

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL APPEAL NO. 68 OF 2010
(Arising From Mengo Civil Suit No. 426 of 2008)

KIZITO MUMPI SSALONGO.....APPELLANT

VERSUS

SERUGA FRANK.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGEMENT

This was an appeal from the decree of His Worship Kavuma Mugagga Magistrate G.1 in Mengo Civil Suit No. 426 of 2008 dated 19th November 2010. The background to the appeal is that the Appellant filed Civil Suit No. 426 of 2008 against the appellant claiming to be the owner of a plot of land held under customary tenure “kibanja” having bought the same from Ben Mutumba, heir of the late Bruno Kayongo, by virtue of a sale agreement dated 7th May 2001. Bruno Kayongo had bought the same land from Samwiri Mukasa by virtue of an agreement dated 22nd November 1974. In his Written Statement of Defence (WSD) the Defendant/Respondent denied the Plaintiff/Appellant’s claims and pleaded that he lawfully bought the suit land and was duly authorized to develop the said kibanja. At the trial two issues were framed as follows:-

1. ***Who is the lawful owner of the suit land or whether the Defendant is a trespasser on the suit property.***
2. ***Remedies.***

The trial Magistrate resolved the first issue in the Defendant/Respondent’s favour, that there was no trespass by the Defendant/Respondent and that the suit land belongs to him. He accordingly dismissed the case with costs to the Defendant/ Respondent.

The Appellant being dissatisfied with the judgment appealed against it on the following grounds:-

1. *That the learned trial Magistrate erred in law and fact when he failed to evaluate the evidence for the plaintiff but only analysed that of the Defendant, thereby exhibiting elements of bias.*
2. *That the learned trial Magistrate erred in law and fact when he rejected the plaintiff's submission that he had constructive possession of the suit land.*
3. *That the learned trial Magistrate erred in law and fact in ascribing fraud to the plaintiff regarding his purchase agreement, which factor was neither pleaded nor adduced in evidence.*
4. *That the learned trial Magistrate erred in law and fact in finding that it was the duty of some of the plaintiff's witnesses to prevent the Respondents from constructing his structure on the suit land yet they were not the plaintiff's agents.*
5. *That the learned trial Magistrate erred in law and fact when he based his decision on the alleged failure by the Appellant to take actual possession of and to commence development of the land immediately after purchase.*
6. *That the trial court erred in finding that omission to include measurements and neighbourhoods in the Appellant's purchase agreement was fundamentally erroneous yet it is not mandatory nor a legal requirement.*
7. *That the learned trial Magistrate erred in law and fact in finding that the sale to the plaintiff was void for want of letters of administration by the vendor to the Appellant yet there was unanimous agreement by the said vendor's family who all endorsed and witnessed the transaction.*
8. *That the learned trial Magistrate erred in law and fact when he engaged in conjecture speculation and fanciful theorizing that the plaintiff abandoned his land bought at an exhaustive amount, and that on that ground, had lied to court.*
9. *That the trial Magistrate acted against the weight of the evidence and arrived at wrong decisions.*

At the hearing of this appeal, Mr. Anguria Joseph, holding brief for Counsel Kusiima, appeared for the Appellant while Mr. Wycliffe Birungi represented the Respondent. Both Counsel agreed to file written submissions.

Ground 1: That the learned trial Magistrate erred in law and fact when he failed to evaluate the evidence for the plaintiff but only analysed that of the Defendant, thereby exhibiting elements of bias.

Ground 9: That the trial Magistrate acted against the weight of the evidence and arrived at wrong decisions.

Learned Counsel for the Appellant submitted on ground 1 that while the Defendant's evidence was analysed by the trial Magistrate full thrust as indicated from pages 2 to 4 of the judgment,

trivial attention was paid to the Plaintiff's evidence and the Magistrate made no comment on it. He argued that this suggested bias. He also contended that the court appointed witnesses averred like they were appointed for and by the Defendant. On ground 9, learned Counsel for the Appellant argued that the Plaintiff's witnesses, who were five in number, gave credible evidence the gist of which was that the Plaintiff purchased the suit land which initially belonged to Bruno Kayongo's family. He contended that the trial Magistrate preferred to rely on the contradictory evidence of the Defendant. He gave the example of the Respondent's purported purchase agreement, exhibit **D1/2**. He submitted that it was evidently a concoction in so far as the original document bore on it a sketch map of the boundaries, yet the map was missing on the photocopy of the same document.

Learned Counsel for the Respondent Wycliffe Birungi chose to address grounds 1, 5, and 9 of the appeal together arguing that they all concern the evaluation of evidence by the trial Magistrate. He submitted that it is not true that the trial Magistrate failed to evaluate the Plaintiff's evidence and only analysed that of the Defendant or that he exhibited bias. He argued that the trial Magistrate clearly outlined the evidence of the Plaintiff from page 1 to page 2; that of the Defendant from the last line of page 2 to page 5; that of the court appointed witnesses on pages 4 and 5; and the court analysis from pages 5 to 8 of the judgment. He submitted that the trial Magistrate gave reasons as to why he chose to believe a particular witness and not the other and there is no indication whatsoever that the court failed to evaluate the Plaintiff's evidence. He further submitted that the trial Magistrate addressed the evidence of PW3 and PW4 on pages 5 and 6 of the judgment. He contended that this goes to show that in reaching his decision, the trial Magistrate bore in mind all evidence as presented by the Plaintiff and the Defendant and that any court of competent jurisdiction applying the law for the facts and evidence cannot come to a contrary decision.

The grounds addressed together by learned Counsel for the Respondent are set out in the memorandum of appeal as follows:-

1. *That the learned trial Magistrate erred in law and fact when he failed to evaluate the evidence for the plaintiff but only analysed that of the Defendant, thereby exhibiting elements of bias.*
5. *That the learned trial Magistrate erred in law and fact when he based his decision on the alleged failure by the Appellant to take actual possession of and to commence development of the land immediately after purchase.*
9. *That the trial Magistrate acted against the weight of the evidence and arrived at wrong decisions.*

I must differ from Counsel for the Respondent's position that ground 5 of the appeal concerns evaluation of evidence. In my view, unlike grounds 1 and 9 which, I would agree, concern

evaluation of evidence, I find ground 5 to be concerning interpretation of the law or of a legal principle on the legal implications of failure to take actual possession of land after purchase. In that respect the grounds I will address together as concerning evaluation of evidence are grounds 1 and 9.

The Appellant's grievance on these grounds requires that it be looked at from two perspectives. The first is whether the trial Magistrate accorded ample attention to the plaintiff's evidence as he did to that of the defendants. The second is whether the Magistrate exhibited bias in his decision.

On the aspect of whether the trial Magistrate accorded ample attention to the Plaintiff's evidence, one needs to look at the judgment together with the record of proceedings. It is evident from the judgment that after summarizing the facts and the issues, the trial Magistrate proceeded to outline the evidence of the Plaintiff's witnesses on pages 1 and 2 of his judgment. He then outlined the evidence of the Defendant from the bottom of page 2 to page 4, and that of the court appointed witnesses on pages 4 and 5. He then analysed the evidence on pages 5 up to the end of the judgment which he concluded by making his decision. While it is true as submitted by the Appellant's Counsel that the trial Magistrate gave full thrust to the Defendant's evidence from pages 2 to 4 of the judgment, it is not correct for him to submit that the Magistrate paid trivial attention to the Plaintiff's evidence and made no comment on it. The judgment as already indicated above outlined the Plaintiff's evidence on pages 1 and 2 of the judgment. This indicates that the evidence, in terms of outlining it, covered roughly two pages each for each of the parties as well as for the court appointed witnesses. In addition the Magistrate particularly addressed the evidence of PW3 and PW4 on pages 5 and 6 of the judgment in the course of analyzing the evidence. He then gave reasons as to why he chose to believe the evidence of the Defendant and not that of the Plaintiff.

The foregoing is reflected in pages 5 and 6 of his judgment where the trial Magistrate stated as follows:-

"...after carefully perusing and analyzing evidence on court record adduced by the Plaintiff, there is no inference in that evidence that the Plaintiff ever occupied the suit land he allegedly bought even since he allegedly purchased the land on 7th May 2001 as the purported sale agreement is dated. The Plaintiff claimed that after purchasing the suit land he travelled to Rwanda to take care of his sick mother and he returned six years after the Defendant had built on it.

One should not forget the fact that PW4 Kayiwa Steven a brother to the so called vendor to the Plaintiff and a so called witness to the sale agreement was staying in the same area and witnessed the Defendant putting up his structures and also assisted him to

putting out the fire that had caught the Defendant's container which he had placed on the suit land.

It beats my understanding as to why didn't PW4 confront the Defendant on the trespass if he indeed was trespassing on the land they had first sold to the Plaintiff? But (sic) looked on as the Defendant developed his structure. For that matter, PW1's evidence with PW3's is not to be believed whatsoever simply because it is too erroneous and full of loopholes and gaps which points to nothing other than a lie and untrustworthiness."

The said extracts from the judgment indicate that the trial Magistrate accorded ample attention to the evidence adduced by the Plaintiff as he did to the evidence adduced by the Defendant. This is reflected in the outline of the evidence on pages 1 and 2 of the judgment as well as the analysis of the same on pages 2, 3 and 4 of the same. The outline and analysis of the evidence fairly brings out the Plaintiff's case as deduced from the same Magistrate's record of proceedings. On the second aspect of whether the trial Magistrate exhibited bias in his judgment, one needs to address the judgment. On page 6 of the judgment, he stated as follows:-

"...The averment by the Plaintiff that he bought the suit land for Ugx 20,000,000/= in 2001 abandoned it and went to Rwanda when actually none of the court witnesses at locus ever saw him or witnessed his so called purchase including the LC of the area is nothing other than erroneous misleading and superfluous and should be ignored with the contempt it deserves...."

On page 7 he stated as follows:-

"...the purchase agreement is very much questionable and has so many loopholes so that leads me (sic) the sale agreement itself...exhibit D1...did not include size and neighbours since the suit land is unregistered land. I find the above pertinent and essential in any agreement involving bibanjas.....Further to that the current Chairman of the area DW1 Haruna Bombo distanced himself from the stamps used on the purported exhibit 1 and also the signature of the late former Chairman which appears on the agreement (sic), his evidence was unchallenged.

As if that was not enough the Counsel who prepared exhibit P1, PW5 acknowledged that...he did not see the witnesses signing and neither could he remember who was witnessing for who or what they were witnessing....Therefore he could not confirm the authenticity of the witnesses. To me that amounts to denying the whole agreement, for that matter the content and value of (sic) sales agreement is nothing other than a sham, deliberate and vain attempt to commit forgery."

On page 8 of the judgment, the trial Magistrate stated as follows:-

“I would like also to address myself to the fact that even if Ben Mutumba was selling Bruno Kayongo’s land did he have the powers to sell since he did not have letters of administration to Bruno Kayongo’s estate?...”

From the above reasons I would without a doubt answer the issue in the negative....”

I find this to be ample evaluation of the evidence on record on the part of the trial Magistrate.

The Appellant’s Counsel on ground 1 also contended that the court appointed witnesses averred like they were appointed for and by the Defendant. He raised this to strengthen his position that there was an element of bias on the part of the trial Magistrate.

The record of proceedings indicates that when court visited the locus all the parties and their respective Counsel were present. Three witnesses were appointed by court to testify, namely Court Witness No. 1 Semambo Ronald, Court Witness No. 2 Batuusa Simon, and Court Witness No.3 Ahmed Matovu. All the said witnesses testified that they did not know the Plaintiff/Appellant and that they had stayed in the place where the land is located for a long time. Court Witness Nos.1 and 2 were the LC 1 Secretary for Defence and General Secretary respectively. Court Witness No. 3 also testified that Mr. Kasozi sold the place to Seruga (defendant/Respondent) and that Kayongo’s land is behind the disputed plot. The trial Magistrate summarised the evidence of the court witnesses on pages 4 and 5 of his judgment and analysed it together with the other adduced evidence. There is nothing on record to suggest that the court appointed witnesses averred like they were appointed for and by the Defendant as contended by the Appellant’s Counsel. To my understanding, on careful perusal of the court record, namely the trial Magistrate’s and learned Counsel’s summaries of the said witnesses’ oral testimonies at the locus, the witnesses stated what they knew about the dispute.

In my opinion, without prejudice to the merits or demerits of his reasoning, the trial Magistrate evaluated the evidence of the Plaintiff and gave reasons as to why he chose not to believe the Plaintiff. This is well illustrated in the extracts of the Magistrate’s judgment I have quoted above. This would, in my opinion, infer that there was no bias exhibited by the trial magistrate as the Appellant’s Counsel would like this court to believe. In that respect grounds 1 and 9 of this appeal would fail.

I must state however, that I carefully perused the record and I have failed to see the record of proceedings or notes, typed or handwritten, that were taken at the locus in quo. Thus, I could only access the evidence of the court appointed witnesses through the trial Magistrate’s judgment and Counsel’s submissions. It is clear from the record though that the visit to the

locus in quo took place since the court and both Counsel refer to it and in fact outline the evidence of the court appointed witnesses who gave evidence at the locus.

Ground 2: That the learned trial Magistrate erred in law and fact when he rejected the plaintiff's submission that he had constructive possession of the suit land.

Ground 5: That the learned trial Magistrate erred in law and fact when he based his decision on the alleged failure by the Appellant to take actual possession of and to commence development of the land immediately after purchase.

I addressed grounds 2 and 5 together because some of the matters to be addressed in the course of addressing them are common. In doing this therefore I have differed from the position of learned Counsel for the Appellant who handled grounds 4 and 5 together, contending that they were related. In my view, it is grounds 2 and 5 which are related, rather than grounds 4 and 5.

On ground number 2, Counsel for the Appellant submitted that the Appellant had rightly argued at the trial that he had constructive possession of the suit land by virtue of possession of the purchase agreement, exhibit **P1**. He submitted that there is no law that requires a purchaser to be in physical possession of land to be recognized as the owner of such land. He contended that it was erroneous in law and fact for the trial Magistrate to have ruled that the Appellant did not own the land merely because he did not occupy the land after purchase. He maintained that the Appellant accounted for his non presence on the land when he told court he was away attending to his sick mother in Rwanda as indicated on page 2 of the court proceedings. However, learned Counsel for the Respondent referring to the evidence of DW1, DW2, DW3, DW4, Court Witness No. 1, Court Witness No. 2, and paragraph 1 of the judgment argued that the holding indicates that the learned trial Magistrate was aware of what is required to prove notice of a fact. He argued that constructive refers to notice, that is, constructive notice, and contended that there was nothing on the suit property to put the Respondent on notice of the Appellant's interest. He argued that in such a case, there was no basis on which to base a finding of constructive possession/notice to the Respondent. He concluded that it would therefore be superfluous as in the words of the trial Magistrate to make such a finding.

It is a well known principle of law that the tort of trespass is committed not against the land but against the person who is in actual or constructive possession of the land. The case in point is the Supreme Court decision in **Justine Lutaya V Stirling Civil Engineering Co Ltd Civil Appeal No. 11 of 2002**. Thus possession of land can be actual or constructive. One does not have to be physically on the land to be recognized as owner of the land for purposes of trespass to be committed on the land claimed by him or her. In **Katarikawe V Katwiremu [1977] HCB 210**

however, it was held that mere payment is by itself no evidence that it was for the purchase of land for it is explainable on a number of grounds. There is certainly nothing in it to connect it inevitably to a contract for the sale of land by the payee to payer. More frequently the act of part performance is concerned with possession of the land. It does not appear that mere payment of the contract sum without taking actual possession of the land is sufficient act of part performance, even if the vendor surrenders the title deeds to the purchaser so long as no effective transfer of title is made or a caveat is effected on the register. The entry into possession is decisive as evidence of a contract to part with ownership of land on the part of a payee and will often operate as notice to anyone dealing with the same land.

In this case, where the suit land is an unregistered kibanja, the evidence adduced by the Plaintiff indicates that other than paying for the land and executing an agreement he did nothing that would amount to constructive notice in as far as third party interests are concerned. In his oral testimony as PW1 he stated as follows:-

“... I bought the land on 7th July 2001 from Ben Mutumba, I paid Ugx 20,000,000/= for the land and we made an agreement. I had not started to develop the land because I went to look after my mother in Rwanda. I came back in 2007 March. When I came back I found they had built a building on it and then when I inquired, I was told it was Seruga Fred who built on it...”

In cross examination he stated:-

“... I do not have a busuulu ticket. I have never registered the property with Buganda Land Board. I never left anybody to take care of my land....The present LCs do not know anything about my land...”

It was the argument of the Appellant's Counsel that the Appellant had constructive possession of the suit land by virtue of possession of the purchase agreement, exhibit **P1**. He submitted that there is no law that requires a purchaser to be in physical possession of land to be recognized as the owner of such land. He contended that it was erroneous in law and fact for the trial Magistrate to have ruled that the Appellant did not own the land merely because he did not occupy the land after purchase.

In **Katarikawe V Katwiremu, supra**, it was held that a contract for sale of land is not perfected until an effective transfer of title has been made, but failure to do so does not affect a contract until the land is transferred to other persons. Similarly, in **Zimbe V Kamanza [1952 - 1956] 7 ULR 68**, it was held that no man can become the owner of land until a statutory transfer of the land to him has been made and registered.

It would appear that the trial Magistrate based his decision on the evidence adduced in court that the Appellant never occupied the suit land after buying it. This is evident in his following analysis which states:-

“...after carefully perusing and analyzing evidence on court record adduced by the Plaintiff, there is no inference in that evidence that the Plaintiff ever occupied the suit land he allegedly bought even since he allegedly purchased the land on 7th May 2001 as the purported sale agreement is dated. The Plaintiff claimed that after purchasing the suit land he travelled to Rwanda to take care of his sick mother and he returned six years after the Defendant had built on it.

The trial Magistrate on page 7 of his judgment stated:-

“In the instant case there was no possession by the Plaintiff either constructive or actual, the land was simply empty. I find it superfluous for Counsel Nyakaana to argue in his submission that the Plaintiff had constructive possession by purchasing the suit land, since when is purchasing ever been possession of any kind?”

In **Wuta-Ofei V Danquash [1961] 3 ALL E R 597 PC** which was applied with approval in **NH&CC V KDLB & Chemical Distributors CACA 43 of 2002**, it was held that in order to establish possession of land, it is not necessary for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession. In that case the slightest possession was held to suffice where the possession the Respondent sought to maintain against the Appellant who never had any title to the land. It was Counsel for the Appellant's submissions that there is no law that requires a purchaser to be in physical possession of land to be recognized as the owner of such land. I would agree that this is the correct position of the law, as per the court decisions cited above. To that extent therefore, the trial Magistrate erred in law when he based his decision on the alleged failure by the Appellant to take actual possession of and to commence development of the land immediately after purchase.

It is important to note however that this position of the law can only stand when the land in question has not been transferred to a third party who bought bona fide without notice. In the instant case the possession sought by the Plaintiff/Appellant against the Defendant/Respondent who does not have a title to the land but is in occupation of the land. In the circumstances where the Defendant is in occupation of the land proof of the slightest possession would be required as to put the Defendant on notice of the Plaintiff's claim to the land. No such evidence was adduced by the Plaintiff to establish constructive possession for

purposes of establishing his claims against the Defendant/Respondent who is in possession of the land. On the contrary, the Defendant adduced evidence, which was not challenged, that he purchased the land which was measured and clearly identified by witnesses. There was a sale agreement exhibit **D1/2** witnessed by Local Council officials of the area one of whom was DW1 Haruna Bombo the LC Chairman of the area. DW2 Kasozi John who sold the kibanja to the Defendant stated that the land he sold to the Defendant had never been sold to any other person, and that the only wrangle that affected the land concerned a lady and it was solved by demolishing her illegal structure on the land. DW3 Kalibala Muttaka stated that Bruno Kayongo's land, a portion of which the Plaintiff claims to have bought from Ben Mutumba, the late Kayongo's son, has never encroached on the Defendant's plot, and that no other person had owned the Defendant's plot.

According to **Black's Law Dictionary**, the word "constructive" is stated to be legally imputed, having an effect in law though not necessarily in fact. Courts usually give something a constructive effect for equitable reasons.

It is my considered view that mere possession of the purchase agreement could not entitle the Plaintiff to ownership of the land *per se*. Where the land is already in possession of the Respondent who purchased it without notice of the Appellant's interest, the Appellant's claim to the land as against the Respondent would fail. Counsel for the Appellant's submissions that there is no law that requires a purchaser to be in physical possession of land to be recognized as the owner of such land can only stand when the land in question has not been transferred to a third party who bought bona fide without notice. The facts as adduced by evidence in the instant case, where the Respondent had purchased the land bona fide without notice of the Appellant's interest, if any, and subsequently occupied and developed it the same argument would not stand.

Thus, the trial Magistrate may have erred in interpreting the law, but not the facts. In the instant case the Plaintiff as purchaser could only proceed against the seller for damages for breach of contract. However, the claim for trespass against the Respondent cannot stand. The adduced evidence does not establish that he was in constructive possession of the suit land as he alleges to sustain an action for trespass against the Respondent whose adduced evidence establishes not only ownership but also actual possession of the land in dispute.

In that respect, ground No. 2 of this appeal would fail.

In my view ground number 5 has been disposed of in the course of addressing ground number 2. I would agree that the trial Magistrate erred in law when he based his decision on the alleged failure by the Appellant to take actual possession and to commence development of the land immediately after purchase of the land. This ground of appeal is allowed.

Ground 3: That the learned trial Magistrate erred in law and fact in ascribing fraud to the plaintiff regarding his purchase agreement, which factor was neither pleaded nor adduced in evidence.

On this ground, learned Counsel for the Appellant submitted that it is trite law that for a fact to be adjudicated upon, it must be specifically pleaded. He submitted that the WSD makes no averment as to the alleged fraud, nor does it come across in any of his witnesses' testimonies. He argued that it is a well known legal tenet that fraud must be strictly pleaded with particulars set out which should be proved at a very high standard almost bordering that of criminal cases. He in addition argued that no evidence was adduced from an expert to show that the Plaintiff did commit forgery in his purchase agreement, exhibit **P1**. In reply, the Respondent's Counsel argued that there is nothing in the learned trial Magistrate's judgment to suggest any fraud. He argued that the basis for the trial Magistrate's doubt was in the content and value of the sale agreement exhibit **P1**, and the fact that the Plaintiff could not remember who was witnessing it and on whose behalf, thereby failing to confirm the authenticity of the witnesses. Counsel argued that the trial Magistrate's analysis of the evidence (testimonies and exhibits) was proper and could not lead to any other logical conclusion other than a dismissal of the plaintiff's claim.

In **J. W. Kazoora V Rukuba Civil Appeal No. 13 of 1992**, Oder, JSC held that allegations of fraud must be specifically pleaded and proved. The degree of proof of fraud required is one of strict proof, but not amounting to one beyond reasonable doubt. The proof must, however, be more than a mere balance of probabilities. In **Hannington Wasswa V Maria Onyango & Ors SCCA No. 22 of 1993 [1994] KALR 98** the Supreme Court held that the allegation of fraud required an ordinary suit where witnesses could be cross examined. Court however did not find the procedure wrong but inappropriate and stated that every case must be decided on its own unique facts and circumstances. In **BEA Timber & Co V under Singh [1959] EA 453** where it was also held that fraud must be specifically pleaded and the particulars alleged on the face of the pleading, court however observed that fraud is a conclusion of law. If the facts alleged in the pleading are such as to create fraud it is not necessary to allege fraudulent intent. The facts alleged to be fraudulent must be set out and then it must be stated that these facts were done fraudulently, but from the acts fraudulent intent may be inferred.

I have looked at the WSD. It did not specifically allege fraud on the part of the Plaintiff. DW1 Haruna Bombo, the current Chairman of the area gave oral testimony that he doubted the signature of the former chairman appearing on the agreement exhibit **P1**. No expert evidence was brought to disprove the signatures that DW1 appears to have disowned. On page 7 of the judgment, the trial Magistrate observed that the sale agreement between the Plaintiff and one Ben Mutumba, exhibit **P1**, did not include size and neighbours yet it is pertinent and essential in any agreement involving bibanjas. He wondered why the size was not included the sale

agreement. He concluded that that meant the Plaintiff did not know what they were buying. He further observed that DW1 Haruna Bombo, the current Chairman of the area, whose evidence was unchallenged, distanced himself from the stamps used on the purported exhibit **P1** and doubted the signature of the former chairman appearing on the agreement. He noted that as if that was not enough, Counsel (PW5) who prepared exhibit **P1** could not confirm the authenticity of the signatures. He interpreted this as amounting to denying the whole agreement. The trial Judge concluded that for that matter the content and value of the sales agreement is nothing other than *“a sham, deliberate and vain attempt to commit forgery.”*

In my opinion the trial Magistrate analysed various loopholes in the agreement exhibit **P1**. After the analysis he concluded that the content and value of the sale agreement was a sham deliberate and vain attempt to commit forgery. I would interpret this to mean that the Magistrate concluded that the agreement was forged, in other words, suggesting fraud. This therefore would mean that the trial Magistrate based his decision on fraud which he deduced from the oral testimonies of especially DW1 Haruna Bombo, the current Chairman of the area.

In this respect, I would agree with learned Counsel for the Appellant that the learned trial Magistrate erred in law and fact in ascribing fraud to the plaintiff regarding his purchase agreement. This factor as is evident on the record was neither pleaded nor adduced to the required standards in evidence. In view of the case decisions which require fraud to be specifically pleaded and the particulars alleged to be stated on the face of the record, I would find that the trial Magistrate erred in law to make a finding of fraud when the same was not pleaded in the WSD as to give an opportunity to the Appellant/Plaintiff an opportunity to adduce evidence to rebut it or cross examine the Respondent/Defendant's witnesses. In addition, the degree of proof of fraud required is one of strict proof, but not amounting to one beyond reasonable doubt. The proof must, however, be more than a mere balance of probabilities. In the instant case this was not done. The trial Magistrate in his decision merely relied on the doubts expressed by DW1 regarding the signatures of the then LC Chairman. No expert evidence was adduced to prove the fraud. In my view the matter was not strictly proved to the required standards, let alone pleaded in the Defendant's pleadings before the trial Magistrate relied on it to make the decision that the sale agreement exhibit **P1** was a forgery.

I would therefore allow ground number 3 of the appeal for the reasons given above.

Ground 4: That the learned trial Magistrate erred in law and fact in finding that it was the duty of some of the plaintiff's witnesses to prevent the Respondents from constructing his structure on the suit land yet they were not the plaintiff's agents.

Counsel for the Appellant argued grounds 4 and 5 contending that they were related. He submitted that land is an inanimate thing and that possession thereof does not require the

possessor to place his physical body there. He argued that the fact that the vendors recognized the Appellant after he paid for it is sufficient evidence of possession entitling him to bring an action for trespass against the Respondent who in any case was not entitled to access the suit land merely because it was vacant. Counsel for the Respondent maintained on the other hand that the trial Magistrate did not at any time make a finding that the Plaintiff's witness had a duty to prevent the Respondent from constructing his structure on the suit land. He argued that the same people who witnessed the Plaintiff's agreement are neighbours and they were present when the Defendant/Respondent took possession of the premises. They did not inform their alleged brother and also testified at the trial. He argued that their conduct was inconsistent with their testimony at the trial and that this is what the trial Magistrate based his decision on.

On pages 5 and 6 of the judgment, the Magistrate analysed the evidence as follows:-

“ One should not forget the fact that PW4 Kayiwa Steven a brother to the so called vendor to the Plaintiff and a so called witness to the sale agreement was staying in the same area and witnessed the Defendant putting up his structures and also assisted him to putting out the fire that had caught the Defendant's container which he had placed on the suit land.

It beats my understanding as to why didn't PW4 confront the Defendant on the trespass if he indeed was trespassing on the land they had first sold to the Plaintiff? But (sic) looked on as the Defendant developed his structure.”

He then concluded as follows:-

“ For that matter, PW1's evidence with PW3's is not to be believed whatsoever simply because it is too erroneous and full of loopholes and gaps which points to nothing other than a lie and untrustworthiness.”

In view of the foregoing, the trial Magistrate, in my view, chose to believe the evidence of PW1 and PW3 which he analysed as being full of errors loopholes and gaps and therefore, according to him, untrustworthy and a lie. It is clear from the above extracts that the learned trial Magistrate considered all the evidence adduced on this matter. He then accepted the evidence of the Defendant's witnesses and relied on it. Having heard the opportunity to see the demeanour of witnesses in court, he was entitled to form his own judgment on whether to believe the Plaintiff's witnesses or the Defendant's. I have not had opportunity to ascertain the witnesses' demeanour as the trial court did and I see no reason to doubt the trial Magistrate's judgment on this matter. I would agree with learned Counsel for the Respondent that the trial Magistrate did not at any time make a finding that the Plaintiff's witness had a duty to prevent the Respondent from constructing his structure on the suit land. In my considered view, he took

into account the surrounding circumstances where the same people who witnessed the Plaintiff's agreement are neighbours and they were present when the Defendant/Respondent took possession of the premises. The said people did not inform their alleged brother and also testified at the trial. Their conduct was inconsistent with their testimony at the trial and that this is what the trial Magistrate based his decision on.

In my opinion therefore the trial Magistrate did not at any time make a finding that the Plaintiff's witness had a duty to prevent the Respondent from constructing his structure on the suit land. The Magistrate made a finding on which evidence was more credible and decided to base his decision on it. A close scrutiny of the evidence on record indeed reveals that the evidence adduced by the Plaintiff, especially on his sale agreement with Ben Mutumba exhibit **P1** leaves many credibility questions unanswered. The lawyer who drafted it saw only the parties but not the 12 witnesses signing and thus could not confirm the authenticity of their signatures. DW1 the current Chairman of the area doubted the signature of the former Chairman of the area as well as the area LC stamp on the agreement. This evidence was not challenged by the Plaintiff or his Counsel. On the contrary, the Defendant's evidence is more credible than that adduced by the Plaintiff, especially on the authenticity of the sale agreement exhibit **D1/2** between him and Kasozi DW2. It was properly identified by the Defendant's witnesses who included the vendor Kasozi and the LC executives of the area. These witnesses also testified, and the evidence was unchallenged, that the land in dispute had never been sold before, and that Kayongo's land allegedly bought by the Plaintiff was different.

Ground no. 4 of the appeal therefore fails.

Ground 6: That the trial court erred in finding that omission to include measurements and neighbourhoods in the Appellant's purchase agreement was fundamentally erroneous yet it is not mandatory nor a legal requirement.

On this ground, Counsel for the Appellant submitted that no reference was made to any law that provides for such a position. He contended that the sale agreement exhibit **P1** sufficiently describes the subject matter of the transaction and the parties thereto. He maintained that the omission was not fatal as to deprive the Appellant of his property since it is not a legal requirement to give detailed description to include measurements and neighbours. Counsel for the Respondent who submitted on this ground in combination with ground 3 maintained that the analysis of the trial Magistrate was based on the loopholes in the agreement, which included no indication of neighbours or size of the land.

On page 7 of his judgment, the trial Magistrate stated as follows:-

"...the purchase agreement is very much questionable and has so many loopholes so that leads me (sic) the sale agreement itself i.e....did not include size and neighbours since the

suit land is unregistered land. I find the above pertinent and essential in any agreement involving bibanjas. The Plaintiff's witness only said in their evidence at court that size was 43 feet in length.

If they knew the size why was it not included in the sale agreement, was it an afterthought? That only means that the Plaintiff did not know why they were buying because even measurements at locus were 44 feet not 43 in width as the Plaintiff would have wanted us to believe..."

With respect to the trial Magistrate there is no law that requires an agreement involving unregistered bibanjas to include size and neighbours to be an essential part of the agreement. The Supreme Court in **Godfrey Magezi & Brian Mbazira V Sudhir Ruparelia [2001 - 2005] HCB 88 held** that the object of construction of the terms of a written agreement is to discover the intention of the parties to the agreement. I would to that extent agree with learned Counsel for the Appellant that there was a description of the land sold. Clause 1 of the agreement between the Plaintiff/Appellant and Ben Mutumba (exhibit P1) described the land as "a plot of land held under customary tenure measuring 43 feet in width and extending up to ring road in length." In his oral testimony before the trial court, the Plaintiff/Appellant stated that the land is located in Buligwanga zone, Katwe in Makindye division, Ring road. He also stated in examination in chief and cross examination that the width is 43 feet and about 80 feet length. In cross examination he further stated:-

"When I was buying, I measured the land but when we were writing the agreed size was not included because on the Ring Road there was no neighbor so there was no size included in the agreement as far as length is concerned...We did not include neighbours in the agreement because the Chairman was around..."

That aside however, it is apparent from the record that the trial Magistrate addressed other factors, in addition to the above, to make his final decision. These, as is evident in the last two paragraphs of page 7 of his judgment, are namely that the current Chairman of the area DW1 Haruna Bombo distanced himself from the stamps used on the purported agreement, and also that the Counsel who prepared the agreement acknowledged he could not confirm the authenticity of the other witnesses' signatures. In his analysis, the trial Magistrate uses the words, "further to that" and "as if that is not enough" which to me indicates that he considered all those factors together. He accordingly concluded as follows:-

"To me that amounts to denying the whole agreement, for that matter the content and value of (sic) sales agreement is nothing other than a sham, deliberate vain attempt to commit forgery."

This ground of appeal therefore has merit but only in as far as the Magistrate's observation, which I find erroneous in law, that an agreement involving unregistered bibanjas has to include size and neighbours as an essential part of the agreement. However, since the trial Magistrate's findings were based on other factors mentioned above in addition to the foregoing, this ground would succeed only in part, in as far as it refers to the Magistrate's erroneous interpretation of the law regarding what a sale agreement of a kibanja should include.

There is no doubt that the trial Magistrate's highly doubted the Plaintiff/Appellant's purchase agreement exhibit **P1** and his decision was influenced by this position. In his own words, as seen from the judgment, it was "*very much questionable and has so many loopholes*". This was also reflected in the submissions of the Respondent's Counsel.

Section 66 of the Evidence Act provides that if a document is alleged to be signed or written by any person the signature or the handwriting must be proved to be of the person alleged to have so signed or written. In the instant case when DW1 Haruna Bombo, the current Chairman of the area doubted the signature of the former chairman as well as the LC stamps appearing on exhibit **P1**, no expert evidence was brought by the Plaintiff/Appellant to disprove or challenge DW1's oral testimony. Learned Counsel for the Plaintiff did not even cross examine DW1 on his doubts about the former Chairman's signature on exhibit **P1**. Instead the cross examination focused on other factors like the developments on the land, size of the plot, and how DW1 came to know about the Defendant's agreement. Counsel for the Plaintiff (PW5) who prepared exhibit **P1** could also not confirm the authenticity of the witnesses' signatures on the sale agreement. This greatly discredited the authenticity of the sale agreement exhibit **P1**.

I therefore find that the Plaintiff/Appellant failed to prove, on the balance of probabilities, that the sale agreement exhibit **P1** was an authentic sale agreement. This, in my opinion, would render it unreliable. I would in this light agree with the trial Magistrate that it is very much questionable and has so many loopholes, though he misdirected himself in law when he decided that an agreement involving unregistered bibanjas has to include size and neighbours as an essential part of the agreement. This ground of appeal therefore fails in part.

Ground 7: That the learned trial Magistrate erred in law and fact in finding that the sale to the plaintiff was void for want of letters of administration by the vendor to the Appellant yet there was unanimous agreement by the said vendor's family who all endorsed and witnessed the transaction.

On this ground, Counsel for the Appellant submitted that the reasoning of the trial Magistrate is not tenable because in the instant case the transaction was fully endorsed by the vendor's family as portrayed by the sale agreement exhibit **P1** which bears all their signatures. He argued that it was a valid transaction to all intents and purposes as between the original owners of the

land (Bruno Kayongo and family) and the purchaser/Appellant, and that it would only have been void if challenged. Counsel for the Respondent first pointed out that this ground is argumentative and narrative offending rule 81 Of the rules of this court as derived from use of words such as yet and restatement of the trial Judge's statements. He also cited the case of **National Insurance Corporation V Pelican Services Civil Appeal No. 15 of 2003** where Twinomujuni JA held that failure to comply with the rule renders the ground of appeal incompetent and liable to be struck off. He also argued however that it was not the finding of the trial court that the sale to the Plaintiff was void for want of letters of administration. He contended that the trial Magistrate in reaching his decision was mindful of the evidence adduced at the *locus* which was that Bruno Kayongo's land the Plaintiff/Appellant claims to have bought was different from the suit land. He contended that since the said evidence was unchallenged a trial court could not have come to a different conclusion other than that the suit land did not belong to the Plaintiff. He also submitted that there was no finding at all by the trial Magistrate that the sale of land to the Plaintiff was void for want of letters. He contended that void is a legal term and it did not arise at all in the judgment.

On the question of whether this ground of appeal is narrative and argumentative, one would have to address the wording in the memorandum of appeal. Twinomujuni JA in **National Insurance Corporation V Pelican Services**, supra, struck out a ground of appeal for being narrative of what the trial Judge stated in her judgment. Citing the Supreme Court decision in **Sietco V Noble Builders(U) Ltd, Civil Appeal No. 31 of 1995**, he stated as follows:-

"It does not specify the points which are alleged to have been wrongly decided. In order to comply with this rule (85(1)) it is not enough to state that the trial Judge was wrong to make a certain statement. A ground of appeal must challenge a holding, a ratio decidendi, and must specify points which were wrongly decided. Failure to comply with the rule renders the ground of appeal incompetent and liable to be struck off."

In **National Insurance Corporation V Pelican Services**, supra, the ground of appeal that was struck off simply quoted a statement of the trial Judge and stated that the Judge was wrong to hold as such. It did not indicate which way the trial Judge went wrong. Rule 85(1) of the Court of Appeal Rules under which the ground of appeal was struck off as incompetent states:-

" A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which is proposed to ask the court to make (emphasis mine).

In the instant case, ground no. 7 of the appeal challenged the trial Magistrate's "**finding that the sale to the plaintiff was void for want of letters of administration by the vendor to the**

Appellant yet there was unanimous agreement by the said vendor's family who all endorsed and witnessed the transaction. (emphasis added).

The words "***yet there was unanimous agreement by the said vendor's family who all endorsed and witnessed the transaction.***" are clearly argumentative, offending the above cited rule. For that reason alone, I would strike off this ground of appeal as incompetent.

Ground 8: That the learned trial Magistrate erred in law and fact when he engaged in conjecture speculation and fanciful theorizing that the plaintiff abandoned his land bought at an exhaustive amount, and that on that ground, had lied to court.

On this ground Counsel for the Appellant submitted that the reasoning of the Magistrate that since PW4 a resident of the same area who witnessed the construction did not prevent the Defendant from constructing on the suit land, his evidence as well as that of PW1 and PW3 should not be believed. He argued that such reasoning has no basis in logic and law as the said persons were neither agents nor employees of the Appellant and were under no obligation to confront the Respondent. He also submitted that the trial Magistrate applied terse language when commenting on the Appellant's purchase price of U.Shs. 20,000,000/= as misleading, erroneous, superfluous, among others, but did not make reference to what he considered the proper price. He contended that such a situation would have been credible if a professional valuation would have been quoted, which was not done. He maintained that this was evidence of bias on the part of the trial court.

Counsel for the Respondent argued that this ground was argumentative and narrative and prayed court to strike it off, relying on the authority of **Seitco V Noble Builders (U) Ltd**, supra, unreported. He contended without prejudice that the trial Judge properly evaluated the evidence and came to the right conclusion that the Plaintiff abandoned his land bought at an exhaustive amount. He maintained that no miscarriage of justice was occasioned to the Appellant, and that the findings of the trial Magistrate were proper in law and fact and error free.

The question of whether ground no. 8 is argumentative and narrative can only be addressed by analyzing its wording, which is as follows:-

"That the learned trial Magistrate erred in law and fact when he engaged in conjecture speculation and fanciful theorizing that the plaintiff abandoned his land bought at an exhaustive amount, and that on that ground, had lied to court."

In **Seitco V Noble Builders (U) Ltd** supra, the Supreme Court struck out some grounds of a memorandum of appeal as incompetent because they did not concisely and specifically point out the points which were allegedly wrongly decided by the trial Judge. The test in this case

therefore is whether the words in ground 8 of the memorandum of appeal do not concisely and specifically point out the points which were allegedly wrongly decided by the trial Magistrate as to be incompetent. In **National Insurance Corporation V Pelican Services**, supra, the ground of appeal that was struck off simply quoted a statement of the trial Judge and stated that the Judge was wrong to hold as such. It did not indicate which way the trial Judge went wrong. In the instant case, ground no. 8 merely restates in fancy words what the trial Magistrate stated which even had nothing to do with his eventual finding. Thus, similarly, in this case, I find that the words in the memorandum of appeal do not concisely and specifically point out the points which were allegedly wrongly decided by the trial Magistrate. They are merely argumentative or narrative restating what the trial Magistrate stated. I accordingly strike off this ground of appeal as incompetent.

In the premises, I would, except for grounds 4 and 6 (in part), dismiss the appeal and, overall, judgment is hereby entered in terms and orders set out below:-

- i) The Defendant is the lawful owner of the suit property and he was not a trespasser on the said property
- ii) The Respondents are awarded three quarters (3/4) of the costs of this appeal.

Dated at Kampala this 15th day of December 2011.

Percy Night Tuhaise

JUDGE.