the learned Chief Magistrate stated about each of the above points;

'A clear examination of the said document shows that the same was registered with the Registrar of documents and, that the particular document that was tendered in court was a certified one. For that matter, I have no reason to disagree with the submissions of Counsel for the Defendant on the certified document since the document is a certified copy but, my finding is that the certification has to be by the

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originator of the document and in this case the Registrar of Documents is not the (sic) of the document hence it does not make the document authentic.

On the contestation that the document offended the relevant provisions of the Illiterates Protection Act, the impugned document clearly has no single provision that points to the fact that it was interpreted for the vendor, and for that reason, it offends S.3 of the Illiterates Protection Act, Cap 78, of the Laws of Uganda, thus it cannot be admissible in this Court.'

[19] On the second point; on whether the consent of the registered Proprietors was sought and obtained, the learned Chief Magistrate stated;

'It is my finding therefore that it cannot be said that the said Ali Musoke sought for the consent of the registered proprietor whom he did not know at the time of the sale of the suit Kibanja to the Defendant. This is explained by D Exh.2; the letter that was written by the defendant to the said Ali Musoke, informing him of the new landlord as well as instructing him to seek his consent...no proof of such consent, or at least a form that is anticipated under the law to be filed by the Kibanja holder, directed to the registered proprietor'.

[20] In this appeal, learned Counsel each argued as follows;

Mr. Ssekonge learned Counsel for the Appellant, faulted the findings of the learned Chief Magistrate. He argued that the impugned sale agreement was authentic, and that, as such, the learned Chief Magistrate improperly rejected it. He based his proposition on **sections 63 (a) and 78 (1) & (2) of the Evidence Act**, and argued that the impugned agreement was a private document registered with the Registration Services Bureau (URSB), and was therefore admissible in evidence as a secondary document. That there was a presumption of its genuineness as a certified copy.

[21] Mr. Ssekonge also faulted the learned Chief Magistrate in her finding that the impugned sale agreement offended the provisions of **sec. 3 of the illiterates Protection Act²**. He

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² Cap 78 of the Laws of Uganda.

argued that she erroneously relied on the submissions of Counsel from the bar without evidence on record to support those submissions.

[22] In rebuttal, learned Counsel for the Respondents; Mr. Agaba supported the findings of the learned Chief Magistrate. He argued that the impugned sale agreement was indeed a forgery and that the learned Chief Magistrate rightly held so.

Learned Counsel based his proposition on the criminal proceedings at Buganda Road Court against Mr. Male, by which he said, Mr. Musoke Ali contested the said impugned sale agreement, and did so as an illiterate. That Mr. Musoke Ali could not therefore have made the impugned sale agreement. He also relied on the handwriting expert's (PW2's) report whose findings he said, were that the impugned sale agreement was a forgery.

[23] I carefully studied the record of the lower court and carefully re-evaluated all the evidence surrounding the impugned sale agreement and found that;

a) **Both Mr. Male and the late Ali Musoke signed the impugned sale agreement dated January 25, 2012.**

By virtue of Sec. 55 & 56 of the Evidence Act³, this court took judicial notice of the Buganda Road Court proceedings in **Criminal Case No. 111 / 2014**. In those proceedings, the late Mr. Ali Musoke, who testified as PW1 on 28/05/2015, acknowledged that he signed the said impugned sale agreement, albeit complained that Mr. Male had not completed payment for the suit Kibanja.

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³ Cap 6 of the Laws of Uganda

In my view, that admission by Mr. Ali Musoke overrides and defeats the handwriting expert's report that the latter's signature on that document was forged.

Similarly, I noted that Mr. E Muhigirwa (the 1st Respondent herein), who testified as PW2 in the same proceedings vide **Criminal Case No. 111 / 2014**, stated on 11/12/2014, that he was aware that Mr. Male had entered into the said impugned sale agreement with Mr. Ali Musoke.

- b) The authenticity of the impugned sale agreement was not dependent on its certification, but rather, it was dependent on whether the parties to it, in fact signed it. The learned chief Magistrate therefore misdirected herself when she relied on the certification of that document and overlooked the evidence that pointed to the fact that it was signed by both parties to it.
- c) **I agree with learned Counsel for the Appellant that no admissible evidence, or at all, was led to the effect that the late Ali Musoke was illiterate, and unable to read and understand.**

The learned Chief Magistrate erred when she misdirected herself and entertained and accepted the proposition that the impugned sale agreement offended sec. 3 of the Illiterates Protection Act, and that the same could not be admissible in Court.

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With all due respect, she was not alive to the legal principle that **for one to invoke sec. 3 of the Illiterates Protection Act, that person must attest to the fact that they, themselves, can neither read, nor understand the document or language.**

Sec. 1 of the Illiterates Protection Act defines an illiterate as;

‘a person who is unable to read and understand the script or language in which the document is written or printed’

That evidence cannot be raised by another person other than the person claiming to be an illiterate, to wit; the person whom the Act seeks to protect.

In law, evidence from another person that another cannot read and understand is treated as hearsay and inadmissible evidence, save in exceptional circumstances. See **Kasaala Growers Co-op Society v Kakooza & Another**⁴.

It is trite that oral evidence must be direct (**section 59 of the Evidence Act**).

In the **Kasaala Growers case**, in his own admission, Bumbakali Sande confessed his illiteracy in the English language in which the affidavit was written and drawn by a one Charles Kaddu.

In the present case, unlike in the **Kasaala case**, the late Ali Musoke did not state anywhere that he was illiterate and did not understand the English language. As it were, interestingly, that assertion was made to the lower court by the Respondents herein, who were, but strangers to the said impugned sale agreement. As such, they were not competent to adduce that evidence.

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⁴ S/C Civil Appeal No. 19 of 2010

d) Mr. Male's possession of the suit kibanja at **all material times to this dispute**, corroborates the other evidence on record that the impugned sale agreement between him and Mr. Musoke Ali, is valid. I refer to the testimony of PW1; Mr. E. Muhigirwa, during cross examination, where he acknowledged that Mr. Male was *'always on the land'*, and that when they (the Respondents) tried to occupy the suit Kibanja, they were stopped by the Police.

e) The earlier **undisputed agreement dated 22/11/2009 (D EXH. 1) between Mr. Male and the late Mr. Ali Musoke**, is further corroboration that the impugned agreement between the duo, which ties in with D. EXH. 1, is valid.

By that earlier agreement (D.EXH 1), a deposit of UGX. 6M was paid to Mr. Musoke by Mr. Male towards the purchase of the suit Kibanja, with a promise by the latter to pay the balance of UGX. 28M at a later date.

[24] I now turn to address the second point on whether the learned Chief Magistrate was correct in her finding on the alleged consent of the registered proprietor.

[25] Mr. Ssekonge argued for the Appellant that the consent of the Registered proprietor, a one Mr. Flex Jovan Kawooya Kabuye, the Respondents' predecessor in title to the suit property, was sought for and obtained orally. He submitted that the learned Chief Magistrate improperly disregarded the Appellant's evidence to that effect.

[26] In rebuttal, Mr. Agaba argued for the Respondents that the consent was never sought for, and that the learned Chief Magistrate was right when she held so. He submitted

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that the Appellant's supplementary witness statement was an afterthought, and that there was no evidence tendered that Ali Musoke obtained the said oral consent.

- [27] On this question, I find that the Respondents; Mr. E Muhigirwa and Dr. Alice Banga failed to prove that the consent of the landlord; Mr. Flex Jovan Kawooya Kabuye was not obtained.

The onus of proof was on the Respondents to substantiate their allegation that Mr. Flex Jovan Kawooya Kabuye did not consent to the sale of the suit Kibanja. It is trite law that he who asserts, must prove such assertion. (Sec. 101-103 of the Evidence Act).

- [28] While I found it strange that Mr. Male was allowed at the trial, **after the closure of the Plaintiffs' case**, to file a supplementary witness statement on February 12, 2019, **five (5) years after he had filed his first witness statement**, I noted that Mr. Agaba who represented the Plaintiffs / Respondents did not object to the late filing of that statement. As it were, the Court's leave was duly obtained, and Mr. Male's said supplementary witness statement was taken as part of his evidence in chief.

Mr. Agaba and his clients are estopped, they cannot now, on appeal, raise objection that the evidence in that witness statement was an afterthought. They neither did so at the appropriate time, nor did they make any effort to rebut the evidence that the oral consent of Mr. Flex Jovan Kawooya Kabuye was obtained. They ought to have called Mr. Flex Jovan Kawooya Kabuye as a witness, but they did not do so.

- [29] As it is, the only direct and admissible evidence on that question of consent, is the evidence of Mr. Male in his said supplementary witness statement. In that witness

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statement, Mr. Male asserted that in the year 2011, he convened a meeting with Mr. Ali Musoke and Mr. Flex Jovan Kawooya Kabuye where the latter informed Mr. Ali Musoke that he was free to sale his Kibanja. That evidence was never rebutted and still stands.

[30] Contrary to the finding of the learned Chief Magistrate, the letter dated December 1, 2009 (D EXH 2), written by Mr. Male to Mr. Ali Musoke, asking him to seek the landlord's consent, was well within the time of the sale of the suit Kibanja. To wit; between the date of the sale agreement dated 22/11/2009 (D. EXH 1), and the date of the impugned sale agreement of January 25, 2012.

It is my view, that the letter dated December 1, 2009 (D EXH 2), corroborated the evidence that the consent was indeed sought and obtained.

Decision of this Court:

[31] For the reasons given, and on a balance of probabilities, grounds 1 - 6 of this appeal succeed. This appeal is accordingly allowed. Judgment is entered for the Appellant in the following terms;

1. The Judgment and orders of the lower court vide C/s No. 124 of 2013 are hereby set aside.
2. A declaration is hereby made that the Appellant; Mr. Male owns the suit Kibanja measuring 7 acres on the suit land comprised in **Busiro Block 598 Plot 29 at Lugumba in Wakiso District, and he is not a trespasser.**

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3. A permanent injunction is hereby issued restraining the Respondents from threatening or in any way affecting the Appellant's occupation of the suit Kibanja on the suit land.
4. The Appellant is awarded a nominal sum of **UGX. 5,000,000/= (Shillings Five Million only)** as general damages for inconvenience.
5. No special damages are awarded, as none were pleaded nor proved.
6. The costs of this Appeal and the costs of the lower court are awarded to the Appellant against the Respondents.

I so Order,

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P. BASAZA - WASSWA
JUDGE

October 13, 2022

This Judgment is delivered electronically via email to the parties, and is uploaded on the Judiciary ECCMIS system.