THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 19 OF 2011

Arising out of Civil Suit No. 251 of 2008 Chief Magistrate's Court of Nabweru

NSUBUGA ABDALATIFF……..…….APPELLANT

VERSUS

KASIRYE AZIZ…….....…….....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGEMENT

This was an appeal from the judgment and decree of Her Worship Joy Bahinguzi Chief Magistrate Nabweru delivered on 26th April 2011.

The background to the appeal is that the appellants, who were plaintiffs in the lower court, filed civil suit no. 251 of 2008 against the respondent seeking a declaration that there was no valid transaction between him and the respondent; a declaration that the suit property was still the property of the appellant; an order for vacant possession or in the alternative, that the respondent pays the appellant for the said house at the prevalent market value; punitive damages; general damages and costs of the suit.

The appellant's case in the trial court was that in April 2006 the plaintiff entered into an arrangement with the defendant whereby the defendant would take the plaintiff's house at Ochieng LC 1 Nansana, Wakiso in exchange for a house situated 8 kilometers along Hoima road plus Uganda shillings 4,500,000/= (four million five hundred thousand). Despite numerous reminders, the defendant never gave the plaintiff the said sum of money nor has he ever provided him with the house as agreed. Instead the defendant made alterations in the agreement showing that he had paid the said sum. The defendant used the said agreement to forcefully evict the

plaintiff and his family from their house. The plaintiff reported the matter to the LC of the area who summoned the defendant but he took no heed. The plaintiff pleaded that the defendant's actions caused the plaintiff great loss, suffering and damages.

The defendant's case is that he made the agreement of 4/4/2006 but later discovered that the plaintiff had several debts. They agreed to alter the agreement. Instead of the defendant constructing a five roomed house for the plaintiff, he built a two roomed house within the agreed location in addition to paying off some of the outstanding debts for the plaintiff. The plaintiff after seeing that his debts were paid by the defendant, wanted to remain in possession of his residential home in Nansana and refused to shift to the house in Kawaala. As a result the defendant evicted him.

The learned trial Magistrate found for the defendant/respondent, dismissed the plaintiff/appellant's suit and declared that the suit house at Nansana belonged to the defendant/respondent. She reasoned that there was a valid exchange between the parties, and that the appellant should take and occupy the two roomed house the respondent had constructed for him.

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

1. ***The trial Magistrate erred in law and fact when she found that there was a lawful and valid exchange between the appellant and the respondent for the appellant's house.***
2. ***The trial Magistrate erred in law and fact when she acted with bias against the appellant in receiving and accepting and/or denying to receive evidence during the hearing of the case thereby arriving at a wrong decision.***
3. ***The trial Magistrate erred in law and fact when she found that the appellant and his wife freely and knowingly entered into the agreement of 12/4/2006 with the respondent.***
4. ***The learned Magistrate erred in law and fact when she failed to properly evaluate the evidence on the record thereby arriving at a wrong decision.***

The appellant prayed this court for the following orders:-

i) The appeal be allowed.

ii) ***The judgment and decree of the trial magistrate be reversed and judgment be entered in favour of the appellant as per the prayers in the plaint.***

iii) ***In the alternative and without prejudice to the prayers in ii) above, that this honourable court orders that the case be heard afresh before another magistrate.***

iv) ***The respondent pays the appellant the costs of this appeal and costs in the courts below.***

At the hearing of this appeal learned Counsel for the appellant informed court that the respondent, who was not in court, had been served by substituted service. The record shows that the Registrar of this court did, on application by the appellant's Counsel, order substituted service of the respondent by publishing the amended memorandum of appeal in the New Vision newspaper and to fix a copy on the notice board. On the record, attached to the affidavit of service of Edith Nalunkuma, there is a photocopy of an advertisement on page 40 of the New Vision of 2nd November 2011. This court granted Counsel for the appellant's prayer and gave time schedules within which Counsel were to file written submissions. The respondent or his Counsel did not file any written submissions on this matter. This court however proceeded to decide the suit under Order 17 rule 4 of the Civil Procedure Act.

I will first address ground number 2 of the appeal since its disposal will determine whether or not to continue with the other grounds of appeal.

Ground 2: The trial Magistrate erred in law and fact when she acted with bias against the appellant in receiving and accepting and/or denying to receive evidence during the hearing of the case thereby arriving at a wrong decision.

Counsel for the appellant referred to page 20 of the record of proceedings where the trial Magistrate rejected the tendering in of the report of the eviction by the appellant to the LC1 of Kawaala zone on grounds that it was not in the original form and was not stamped, yet she at the same trial, on page 31, accepted the tendering in of a photocopy of the agreement of 12/4/2006 which did not have the signature of the respondent reasoning that the defendant had filed the original copy with the WSD. Counsel argued that an original cannot have a signature whereas a

photocopy not. He submitted that had all the evidence been received by the trial magistrate, she would have arrived at a different conclusion.

The record of proceedings on page 20 indicates that the trial magistrate rejected the plaintiff to tender in evidence a complaint he purportedly wrote to the LC1 Chairman Kawaala zone. The record of proceedings relevant to this ground of appeal, and which reflects the plaintiff's evidence as PW1 during examination in chief, partly reads as follows:-

> *"…**We went to LC1 Chairman zone II M. Serwaniko. He was not there. We made an application and we complained to LC1 Kawala zone II. This is the complaint I filed dated 18/4/2006.***
>
> ***Counsel:** I would like to tender the complaint as exhibit No. 1*
>
> ***Counsel Richard Mugisha:** I am objecting; the document is not in original form and it was not received by LC1 Chairman Kawala zone. So it has never been received or delivered.*
>
> ***Court:** The document is rejected since there is no indication that it was received. Let the copy which the Chairman received and stamped be the one to be tendered through the said LC1."*

The record indicates that the document in question, a copy of a letter dated 18th April 2004 written by the plaintiff and addressed to the LC1 Chairman Kawaala zone ii, Kasubi parish, Lubaga Division was mentioned in paragraph 4c of the amended plaint and annexed as **"B"**, together with the same Chairman's summons to the defendant to answer the 1st plaintiff's complaint annexed as **"C".** It is also indicated on page 17 of the record of proceedings that the trial Magistrate had earlier given leave to Counsel for the plaintiff to produce the document annexture **"B"**, along with others including annexture **"C"** with no objection from the defendant's Counsel. The record of proceedings on page 20 shows that the trial Magistrate went ahead to admit the summons annexture **"C"** as a document for identification **IDP3.** This document was supposedly issued by the LC 1 Chairman after he had received the plaintiff's complaint**.** The question that arises is whether the ground given by the learned trial Magistrate for rejecting annexture **"B"** to be tendered in evidence was justifiable in the circumstances.

Section 61 of the Evidence Act defines primary evidence as the document itself produced for the inspection of court. It is also explained in the same section that where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography each is primary evidence of the contents of the rest, but where they are all copies of a common original, they are not primary evidence of the contents of the original. Section 62 of the Evidence Act defines secondary evidence as including, among other things, copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with those copies, and copies made from or compared with the original. This could be read together with section 66 of the Evidence Act which states that if a document is alleged to have been signed or to have been written wholly or in part by any person, the signature or handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his or her handwriting.

PW1 testified that the report sought to be tendered in evidence was written by himself and addressed to the LC 1 Chairman Kawaala. The said report if it was not in its original form as stated by the defendant's Counsel, could have been admitted in evidence under sections 62 and 66 of the Evidence Act on PW1 proving that it was in his handwriting. The question of whether or not it was received by the LC 1 Chairman of Kawaala, in my view, was an issue that could be brought up by the defendant in the course of discrediting the plaintiff's evidence. It was not an issue for the trial Magistrate to rule on at that stage of tendering evidence. I find that the learned trial Magistrate misdirected herself on the law when she rejected the document on grounds that it was not received or stamped by the Chairman of Kawaala. In my opinion, the trial was highly irregular and badly handled.

Order 43 rule 20 of the CPR empowers this court to determine a case finally if the evidence on record is sufficient. Order 43 rule 21 provides that if upon hearing of an appeal it shall appear to the High Court that a new trial ought to be heard, the High Court may, if it shall think fit, order that the judgement and decree shall be set aside, and that a new trial shall be had.

In the instant case though the rejected document is on record as annexture **"B"** to the amended plaint, it will prejudice the defendant's case for this court to address it as evidence without its credibility having been tested through cross examination by the defendant's Counsel who would

then have an opportunity to submit on it. In that regard, it is only fair that this case be heard afresh before another Magistrate.

I therefore allow this ground of appeal. In the interests of justice I accordingly order that the judgement and decree of the trial magistrate be set aside, and that a new trial be had before another magistrate.

The costs of this appeal are awarded to the appellant. The costs in the lower court will follow the event in the re trial.

In view of the order for a fresh trial, it is not necessary to address the other grounds of appeal.

Dated at Kampala this 29th day of November 2012.

Percy Night Tuhaise

JUDGE.