

- [3] The late **Rufunda James** lived on the suit land together with his family but that after the death of **Rufunda James**, the Respondents started harassing them, stopping them from using the suit land and destroyed their crops.
- [4] The Respondents/defendants on the other hand denied the Appellants/plaintiffs' allegations and contended that the property which the Appellants are claiming does not constitute the estate of the late **Rufunda James**. That the suit land was bought from the late **Rufunda James** by the 4th Respondent who distributed it to other persons who include the rest of the Respondents. That otherwise, they have lived peacefully on the suit land without any interruption until around October 2013, when the Respondents started laying baseless claims over the suit land.
- [5] On her part, the trial Magistrate found that there are 2 purchase agreements dated 30/1/2002 and 27/6/2002 where the late **Rufunda James** sold to the 4th Respondent/defendant, **Byamani Fred** and therefore, that ownership of the land had changed as a result, the suit land did not form part of the estate of **Rufunda James**. That **Rufunda** was not entitled to indicate what he did not own in the WILL. The Appellants/plaintiffs' suit was in the premises dismissed with costs to the Respondents/defendants.
- [6] The Appellants were dissatisfied by the decision of the trial Magistrate upon which they lodged the present appeal on 6 grounds of appeal as contained in their memorandum of appeal.
1. *The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record leading to a wrong conclusion which occasioned a miscarriage of justice to the Appellants.*
 2. *The learned trial Magistrate erred in law and fact when she held that the suit land does not belong to the estate of the late Rutunda James leading her to a wrong conclusion which occasioned a miscarriage of justice.*
 3. *The learned trial Magistrate erred in law and in fact when she made the decision basing on evidence not adduced before court.*
 4. *The learned trial Magistrate erred in law and fact when she failed to consider the grave contradictions and inconsistencies in the*

Respondents' evidence thereby reaching a wrong conclusion which occasioned a miscarriage of justice.

5. *The learned trial Magistrate erred in law and in fact when she failed to conduct the locus in quo properly thereby leading her to a wrong decision.*
6. *The learned trial Magistrate erred in law and fact when she held that the 4th Respondent purchased the suit land leading to a wrong conclusion which occasioned a miscarriage of justice to the Appellants.*

Duty of the 1st Appellate court

- [7] As both counsel submitted, the duty of the first Appellate court is to review the evidence of the case and reconsider the materials as adduced before the trial court. The Appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it; **Gospel Talents Ltd Vs Nelson Onyango, HCCA No.14/2008** and **Kifamunte Henry Vs Uganda, Crim. Appeal No.10/97 S.C.**
- [8] This being a first Appellate court, it therefore has a duty to re-evaluate the evidence adduced before the trial court as a whole by giving it fresh and exhaustive scrutiny and then draw its own conclusion of fact and determine whether on the evidence, the decision of the trial court should stand.
- [9] In this appeal, it is apparent from the grounds of Appeal that grounds **1,2,3,4** and **6** revolve around how the trial Magistrate evaluated the evidence before her. As a result, I shall deal with grounds **1,2,3,4** and **6** together and ground **5** separately.

Grounds 1,2,3,4 and 6: Evaluation of Evidence

- [10] Counsel for the Appellants, **Mr. Aaron Baryabanza** submitted that the trial Magistrate relied and based her judgment on 2 purchase agreements dated 30/1/2002 and 27/6/2002 where **Rufunda James** sold land to the 4th Respondent/defendant which though the Respondents referred to them,

none of the 2 agreements was exhibited in court. According to him, relying on the case of **Byekwaso & Anor Vs Yudaya Ndagire, CACA No.78/2012**, there was no evidence of the purchase from **Rufunda James** as alleged by the Respondents. That unless a document is admitted in evidence and marked as an exhibit, it cannot form part of the evidence and it cannot be relied on in judgment by the trial Magistrate as in doing so, would be an error. That besides, the agreement dated 27/6/2002 for refund of Ugx 700,000/= for the land **Kutegeka Joseph** had bought from the late **Rufunda James** was not pleaded in the first place. He concluded that basing a court decision and relying on an unpleaded matter or issue not properly placed before it for determination is an error in law, **M/s Fang Min Vs Belex Tours & Travel Ltd, SCCA No.6/2003**.

- [11] 2ndly, that there were many grave contradictions and inconsistencies in the evidence of the Respondents which the trial Magistrate ignored to the prejudice of the Appellants. He disclosed the inconsistencies as then shs. 1.3m as the purchase price paid by the 4th Respondent to **Rufunda James** as per the evidence of **DW1, DW2 and DW3** yet **DW4** testified that he paid shs.1m. Then, that whereas **DW5** stated that the purchase price was received by **Ruth Kiiza**, the daughter of **Rufunda**, **DW2** told court that the money was not paid to her mother **Ruth Kiiza** but to **James Rufunda**.
- [12] Counsel concluded relying on the authority of **Omona Francis & 3 Ors Vs Aboda Atiny, Civil Appeal No.048/2016 (H.C)** that the contradictions in the instant case on the purchase of the suit land were major and since they were not explained in any way by the Respondents, the only conclusion to be made is that they were deliberate lies which render the evidence of purchase of the suit land doubtful.
- [13] Counsel for the Respondents **Mr. Asiimwe** submitted that the trial Magistrate considered the evidence of the 2 purchase agreements dated 30/1/2002 and 27/6/2002, where the 4th Respondent bought the land from **Rufunda James** and **Kutegeka Joseph** who received refund of what he had paid to **Rufunda** for another piece of land and therefore the suit land had changed after the said purchase from **Rufunda** and refund of the money to **Kutegeka** and accordingly, the suit land did not form part of the estate of **Rufunda James**.

Determination of the appeal

- [14] It is apparent on record and it is not in dispute that the parties in this appeal are both maternal grandchildren of the late **Rufunda James** who died intestate in 2005. The WILL left by the deceased was admitted in evidence as **P.Exh.1**. In the WILL dated 14/2/2004, the deceased bequeathed his land (kibanja) at Kiryabutuzi, Kyabigambire sub county to his grandchildren hailing from Bulindi, the plaintiffs, for cultivation purposes. The kibanja measures 26 acres. There is no suggestion from the Respondents that either the WILL was forged or fraudulently made and or obtained.
- [15] It is also an agreed fact that the Respondents also have interests in the suit land as conceded by **Ayebare Teddy** (PW1) during cross examination, that save for the 2nd Respondent's mother who was buried in Lira, where she was married, the 1st, 3rd and 4th Respondents' mothers were buried on the suit land. In addition, the Respondents have houses and gardens on the suit land. This is also the evidence of **Tadeo Byairungu**, an old man of 77 years who witnessed the late **Rufunda's** WILL.
- [16] It is also an admitted fact that the plaintiffs don't stay on the suit land, but they stay in Bulindi where their late father, **Kisengo John** lived and was buried together with the deceased's wife and children. The Appellants therefore only come to work/cultivate, as their grandfather WILLED them on the suit land where they are now meeting resistance from the Respondents.
- [17] The above apparent facts are consistent with the evidence of **Byairungu Tadeo** (PW2) and **Kasigwa Godfrey** (PW3). During cross examination, PW3 stated thus;
- "When my grandfather was giving land, 3rd defendant (3rd Respondent) was given. DW1 (1ST Respondent) and DW2 (2nd Respondent) were also given."*

The implication of the above is that what the Respondents are occupying and where the mother of the 3rd defendant was buried, comprised that portion of land given to them by the late **Rufunda James**.

- [18] As regards the 4th Respondent, he claims and indeed testified that he purchased from **Rufunda James** 15 acres of the land at **Ugx 1,300,000/=** and also redeemed 10 acres of land **Rutunda James** had previously sold to **Kutegeka Joseph** at **Ugx 700,000/=** which he refunded.
- [19] However, though the trial Magistrate relied on the evidence of the 4th Respondent/**DW4** and referred to the 2 purchase agreements dated 30/1/2002 for purchase of the portion of the land from **Rufunda James**, and, that dated 27/6/2002 for refunding of **Kutegeka Joseph's Ugx 700,000/=** paid to **Rufunda** and therefore found in favour of the Respondents/defendants, the acquisition of the land that was allegedly sold to **Kutegeka Joseph** by **Rufunda James** by payment of the **Ugx 700,000/=** as a refund did not form part of the pleadings of the Respondents. In the premises, under **O.6 r.7 CPR**, they would not be permitted to lead such evidence, See also **M/s Fang Min Vs Belex Tours & Travel Ltd (supra)**.
- [20] In the premises, I find that the learned trial Magistrate erred in law and fact when she allowed the evidence which departed from the Respondents/defendants' pleadings.
- [21] 2ndly, none of the 2 purported agreements was exhibited in court by the Respondents. In **John Byekwaso & Anor Vs Yudaya Ndagire, CACA No. 78/2012**, where a sale Agreement was never tendered in evidence as an exhibit though a photocopy of the same was initially identified for eventual tendering as an exhibit, court held that the learned trial Magistrate erred in law and fact when she based her decision on a sale agreement which was not part of evidence.
- [22] In this case, since none of the agreements relied on by the Respondents had been tendered in evidence, it was an error in fact and in law for the trial Magistrate to have based herself on the agreements mentioned by the Respondent that were not tendered in evidence. **Under Ss.63-76 Evidence**

Act documentary evidence is proved by primary evidence save for public documents which permit certified copies.

- [23] 3rdly, during cross examination, the 4th Respondent/**DW4** himself conceded that the size of the land he allegedly purchased from **Rufunda James** was not mentioned though its boundaries were shown. One would wonder therefore, how he came to claim that he purchased from **Rufunda James** 15 acres of the land without evidence of a later conducted survey or carrying out of its measurements.
- [24] Lastly, the credibility of the evidence of purchase of the land by the 4th Respondent from **Rufunda** and the authenticity of the purchase agreement, if at all it existed, was further exposed by the fact that **Wamananu Abenego** (DW6) who claimed to have witnessed it, during cross examination, he conceded that his signature thereon is different from his signature on his witness statement. Indeed, a visual comparison of the 2 signatures reveal that the 2 signatures are completely different from each other. The explanation given by **DW6** that the change in appearance of the signatures is a result of the long passage of time is neither convincing nor supported by any evidence. Besides, during re-examination, the 4th Respondent/DW4 disclosed that **Rufunda James**, the alleged vendor, there is no evidence that he signed for the receipt of the final payment. One wonders how the vendor of the land would fail and or refuse to sign for payment, in this case, shs.1,000,000/= for the land he had sold. On record, there is no explanation for this occurrence.
- [25] Counsel for the Appellants had submitted that there were inconsistencies and contradictions on the Respondents' evidence as regards the purchase price of the suit land and who actually received the money. I have not been able to appreciate the alleged inconsistencies and contradictions. It is clearly evident from the evidence of **DW1-DW5** that the 4th Respondent/**DW4** first deposited Ugx 300,000/= as the purchase price and then paid Ugx 1,000,000 as the final payment to the vendor, **Refunda James**.
- [26] What I find doubtful is whether the purchase actually took place in the first place in view of the unavailability of the purchase agreement in

evidence and discrepancies of the purported witnesses/signatories to it. The 4th Respondent/**DW4's** evidence regarding how he allegedly distributed the land he purported to purchase from **Rufunda** to his siblings is also questionable for there is no evidence that was adduced to support that the distribution occurred or took place.

[27] As a result of the foregoing, this court is entitled to find and rule that no such purchase of land from **Rufunda** ever took place. The Respondents' claim that the 4th Respondent purchased the suit land from **Rufunda** and distributed it among themselves is a mere afterthought and design to deprive the Appellants of their rightful share in their grandfather, **Rufunda's** estate.

[28] The late **Rufunda James** was well alive of the fact that he gave out portions of his land to the Respondents and or sold some to other people when he made his last WILL (**P.Exh.1**) bequeathing his remaining 26 acres of land (kibanja) to his grandchildren, the Appellants/plaintiffs who hailed from Bulindi for cultivation purposes as he clearly disclosed in the WILL, that the rest had already been catered for.

[29] In the premises, I find the 1st, 2nd, 3rd, 4th and 6th grounds of appeal having merit and they accordingly succeed. The Appellants are beneficiaries to the estate of the late **Rufunda James** and they are entitled to have their share of the 20 acres of land bequeathed to them for cultivation.

Ground 5: The learned trial Magistrate erred in law and fact when she failed to conduct the locus in quo properly thereby leading her to a wrong decision.

[30] This court having found that the trial Magistrate erred in fact and in law in the evaluation of evidence before her in court hence arrived at a wrong decision decreeing the suit land to the Respondents, it becomes unnecessary to consider the 5th ground of appeal since the consideration of grounds 1,2,3,4 and 6 disposes of this entire appeal in favour of the Appellants.

- [31] In conclusion, the appeal is allowed. The orders of the lower court are accordingly set aside. The Appellants are beneficiaries to the estate of the late **Rufunda James** and they are therefore entitled to their bequeathed share in the suit land. The Respondents have no authority to stop the Appellants from utilizing their bequeathed 26 acres of the suit land.
- [32] A permanent injunction against the Respondents from further interference with the Appellants' rights as beneficiaries to the estate of their grandfather, **Rufunda James** accordingly issues.
- [33] No order as to damages is issued for none was sought in the lower court. It is now well established that a party cannot be granted a relief which it has not claimed in the plaint; **Julius Rwabinumi Vs Hope Ahimbisibwe, SCCA No.102/2009**.
- [34] As regards costs, the Appellants are granted costs of this appeal and in the lower court since they are the successful parties.

Dated at Hoima this **28th day of July, 2023**.

Byaruhanga Jesse Rugyema
JUDGE.