

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

CIVIL APPEAL NO.0044 OF 2022

5 **(Arising out of the Chief Magistrates Court of Kajjansi Civil Suit
No.002 of 2018)**

KASUMBA JOHN:.....APPELLANT

VERSUS

1. BABIRYE JENIFER

10 **2. KAZANYIRA JANE**

3. NAYIGA CISSY:.....RESPONDENTS

Before: Lady Justice Alexandra Nkonge Rugadya.

Judgment.

Introduction.

15 This is an appeal arising from the ruling and orders of **Her Worship Ms. Birungi Phionah**, the Magistrate Grade 1 at the Chief Magistrates Court of Kajjansi dated 25th January 2022.

Brief Background.

20 The appellant (plaintiff) instituted **Civil Suit No.002 of 2018** against the respondents (defendants) at the Chief Magistrates Court of Kajjansi at Kajjansi for recovery of **Ug.x. 4,500,00/- (Uganda shillings four million five hundred thousand only)** being a refund of money received on a land transaction, compensation for all the developments made on the land.

25 In the alternative, he sought to be allowed to develop the suit land as the true owner, special, general, and punitive damages, interest thereon, and costs of the suit.



When the matter came up for hearing, counsel for the 3rd respondent (3rd defendant) raised a point of law, and prayed that the suit be dismissed on grounds that it was barred by law under the provisions **section 5 of the Civil Procedure Act Cap.71, Sections 38, 41, & 114 of the Evidence Act cap.6,** and the existing judgment in in **Criminal Case No.447 of 2017 Uganda vs Babirye Jennifer & Kazanyira Jane.**

Counsel for the 3rd respondent in his written submissions an objection to the effect that the plaintiff lacks a cause of action against the 3rd defendant/respondent.

The learned trial magistrate framed 2 issues for determination to wit;

1. Whether the suit is barred by operation of law. (Section 5 of the CPA and sections 38, 41, and 114 of the Evidence Act cap.6)

2. Whether the suit discloses a cause of action against the 3rd defendant.

In her ruling, the trial magistrate declared that the suit is not barred by operation of law.

In regard to the 2nd issue, it was held that the plaint did not disclose a cause of action against the 3rd defendant/respondent, and accordingly dismissed the suit with costs against the 3rd defendant.

Being dissatisfied with part of the decision/ruling and orders of the court the plaintiff lodged this appeal, raising the following grounds:

1. That the learned trial Magistrate erred in law and fact when she held that the plaint does not disclose a cause of action against the 3rd defendant/respondent.

2. That the learned trial Magistrate erred in law and fact when she proceeded to entertain and determine a preliminary objection which was based on mixed law and fact in the absence of any evidence on court record.

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3. ***That the trial magistrate in law and fact when she proceeded to misapply the principles relating to determination of a cause of action thereby reaching the wrong conclusion that the plaintiff does not disclose a cause of action against the 3rd respondent.***

The appellant's prayer is that the appeal be allowed, the ruling and orders in **Civil Suit No.002 of 2018** be set aside, and that the appellant be awarded costs.

10 **Representation:**

The appellant was represented by **M/s F. Gumisiriza & Co. Advocates**, while the 3rd respondent was represented by **M/s Okecha Byaruhanga & Co. Advocates**.

15 As directed, both counsel filed written submissions in support of their respective clients' cases as directed by this court.

Consideration of the appeal.

I have carefully read the submissions of both counsel, the details of which are on court record, and which I have taken under consideration in determining this appeal.

20 **Duty of the 1st appellate court.**

25 This is a first appeal arising from the decision of the Chief Magistrates Court in exercise of its original jurisdiction. It is therefore important for this court to remind itself of its duty as a first appellate court, that is, a duty to review and re-evaluate the evidence before the trial court and reach its own conclusions.

This court must take into account that the appellate court did not have the opportunity to hear and see the witnesses testify. (**See: Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC).**)

Counsel for the appellant in submissions argued all three grounds of appeal jointly, and I shall consider them jointly as well, bearing in mind the above authorities.

Appellant's arguments.

5 Counsel for the applicant in his submissions argued that *paragraph 4 (f)* of the plaint clearly shows that the appellant enjoyed the right of quiet possession of the land until September 2017, when the 3rd respondent through her agents started claiming ownership of the same, and that the trial magistrate erred by only basing her decision on *paragraph 5* of the plaint in
10 isolation of *paragraph 4 (f)*.

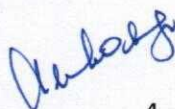
That the appellant's claim against the 3rd respondent was not based on fraud but rather a declaration as the rightful owner of the suit land as it can be seen from *paragraph 5* of the plaint that fraud as a cause of action was against the 1st and 2nd respondents.

15 Thus the trial magistrate erred in relying only on fraud and non-participation in the sale agreement as a cause of action disregarding the fact that the claim was for ownership land.

In addition, that determination of **Civil Suit No.002 of 2018** would also determine the issue of ownership hence there was need for evidence to be
20 called, and the matter be determined on its merits to ascertain the right ownership.

3rd respondent's arguments in reply.

Counsel for the 3rd respondent on the other hand submitted that an appreciation of *paragraph 3* of the plaint shows that while the appellant
25 claims a refund of the purchase price of the suit land, compensation for the developments made thereon and in the alternative claims ownership of the suit land, *paragraphs 4 (a) & (d)* of the plaint confirm that the purchase price of Ug. Shs. 7,000,000/- was paid to the 1st respondent and not the 3rd respondent.



As such, the appellant cannot claim for a refund from the 3rd respondent because he has never paid any money to her and for that reason, he has no cause of action against the 3rd respondent in relation to the refund of the purchase price.

- 5 That the would be claim against the 3rd respondent is in the alternative claim of ownership of the suit land by the appellant but the same does not suffice because according to *paragraphs 4 (f), (g), & (h), and paragraph 5 (iv)* of the plaint the 3rd respondent started claiming an interest in the suit land in 2017.

10 The 2nd respondent acknowledged having given the appellant wrong information about ownership of the suit land, and promised to find alternative land as compensation for her mistake but did not avail the same or refund the money, hence the initiation of the criminal charges to which the 2nd respondent pleaded guilty to obtaining money under falsely obtaining money from the appellant in pretence of selling the suit land whereas not. She was
15 convicted, sentenced and is serving her sentence of 6 years.

Further, that from the plaint, the appellant concedes to having been defrauded of his money by the 1st and 2nd respondents in pretence of selling to him the suit land whereas not, hence the conviction.

20 Thus the appellant enjoys no right over the suit land because he was defrauded but never purchased the same and therefore has no right to be violated over the suit land and as such the 3rd respondent cannot be liable.

In addition, that *paragraph 4 (f)* of the plaint does not show cause of action against the 3rd respondent but states that the 3rd respondent claimed the suit land while the appellant was merely defrauded on the same, but never bought
25 it.

Appellants arguments in rejoinder.

In rejoinder, counsel for the appellant emphasized his earlier submission that the trial magistrate only based her ruling on *paragraph 5* of the plaint but counsel for the 3rd respondent's submissions seem to suggest that the trial
30 magistrate in reaching her decision considered the plaint as a whole let alone

paragraphs 3 & 4 (f) of the plaint which is not the case and the same was an error on the part of the trial magistrate hence occasioning a miscarriage of justice.

Counsel citing the case of **Wabwire Charles vs Kazoora Robert High Court**

5 **Civil Suit No.187 of 2019** stated that the appellant's rights of ownership were being affected if not deprived by the 3rd respondent's actions of claiming the suit land, and that questions of acquisition, rights and ownership in respect of the suit land are triable issues as would require the parties to adduce evidence for court's determination.

10 It was therefore premature for the 3rd defendant to submit that the appellant had no right to be violated over the suit land. Furthermore, that it is trite law that the plaintiff is *dominus litis*, meaning that he has the right to choose to sue and from whom he/she knows and believes to have a remedy thus there is no way the appellant would have realized the alternative part of *paragraph*
15 3 of the plaint which is the claim of ownership without adding the 3rd respondent, implying that the outcome of **Civil Suit No.002 of 2018** affects the 3rd respondent against whom the appellant seeks a remedy.

Analysis of court.

20 **Order 7 rule 11 (a) of the Civil Procedure Rules SI 71-1** stipulates that a plaint may be rejected by the court if it does not disclose a cause of action. The Court of Appeal in **Kapeka Coffee Works Ltd V NPART CACA No.3/2000** held that in determining whether a plaint discloses a cause of action, the court must look only at the plaint and its annexures if any, and nowhere else. (**See also: Attorney General Vs. Oluoch (1972) EA 392**).

25 The plaint must show that the plaintiff enjoyed a right; that the right has been violated; and that the defendant is liable. If the three elements are present, a cause of action is disclosed and any defect or omission can be put right by amendment. (**See: Tororo Cement Co Ltd V Frokina International Ltd Civil Appeal No. 2/2001**).

30 In the case before me, it is not in dispute that the appellant instituted **Civil Suit No.002 of 2018** jointly and severally against the respondents herein

seeking amongst others, a refund of the purchase price for the suit land, and developments made thereon, and in the alternative, he sought a declaration that he was the lawful owner of the suit land.

According to *paragraph 4 (a), (b), (c), & (d)* of the plaint on record, sometime in 5 2017, the appellant herein purchased the suit *kibanja* measuring approximately 50ft x 40 ft x 50ft x 40ft from the 1st respondent herein, after making inquiries from the area local leaders, and upon being assured by the 2nd respondent that the suit *kibanja* indeed belonged to the 1st respondent after which he took possession of the said *kibanja* and commenced 10 construction.

The appellant claims that sometime in September, 2017, while he was still continuing his construction, the 3rd respondent appeared claiming ownership of the *kibanja* which she claimed to have purchased from the 2nd respondent, and claiming that she left the same in the care of her daughter, the 1st 15 respondent.

In addition, that the 2nd respondent acknowledged the mistake and promised to find the plaintiff another piece of land as compensation since she had given wrong information in respect of the suit *kibanja*.

It is also stated that the 1st and 2nd respondent were charged with the offence 20 of obtaining money by false pretences to which the said respondents pleaded guilty, convicted and sentenced to 6 years' imprisonment. This court was not however availed with a certified copy of the judgment or record of proceedings in the matter.

Counsel for the 3rd respondent's argument was that the appellant in his plaint 25 conceded to having been defrauded of his money by the 1st and 2nd respondents in pretence of selling him land, and as such, he acquired no right over the suit land.

In *paragraph 6* of the plaint the appellant alleges that acts he terms as dubious, barbaric and unlawful were committed by the defendants (without 30 exclusion) had caused him gross inconvenience, damage, disturbance and

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torture and in respect to which he seeks special, general and punitive damages.

It is also quite clear that both the suit and counterclaim raise the question of who, between the appellant and 3rd respondent, was the lawful owner of the
5 suit *kibanja*.

The 3rd respondent as the counterclaimant seeks ownership of land measuring 80ft x 50ft and prays for the eviction and vacant possession against the respondents. The agreement relied on by the 3rd respondent dated 11th March, 2007 indeed indicates that the area claimed by her is 80ft x 50ft.

10 As noted earlier, the applicant's claim is for ownership of land measuring approximately 50ft x 40ft x 50ft x 40ft. He however relies on a sale agreement which indicates an area of 50ft x 40ft.

If one was to rely on the uncertified proceedings of court for *Crim. Case No. 447 of 2017*, the 2nd respondent allegedly pleaded guilty to charges of forgery,
15 uttering false documents, conspiracy, and obtaining money by false pretences.

During the criminal trial, reference was also made to land at Makandwa village in Kajjansi town council, Wakiso and to a sale agreement dated 22nd June, 2017 which was made in respect of the *kibanja*. The sale agreement
20 presented by the applicant in his pleadings is however dated 26th June, 2017.

In light of the apparent discrepancies in measurements and dates of the sale as indicated, the question which the trial court ought to have addressed first would have been whether in light of those discrepancies this was the same area claimed by both the appellant and 3rd respondent. According to this
25 court, this was a matter for trial, requiring proof.

It has also come to this court's attention that some of these issues as highlighted could have been verified by the 1st and 2nd respondents themselves who apparently, did not file a defence.



The two were however made parties to the application but there is no evidence that they were served with the application and submissions as directed by this court.

5 Within that context, and as correctly noted by the trial court in its ruling, a cause of action constitutes *every fact which is material to be proved to enable the plaintiff succeed or every fact which if denied the plaintiff must prove in order to obtain judgment. (Cooke vs Gull LR 8 E. P 116 and in Read vs Brown 22 QBD P. 31).*

10 Even if therefore one were to accept the argument by the learned counsel for the 3rd respondent that **sections 38 and 41 of the Evidence Act** (recognition of existing judgments) were invariably applicable to the present case, the question of whether or not the applicant was a *bonafide* purchaser (though not raised by parties during the scheduling) becomes a material fact and a triable one at that, under a civil court.

15 The administration of justice requires that the substance of all disputes should be investigated and decided on their merits. It would also seem that the main purpose of litigation, namely the hearing and determination of dispute should be fostered rather than fettered. **(Essa JI VS Solanki (1968) EA 218 at 222.)**

20 The objection raised by the 3rd respondent undoubtedly raises triable issues which can only be determined after the leading of evidence in a full trial, before final orders on issues of ownership and reliefs can be granted.

25 Thus although no allegation of fraud was raised against the 3rd respondent, the reliefs sought are made generally against all the defendants. That implies that the appellant had a right to be heard on all issues raised, (rightly or otherwise) in a formal trial, and all evidence put to test.

Accordingly, the trial Magistrate erred when she proceeded to entertain and determine a preliminary objection which was based on mixed law and facts, in the absence of tested evidence.

Chakraborty

I am also inclined to agree with counsel for the appellant that the alternative order of declaration of ownership of the suit land may directly impact on the 3rd respondent. It is in her interest therefore that she remains a defendant under the main suit.

- 5 In the opinion of this court, the trial magistrate ought to have deferred this question and have it raised as one of the issues during trial. Accordingly, this appeal is allowed.

The ruling and orders of the trial magistrate are hereby set aside, and the suit against the 3rd respondent is hereby reinstated, awaiting the full trial.

- 10 Costs abide the outcome of the suit.

I so order.

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- 15 **Alexandra Nkonge Rugadya**

Judge

20th October, 2023.

Delivered by email



20/10/2023