THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT JINJA

HCT-03-CV-CA-036-2009

(ARISING FROM CIVIL SUIT NO.038 OF 2004)

IGADILA PETER::APPELLANT

VERSUS

BYAKIKA CHRISTOPHER::RESPONDENT

Land Appeal

Held: *All Grounds of Appeal cannot be fully resolved, however, the Judgement and Orders of the learned Trial Magistrate Grade One are quashed and set aside. The Case File is returned to Kamuli to be placed before the current Magistrate Grade 1 Kamuli for a retrial denovo following guidelines in this Appeal.*

BEFORE: HON. JUSTICE DR. WINIFRED N NABISINDE

JUDGMENT ON APPEAL

The Appellant being dissatisfied and aggrieved by the decision/Judgement of Her Worship Agnes Nabafu Magistrate Grade One of the Chief Magistrate's Court of Kamuli, delivered on the 9th of February 2009, appealed to this Honorable Court against the whole decision/Judgement and Orders on the following grounds that the learned trial Magistrate erred both in law and fact when she: -

1. Heard and determined the case based on a Plaint which was bad in law and did not disclose a cause of action.
2. Held that the suit land is customary land of the Respondent contrary to the overwhelming evidence that it is surveyed and gazzeted land falling under the control of Urban Authority.
3. Failed to mark and enter the Appellant's exhibits on court a miscarriage of justice.
4. Entered judgment for the Respondent without first analyzing and evaluating the evidence on record thereby reaching a wrong decision.
5. Held that the Appellant is trespasser on the suit land despite the overwhelming evidence that he rightly purchased the suit land.

6. Failed to hold that the Respondent's /plaintiff's suit as filed was time barred.
7. Put the burden of compensating the Respondent if any to the Appellant despite the fact that he was a bonafide purchaser.
8. Made vague and ambiguous orders in her Judgment contrary to the law.

They prayed that:-

a) The Appeal be allowed.
b) The Judgment and Orders of the Learned Magistrate be set aside and, or quashed.
c) The Respondent / Plaintiff's suit be dismissed.
d) The Respondent pays the costs of the Appeal and in the lower court.

REPRESENTATION

When this Appeal came before me for hearing, the Appellant was represented by learned Counsel Mr. Were David Mukoche of M/S. Were Associated Advocates, while the Respondent was represented by learned Counsel Mr. Ibembe Julius appearing together with Miss. Babirye Judith of M/S. Bis Associated Advocates.

Both sides were directed by Court to file Written Submissions and they each complied.

THE BACKGROUND

The brief facts according to learned counsel for the Appellant is that the Respondent was the Plaintiff in the lower court in which he filed a claim contending that he inherited the suit land from his father Namabale Kawuuta in 1948 and had been using the same since then. That in 1995, the Defendant/Appellant came to settle on the suit land claiming that he bought it from a Doctor who was working at the Trading Centre in Bulopa wherein he brought building materials which were intercepted by the Respondent/Plaintiff.

Further, that the Plaintiff/Respondent reported the matter to the District Urban Offices and the Appellant/Defendant abandoned his plans until 2004 when he came and put iron sheets and his wife to stay in the suit land. That the Appellant/Defendant then extended his boundaries to the claimant's/ Respondent's coffee and banana plantation and dug a pit latrine.

That the matter was then reported to the LC1 who summoned the defendant in vain and later the in his Written Statement of Defence, the Defendant/Appellant
denied the claim as filed by the Respondent/Plaintiff and contended that he bought the suit land from Isabirye. That from the record of matters were taken to Police and LC II Mukwalu in 1995who did not make any decisions, but went on to demarcate the suit land without Judgment.

The Defendant contended that Bulopa Trading Centre is a planned unit under the law and that the District recommended the grant of a lease offer and that the land was free from encumbrances. The Defendant contended that the Plaint did not disclose a cause of action and prayed that the claim be dismissed with costs.

On the other hand, the background according to learned Counsel for the Respondents is that the Respondent filed **Civil Suit No.0038 of 2004** in the District land Tribunal at Kamuli and upon closure of the Land Tribunals, the suit was transferred to the Chief Magistrate's Court of Kamuli to Kamuli. The Respondents claim was based on trespass to his land by the Appellant and the Judgment was passed in his favour. The Appellant was dissatisfied with the lower court's judgment and he filed **Civil Appeal No.36 of 2009.**

From my own analysis, the Plaintiff/ Respondent's case is that he filed **Civil Suit No.0038 of 2004** claiming to have inherited the suit land from his father Namabale Kawuta in 1948 and since then has been using the same. That in 1995 the Defendant/Appellant came to settle on the suit land with the allegations that he bought it from a Doctor who was working at the trading center in Bulopa. The Defendant/Appellant since then brought construction materials but he was intercepted by the Plaintiff/ Respondent thereafter.

The Plaintiff/ Respondent went to the District Urban Officer for more clarification about the suit land and they gave him a letter to the LCIII to stop the Health Assistant from selling people's land. That since that interception, the Defendant/Appellant abandoned his plan until March 2004, he put up iron sheets for the wife to stay on the land. Thereafter, he extended his boundaries to the Plaintiff/ Respondent's coffee and banana and he dug a pit latrine. The Plaintiff/ Respondent prayed to court that:-

a) The defendant ceases construction on the suit land;
b) Pay costs of the suit;

c) The pit latrine dug in the claimant's land be put on a hold until the case is dissolved;
d) The Defendant produces the Sales Agreement which he claims was given to him by the seller.

Defendant's case

In reply, the Defendant/Appellant in his WSD contended that he bought the suit land from Issa Isabirye Mulwalu in 1995 as per **Annexure A**.

Further, that Bulopa Trading Centre is a Planning Unit under the law (Town and Country Planning Act and the District recommended a granting of the lease offer to the Defendant/Appellant and that the land was free from encumbrance as per **Annexures B & C**.

He contended that the Plaint did not disclose a cause of action and that the Plaintiff was not entitled to any reliefs sought.

THE LAW

It is now settled law that it is the duty of the Plaintiff to prove his or her case on the balance of probabilities. In relation to the onus of proof in civil matters, the burden of proof lies on he who alleges a fact and the standard is on the balance of probabilities, and not beyond reasonable doubt as in criminal case. It is provided for in **Sections 101, 102, and 104 Evidence Act** and is discharged on the balance of probabilities. The standard of proof is made if the preposition is more likely to be true than not true.

The standard of proof is satisfied if there is greater than 50% that the preposition is true and not 100%. As per Lord Denning in ***Miller v Minister of Pension [1947] ALLER 373;*** he simply described it as 'more probable than not." This means that errors, omission and irregularities that do not occasion a miscarriage of justice are too minor to prompt the appellate court to overturn a lower court decision. See ***Festo Androa & Anor vs Uganda SCCA 1/1998.***

It is also the position of the law that in the proof of cases, unless it is required by law, no particular form of evidence (documentary or oral) is required and no particular number of witnesses is required to prove a fact or evidence as per **Section 58 Evidence Act and Section 33 Evidence Act**. A fact under evidence Act means and includes: -

(i) Anything, state of thing, or relation of thing capable of being perceived by senses as per **Section 2 1(e) (i) Evidence Act**.

On the duty of the first appellant court, it is mandated to subject the proceedings and Judgment of the lower Court to fresh scrutiny and if necessary make its own findings. ***Bogere Charles vs Uganda, Criminal Appeal No. 10 of 1996,*** where Supreme Court held that "*The appellant is entitled to have the first appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate Court has a duty to rehear the case and reconsider the materials before the trial Judge. Thereafter, the first appellate Court must make its own conclusion, but bearing in mind the fact that it did not see the witnesses. If the question turns on demeanor and manner of witnesses, the first appellate Court must be guided by the trial Judge's impression.*"

This being the first appellant court, it is duty bound to evaluate evidence and arrive on its own conclusion, bearing in mind that it did not have benefit of the observing the demeanor of the witnesses. The duty of the first appellate court is to re-evaluate, assess and scrutinize the evidence on the record. This duty was well stated in ***Selle vs. Associated Motor Boat Co. [1968] E.A 123***and followed in ***Sanyu Lwanga Musoke vs. Galiwango, S.C Civ. Appeal No.48 of 1995; Banco Arabe Espanol vs. Bank of Uganda S.C.C. Appeal No.8 of 1998.***

A failure to re-evaluate the evidence of the lower court record is an error in law. The appellate court has a duty to re-evaluate the evidence as a whole and subject to a fresh scrutiny and reach its own conclusion. ***See Muwonge Peter vs Musonge Moses Musa CACA 77; Charles Bitwire vs Uganda SCCA 23/95; Kifamunte Henry vs Uganda SCCA No. 10/1997.***

It is also trite law that the appellate court can only interfere and alter the findings of the trial court in instances where misdirection to law or fact or an error by the lower court goes to the root of the matter and occasioned a miscarriage of justice. ***See Kifamunte Henry vs Uganda SCCA No. 10/1997.***

Having satisfied myself and taken due recognition of the Law and rules of evidence applicable to a first appellate court, I will now turn to the substantive matters as raised in the Memorandum of Appeal and proceed to re-evaluate the evidence on record.

RESOLUTION OF THE APPEAL

In resolving all the grounds in this Appeal, I have carefully examined the typed and certified record of proceedings and Judgment of the lower court as availed to and taken into account the submissions of both learned counsel.

<u>GROUND 1</u>: That the learned trial Magistrate erred both in law and fact when she heard and determined the case based on a Plaint which was bad in law and did not disclose a cause of action.

It was submitted by learned counsel for the Appellant that the Plaint which was filed and relied on by the Learned Trial Magistrate was incurably defective and disclose a cause of action against the Appellant/ Defendant. They relied on **Order 7 of the Civil Procedure Rules** which clearly stipulates the requirements of a proper plaint. That **Order 7 rule 1 (e), (f) and (g)** clearly stipulates that a plaint must state their facts constituting the cause of action and when it arose , the facts showing that the court has jurisdiction and the relief which the Plaintiff claims and a statement of the value of the subject t matter

Order 7 r.3 stipulates that where the subject matter is immovable property, yet Plaint shall contain description of the property sufficient to identify it

Further, that in the instant case the Plaint was incurably defective and disclosed no cause of action against the defendant as it failed to comply with the above legal provisions; and relied on the case of ***Assan and & sons (Uganda) Ltd vs East African Records Ltd (1959) EA 360-366 at page 364***, the East African Court of Appeal held that *"**Rule VII of the Civil Procedure Rules** places upon the plaintiff the obligation of pleading the facts showing that court has jurisdiction. Court further held that this is of great importance because if court has no jurisdiction, any judgment it gives is a nullity".*

They argued that in the instant case, no facts were stated to show that court has jurisdiction and it was obviously deficient in essential particulars which ought not to have been ignored by court.

Further, that the failure of the Respondent to attach a Summary of Evidence to the Plaint as requited under **O.6 r.2 of the CPR** was fatal and rendered the suit /Plaint a nullity. They relied on the case of ***Jan Muhamad Alibhai vs Haji Sulaiman Mugwaj (1999) KALR 944*,** where it was held that *"an omission to accompany pleadings with a brief summary of evidence, list of authorities, witnesses and documents is fatal because the rules were intended to eliminate the element of surprise and to set a time frame within which suits should be expeditiously disposed of".*

They concluded that the Plaint must comply with the rules so as to ensure consistency and uniformity in pleadings. That the Plaint for the Plaintiff/ Respondent failed the above test and was incurably defective hence it ought to have been rejected as the same was an outright illegality and therefore it was erroneous for the Learned Trial Magistrate to hear and determine the case on an incurably defective Plaint which caused a miscarriage of Justice.

In reply, it was submitted by learned Counsel for the Respondents that the Appellant's submissions were too general as they didn't inform the Appellant court how bad in law the Plaint was and unfortunately, the Appellant also violated the directives which would have allowed the Respondent to reply to his assertion that the Plaint was bad in law.

Further, that the second part of the first ground that the Plaint doesn't disclose a cause of action; a cause of action was defined in ***Auto Garage & Others Ltd vs Motokov (1973) E.A 514***, where it was held that *"for the Plaint to disclose a Cause Of Action it must be demonstrated that the plaintiff enjoyed a right, the right was violated and the defendant is liable".*

That according to the Plaint under paragraph 3, the Respondent clearly indicated that he inherited the suit land from his father Namabale Kawuta in 1948 and has since then been in use of the suit land.

Furthermore, that under paragraph 4, the Respondent avers that in 1994 the Appellant came to settle on the land with allegations that he had bought it. That in the Respondent's view, the paragraphs prove that the Respondent enjoyed a right to own and enjoy the land he inherited from his late father which right to hid property was violate by the Defendant/Appellant.

They concluded that the Plaint disclosed a cause of action.

In resolving this ground, I have carefully examined the pleadings of the Plaintiff/ Respondent in the case as filed before the lower court, analyzed the Applicable law and paid particular attention to the provisions of on **Order 7 of the Civil Procedure Rules** which stipulates the requirements of a proper Plaint.

Order 7, rule 1 (e), (f) and (g) stipulates that a Plaint must state their facts constituting the cause of action and when it arose, the facts showing that the court has jurisdiction and the relief which the Plaintiff claims and a statement of the value of the subject t matter. The test for determining whether or not a Plaint discloses a cause of action has been restated in numerous authorities. It was laid down to the effect that:-

1. The Plaintiff must show that he enjoyed a right;

2. The right has been violated; and

3. The defendant is liable for the violation.

See Auto Garage & Another vs Motokov (No.3) [1971] EA 514 at page 519*,* relied upon by learned counsel for the Respondents, where Spry VP ruled that "*I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that right has been violated and that the defendant is liable, then in my opinion a cause of action has been disclosed and any omission or defect may be put right by amendment".*

See also Tororo Cement Co Ltd vs Frokina International Ltd Civil Appeal No. 2/2001.

Relating the above to this case, it is clear that the Plaintiff has a right which he clearly articulated in his Statement of Claim that he believes was violated; as such, he has a cause of action.

Turning the second argument by learned counsel for the Appellant that there was failure of the Respondent to attach a Summary of Evidence to the Plaint as requited under **O.6 r.2 of the CPR** and that this was fatal and rendered the suit /Plaint a nullity, I have critically examined the Pleadings that formed the genesis of this case as filed before the lower Court. The authority of ***Jan Muhamad Alibhai vs Haji Sulaiman Mugwaj (1999) KALR 944*****,** relied upon by learned counsel for the Appellant is clearly directive and it is clear that such failure does not go the root of the case. The spirit behind this provisions as rightly stated in that authority is that it is intended to eliminate the element of surprise and to set a time frame within which suits should be expeditiously disposed of.

In view of the fact that this Appeal has had a long history and protracted history which started in the LC Courts and then the Land Tribunal where the procedures are informal and more relaxed than what is required in the Magistrates Court which applies **the Civil Procedure Act and Rules**, it goes without saying that by the time of first filing, **the Civil Procedure Act and Rules** were not applicable to it.

It is therefore my finding and decision that this should not be used against the Respondent in this case to completely extinguish their claim, but they should be given an opportunity to be heard.

This ground of Appeal FAILS.

The Appellant argued grounds 2, 3, 4 and 5 together.

Ground 2: That the learned trial magistrate erred both in law and fact when she held that the suit land is customary land of the Respondent contrary to the overwhelming evidence that it is surveyed and gazzeted land falling under the control of urban authority.

Ground 3: That the learned trial magistrate erred both in law and fact when she failed to mark and enter the Appellant's exhibits on court a miscarriage of justice.

Ground 4: That the learned trial magistrate erred both in law and fact when she entered judgment for the Respondent without first analyzing and evaluating the evidence on record thereby reaching a wrong decision.

Ground 5: That the learned trial magistrate erred both in law and fact when she held that the Appellant is a trespasser on the suit land despite the overwhelming evidence that he rightly purchased the suit land.

It was submitted by learned counsel for the Appellant the Defendant/Appellant filed a Written Statement of Defence to the suit in which he contended in paragraphs 4 and 5 that he is the owner of the suit land having purchased the same from Issa lsabirye Mukwalu in 1995 which land fall in Bulopa Trading Centre which is a planned unit under the town laws for which a lease offer was duly granted.

He attached **annextures A, B** and which is a Sale Agreement dated 18th .2. 1995 between him and lssa Isabirye, a letter from the Urban Officer of Kamuli District Local Government dated 26", 4. 2004 and a deed print for Bulopa Trading Centre where the suit land is located. All this evidence was however not considered at all by the learned trial magistrate.

That according to the Record of Appeal, the Defendant/Appellant testified as **DW1** on the 12th day of December. 2008 and in his sworn testimony, he clearly stated how he acquired the suit land and clearly told court that he had his documentary evidence which he tendered in court at the end of his evidence in chief. Indeed when the Respondent/Plaintiff cross examined him, **DW1** confirmed the documents particularly the, map which he stated he followed in developing his land. **DW1** stated that the plot shares boundaries with Haji Ali Kisano, Rose Ntufunas, a road and the plaintiff and that after the

purchase, he was taken to the local authorities who included the LC.II which heard and decided the matter in his favour that the plot ends at Plot 17. That this evidence was not discredited at all in cross-examination.

Furthermore, that the evidence of **DW1** as regards the said documents was also confirmed and corroborated by the evidence of **DW2** (Mukwalu Isabirye) who identified the sale agreement between him and the defendant/Respondent. **DW2** stated that he acquired the suit land by way of purchase from the urban office of Kamuli Local Government in 1991 and it was measuring 50ft by 100ft and that it had survey mark stones therein. He stated that he failed to develop it and sold it to a one Mufufuma and the defendant in 1993 and 1995 respectively. He stated that he handed to the defendant/Appellant the papers in regard to the same. The evidence of **DW2** was not discredited at all.

They argued that the learned Trial Magistrate erred both in law and fact when she held that the suit land is customary land of the Respondent contrary to the overwhelming evidence that it's surveyed and gazette land falling under the control of urban authority.

In reply, learned counsel for the Respondent submitted that it was the evidence of the Respondent during trial that he acquired the disputed land from his fore fathers; and noted that the survey report and /or gazette where the suit land was gazette were never presented in court. That the Appellant seems to suggest that once land is surveyed and gazetted, it immediately changes from customary to titled land.

That the Respondent disagrees with this opinion and submits that the Magistrate who was never presented with any survey report and gazette during trial rightly held that the suit land was customarily owned the by Plaintiff/Respondent who acquired it by way of inheritance from his fore fathers and in view of **section 101 of the Evidence Act**, the burden of proof was upon the appellant to adduce evidence to the effect that this was not customarily owned land by the respondent.

Further, that despite the said witnesses clearly testifying and bringing out their documentary evidence during their testimony and the same not being objected to at all by the plaintiff/Respondent, the learned magistrate did not mark and, or enter the said documents as defendant's exhibits on Court record yet they were very important in proving the defendant's/Appellant's case on how he acquired the suit land, particularly the fact that the suit land was not customary land but rather town land falling under an urban authority

a fact which was clearly proved by the deed print and the letter from the urban officer.

That the learned Magistrate did not refer to the defendant's/Appellant's documents and did not consider, evaluate and or analyze their authenticity in her judgment at all.

They submitted that had the learned magistrate properly evaluated the evidence on record, she would not have come to a conclusion that the Appellant was a trespasser on suit land. They relied on the case of ***Justine E.M. N Lutaya versus Sterling Civil Engineering (Civil Appeal No. 11 of 2002*** where Trespass was defined as *"unauthorized entry upon land";* and at page 5 paragraph 2 of the judgment, court held thus;

On the issue of Trespass, they submitted that *"Trespass to land occurs when a person makes unauthorized entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land but against the person who is in actual or constructive possession of the land."*

In addition, that in the instant case, the entry by the Appellant on the suit land was authorized under a purchase agreement between Issa Mukwalu and the Appellant. Besides, the Respondent was not in possession and or ownership of the suit land but it is rather Issa Mukwaluho had acquired the suit land from the urban authority of Kamuli Local Government way back in 1991 and owned the same with the full knowledge of the Respondent until 1995 when he sold to the Appellant. The Appellant could not therefore have been a trespasser in the suit land.

Further, that it was erroneous for the learned Magistrate to find in favour of the Respondent despite the overwhelming evidence on record; and that the failure by the learned trial magistrate to tender in and mark the Appellant's documents proving how he acquired the suit land and whether the same fall under an Urban Authority was erroneous and occasioned a miscarriage of justice to his case; and prayed that grounds 2, 3, 4 and 5 succeed.

In reply, learned counsel for the Respondents replied to the grounds separately as follows;-

In respect of Ground Two, they submitted that it was the evidence of the Respondent during trial that he acquired the disputed land from his fore fathers and wished to note that the survey report and /or gazette where the

suit land was gazetted. That the Appellant seems to suggest that once land is surveyed and gazetted, it immediately changes from customary to titled land. That the Respondent disagreed with this opinion and submitted that the Magistrate who never presented with any survey report and gazette during trial rightly held that the suit land was customarily owned by the Plaintiff / Respondent who acquired it by way of inheritance from his fore fathers and in view of **section 101 of the Evidence Act**, the burden of proof was upon the Appellant to adduce evidence to the effect that this was not customarily owned land by the Respondent.

In respect of Ground Three, they submitted that it's an established principle of law that the language of court is English. That **Section 88 of the Civil Procedure Act Cap 71** provides that *"the language of all Courts shall be English and evidence in all Courts shall be in English".*

That the two purchase agreements in the record of appeal are in Luganda and as such without any inadmissible without their English translations; and the Trial Magistrate could not enter were never presented in court.They relied on the case of ***Jeninah Nanyonga & 2 Ors vs Amos Kyangungu Civil Appeal No. 0041 OF 2008*** Hon. Justice Lawrence Gidudu while resolving the ground of appeal on documents that were admitted although then same were in vernacular without any English translation attached had this to say; "*the appellant as they were not would, therefore, hold that the finding of the learned trial Magistrate that the respondents' agreements had evidential value to tilt the balance in favour of the respondent as being unjustified and erroneous since the said documents were useless in the eyes of the law governing proceedings before the Courts in Uganda. The no objection to their tendering by opposite Counsel did not clear them of that illegality.*"

Secondly, that when you look at the end of the Appellants evidence in chief, he states ***"my documentary evidence is here, I tender it in evidence. It will bring it"*** **END**. That what is important to note is that the appellant did not tell Court what documents they were, it seems the Trial Magistrate required something in their view, most likely the interpretation from the Appellant for his documentary evidence since Court could not have admitted vernacular documents in direct contravention of **section 88 of the Civil Procedure Act**.

Further, that at the last page of the record of proceedings, while the Appellant states *"I close my case pending tendering in of document evidence.*"

They argued that this means that by the time the appellant closed his case, he had not tendered in his documentary evidence; and concluded that therefore there was nothing to mark as exhibit of the appellant and the Respondent submitted that its trite law that courts do not look/search for evidence but evidence to prove a party's case must be brought to court by the said party.

That in this case where a party willingly closed its case without adducing his evidence and in the absence of any record showing that the appellant sought court's leave to tender in his evidence after closure of his case and the Trial Magistrate refused, this Honorable Court cannot fault the Trial Magistrate. They prayed that this Honourable Court; and to make a finding that this ground of Appeal fails.

In respect of Grounds Four & Eight, learned Counsel for the Respondent objected to these two grounds of appeal as they are too general and offend the provisions of **Order 43 rules (1) and (2) of The Civil Procedure Rules** which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. They are too general and do not disclose and/or point out which particular evidence the magistrate failed to analyze and evaluate and/or how vague the Orders given by the Trial Magistrate were Vague.

Alternatively, they submitted that in reaching her conclusion, the Learned Trial Magistrate properly evaluated the evidence as clearly indicated in her judgment and that the Orders given were not in any way vague; and pray that Court be pleased to strike out these two grounds of appeal.

Turning to Ground Five, they replied that the Trial Magistrate rightly pointed out that dispute between the parties when she stated that "*the dispute rotates around occupying rights of the parties. Because it appears that the plaintiff was a customary/Kibanja holder of the disputed land at the time the appellant entered thereon, court finds in favor of the respondent.*"

That this is because the law does not allow over stepping of such occupants and in any way they are entitled to compensation which evidently was not granted to the Plaintiff.

In addition, that in view of the above, that the Respondent submits that the Trial Magistrate rightly decided in favor of the Plaintiff /Respondent after scrutinizing the evidence on record which related among others to the fact that the

person who sold to the Appellant rightly told the appellant to compensate the respondent but the appellant did not do so.

Further, that it was the evidence of the Respondent during trial that the Appellant when he came on the suit land, he cut down the coffee plantations belonging to the Respondent which act the Trial Magistrate rightly found to be unlawful.

In order to resolve these three grounds, I will first summarize the evidence of both sides as led before the trial Court. The following are the issues that were agreed upon to be resolved in this matter before the lower court:-

1. Whether the Plaintiffs has a cause of action against the Defendant
2. Whether the Defendant has a substantive defence to the Plaintiff's claim?
3. What remedies are available to the parties if any

The Plaintiff's 1st witness was **Byakika Christopher, a male adult aged 78 years of Bulopa, Kamuli District *(herein after referred to as PW1).*** Her evidence in chief was that the Defendant was known to him because of this case. His claim against the Respondent is for unlawful destruction of boundary between Trading Centre and village and destruction of his coffee plantain and digging there a pit latrine since 2000. That when this happened, he reported the matter to LCs, but nothing was done so he sued the Appellant before the Land Tribunal which served with Summons but he disappeared. That when the Tribunal closed he came back and started constructed on his land further.

That he reported the matter to LC which forwarded him to Court and he acquired the disputed land from his fore fathers in 1948; his father called NAMALE passed it over to him and he shares boundary with the road to Namwendwa, night, swamp of Bulopa and Makoka, Trading Centre.

That he would like court to give him vacant possession of the portion the defendant is grabbing forcefully plus costs of this suit plus damages of his destroyed crops and what he has earned from there for he is continuously utilizing his land despite the suit before court.

During Cross-examination, **PW1** answered that when the Appellant encroached on his land, he reported to Police and LCs but was not assisted.

That he suspected that the Appellant had bribed them, he left the boundary marks cut at LC level. He did not know if LC Chairman can bring the cut *birowa* (boundary mark) to court; the boundary has been clear but he crossed it and started constructing in the Plaintiff's land in the year 2000 and he had disappeared for 3 years since 2004. That when the Plaintiff sued him, before the tribunal when he came back he reinstated the case against the Defendant.

The Plaintiff's 2nd witness was **Mabangu Sosipateri, a female adult aged 83, a peasant, years a resident of *Bulopa, Kamuli District (herein after referred to as PW2).*** In her evidence in chief, she testified that the Plaintiff is her village mate. That the Defendant is also a resident of their area in Nababire and she knew the reason as to why the two are before court; it's over the land dispute.

That the defendant unlawfully entered plaintiff's land and constructed therein, destroyed some plantains on the plaintiff's land and so the matter was reported to LCI Busobya. LCI summoned the defendant who came, but did not bring better evidence to clarify his ownership. That they warned him to stop, but he went a head while they were away and when she came back, they took him to Police but LC III failed the case and he encouraged them to reconcile.

That when time reached the Bataka clarified that the plaintiff's land was not part of the Trading Centre, but the Defendant went ahead so she forwarded him to Land Tribunal. The Defendant was summoned, but he disappeared to Bunya and when the Tribunal closed, the Defendant came back and destroyed more of the Plaintiff's coffee and bananas; that's when the Plaintiff sued the Defendant and he confirms the above.

During Cross-examination, PW2 answered that she has been LC for 14 years. That the Respondent started constructing in the year 2000, LC II got involved and the Defendant had created an impression that LCs were not understanding each other on boundary.

The Plaintiff closed his case.

The Defence case opened with **Igadila Peter, a male adult aged 47 years, a peasant of Nagamuli Village, Bulopa Sub-County, Kamuli District *(herein after referred to as DW1).*** He confirmed that he understood the claim against him, however the claim is false because on

15/5/1995, Isa Isabirye Mukwalu sold to him the land in dispute. That it was a plot, 25ft to 100ft long Namwendwa Road, at 260,000/= under a Sale Agreement written by himself. The plot shares boundary with Haji Ali Kisano, Rose Ntufuna, Road and the plaintiff; and after this, they went to the local authorities and they confirmed their transaction.

That he paid the money for the land and he showed him a plan for the Trading Centre in regard to the plot, then started using the plot. There was a foundation in it and he started constructing completed construction and entered his house with his wife. That when he was digging the latrine the plaintiff came with LC I Chairman and stopped him from constructing claiming that portion; he tried to explain how the Urban Centre had measured and planned the place, but they went and reported to Police who referred them to reconcile within their village. That this was defeated (LC D. LC II intervened decided in his favour that the town ends at plot 17.

That the disputed land with survey stones, he went ahead with construction and was surprised when the Plaintiff sued him; and he prayed that the matter be dismissed with costs.

During cross-examination, DW1 answered that he has never bought any coffee plants. That the plot he bought had no plantain it, he did not run away after he was sued before the Tribunal and he did not run away for 3 years. That at that time the Plaintiff sued him, he was away; he came but found when the Respondent was absenting himself. That he did not cross to his land, but rather he developed where he had been sold. That he did not know when the Map was made, followed it to develop his plot and that the Map and agreement reveal the same thing, so he followed both.

Further, that he had documents of LC II Court about the case. The town ended on the transformer of electricity. That he didn't know when the transformer was installed and he didn’t know if Indians cultivated coffee and did not know the 50ft you are talking about, he bought 25ft and his neighbors can confirm that.

The second Defence witness was **Mukwalu Isa Isabirye, 52 years old, Nurse, Muslim-sworn, a resident of Nagamuli- Bulopa, Kamuli**. He testified that the plaintiff and defendant are known to him as residents of his village and he knew why they are in Court over a land dispute. That he knows the land in dispute and he was the original owner and sold it to the defendant under Sale Agreement and that he wrote it shown document (identifies it).

That he bought the land from the Urban Office of Kamuli Local Government in 1991. Its 50fts width by 100ft length at 40,000/=, it shares boundary with land reserve of UEB near a transformer, plot NO. 17 Ali Kisamu, Road, the banana plantain of the plaintiff.

Further, that he had been there recently and it was not true that the defendant entered the land of plaintiff. That the plot he bought was empty with some banana plants of the Plaintiff. There are survey stones in the land; he failed to develop it so he sold it to the Defendant and one Mufufuma. That in 1995, he sold to the Plaintiff and earlier in 1993, had sold to late Mufufuma and he sold to defendant 270,000/= and handed him the papers. To the late Mufufuma sold at 180,000/=.

That the Defendant took long to develop the plot, but never the less he did, he reached the time of construction of a latrine; and **DW2** advised him to compensate the Plaintiff in some amount before constructing a pit latrine but he did not and when he constructed a pit latrine, the Plaintiff complained yet the town had been gazzetted some time back. That the plot had been surveyed before sold to him, so the Plaintiff has no right over the portion he claims.

During Cross-Examination, he answered that when he finds a boundary mark it means that's a land mark. That he is the one who commanded people to cut down boundary marks and the time he was in the plot had no problem with the Plaintiff and his land did not include his plot in dispute.

That when the land was surveyed it was found that the Plot extends to the Plaintiff's land so that is why he asked the Defendant to compensate the extra portion after survey. That when they surveyed the plot in question, they extended the Plaintiff's land there were survey stones.

The third Defence witness was **Haji Isabirye Amisi 70 years old, a resident of Bulopa, Kamuli *(hereinafter referred to as DW3)*.** He knew the parties before court as his village mates and they are in court over a land dispute. That the land in dispute is of Urban Authority, it was surveyed and mark stones were near transformer, near graves and was given to **DWII**.

That he also acquired a plot under similar circumstances and marking stones are also in his in line with those of the plot in dispute. That in 1991**, DWII** got the plot and sold it off in 1995 and did not know at how much and did not witness the transaction physically.

That the Defendant bought the whole plot of **DWII** of 50ft in width by 100ft in length, the defendant took possession and developed it, but when he wanted to construct the latrine, the Plaintiff resisted saying the latrine was being constructed in his land and he did not don't know why.

During cross examination, he answered that when you find a fence with boundary marks it means a land mark and that he was not there when stones were marked. That the survey or identified the stone marks in question. That he knew that the town passed the transformer as a leader. That Part of the Plaintiff's coffee plantain was in urban area behind the house of the Defendant.

The fourth Defence witness **Rose Nfufuma, 56 years old, peasant**, **a resident of Makoka *(hereinafter referred to as DW4)*.** She knew all parties before court as residents of Bulopa and that he has land at Bulopa and shares a boundary with the two and confirmed to that he owns a plot in Bulopa which he got it in 1993 from Budaza and **DWII** at 180,000/=.

That her husband bought it; and identified the purchase agreement (photocopy admitted for identification). That she did not take possession and have not developed it. The land was 25ft, she has no problem with any of her neighbors.

During cross examination, she answered that she shares boundary with the Plaintiff, transformer and the Defendant. That she got the Map from Urban Authority which rectified boundary and found coffee plants in part of the plot of 50ft in width which was divided between her and the Defendant and she closed her case pending tendering in of her documentary evidence.

During *Locus in Quo* visited on 11/12/2008 in the presence of both parties, the Plaintiff pointed out the Boundary between the town and Busobya Zone cut down by Defendant and constructed upon a house and a latrine. He added that his coffee plantain, oranges were cut down, some remained which he want to show court. (Old coffee plants seen in the vicinity).

The Defendant also showed his Map and **DWII** who sold to him which shows what is in the disputed land boundary of LCs by local authority where 100ft reach as per Town authority measurements (seen); where mark stones are (point seen but no marks stones seen). He showed court the disputed land as shown by defendant and intimated to court that the Plaintiff must have been compensated, but was not sure.

Having summarized all the evidence as led before the trial Court, I have the carefully analyzed all the ground in this Appeal and also examined the Judgement and Orders made therein as availed to me. I have arrived at the following uncontested evidence:-

Original Owner of the suit land

As per the agreed facts in this case, and the evidence led by both parties, it is undisputed that the Defendant bought the land from Mukwalu Isa Isabirye ,a plot, 25ft to 100ft long Namwendwa Road, at 260,000/= under a Sale Agreement written by himself. The plot shares boundary with Haji Ali Kisano, Rose Ntufuna, Road and the Plaintiff.

Secondly, it is clear that the trial court relied on documents that were not reduced into the language of Court and not properly admitted as exhibits by Court. The dispute is about the boundary between the two plots of the parties and the pit latrine constructed by the Respondent in this case allegedly on the Appellants side of the land.

Section 88 of the Civil Procedure Act Cap 71 (as amended) relied upon by learned counsel for the Respondent provides that *"the language of all Courts shall be English and evidence in all Courts shall be in English".*

The record of appeal as availed to me proves that the two purchase agreements relied upon by the Appellant in this case are in Luganda language and there were no efforts to provide English translations of the same.

As such without their English translations, they were inadmissible and I agree that this as rightly submitted upon by learned counsel for the Respondent was put to the test in the case of ***Jeninah Nanyonga & 2 Ors vs Amos Kyangungu Civil Appeal No. 0041 OF 2008*** by Hon, Justice Lawrence Gidudu while resolving the ground of appeal on documents that were admitted although then same were in vernacular without any English translation.

There are numinous decisions of the Courts of record to the same effect and I entirely agree with them and I see no reason to depart from such established procedure.

Secondly, it is also clear from the way the said Sale Agreements were presented before court that they were not being properly exhibited in court.

This offends clearly laid down judicial practice and any Judgment entered into based on erroneously admitted evidence cannot stand.

It is therefore clear that the Appellant's vernacular documents in this case were never admitted in evidence, as such, they cannot be relied upon to make a decision. The trial Magistrate did not mark and, or enter the said documents as defendant's exhibits on Court record yet they were very important in proving the defendant's/Appellant's case on how he acquired the suit land, particularly the fact that the suit land was not customary land, but rather town land falling under an urban authority a fact which was clearly proved by the deed print and the letter from the Urban Officer.

Since the said the agreement entered into between the Appellant and, Mukwalu Isa Isabirye are central to resolving the dispute between the parties and qualifies as documentary evidence in **Sections 61 and 63 of the Evidence Act, Cap 6** the contents of a document as provided under **Sections 61,62,63 and 64 of the Evidence Act, Cap 6** and it is clear that the learned trial Magistrate did not refer to the defendant's/ Appellant's documents and did not consider, evaluate and or analyze their authenticity in her judgment at all.

It must be made clear that it is parties who must make their cases, and not Court to descend into the arena and consider evidence that is not properly put before them, but in a case of unrepresented litigants, the trial Magistrate is enjoined to guide the parties to follow the proper procedure.

Thirdly, even if these documents had been properly admitted which was not the case here, the Respondent/ Plaintiff's claim is based from 1948 and this Court takes Judicial Notice that land in that area was still customarily owned. The evidence shows that it is the Local Authorities that gave away this land to **DW2** who claims to have bought it in 1995 and then sold it to the Appellant.

The evidence of the Respondent seems to suggest that the Urban Town Council allegedly plotted this land and sold it to **DW2** who also sold it to the Respondent thereafter.
The question that begs an answer is was clearly is **"Whether this land vacant, unoccupied and with no claimant in 1995 to give the Local Authority powers to give it away?**

I have critically analyzed the evidence of both sides and since it is the **1995 Constitution of the Republic of Uganda**, which allowed local authorities to dispose off hitherto vacant land, it is my finding that this matter was not properly handled by the learned trial Magistrate.

I have also found that the maps, plans and diagrams from Kamuli District Local Government, drawn to scale which were capable of showing the true boundary of the disputed land, created to support the Urban Authority relied upon by the Appellant were also not properly exhibited before court). I also wish to emphasize that these documents per se even if they had been properly exhibited cannot be relied upon as conclusive evidence of excluding claims of persons who had held land held customarily that was gazette to fall within the Town/ Urban Council or make such land free to be disposed of by the Local Authority as a result.

Instead, the testimonies of trustworthy and knowledgeable elders about land matters in the area and maps adduced about the original boundaries of claimants become an important source in a dispute of this nature between the two parties. This must be supported by visual identification during the *locus in quo* visit so that each side is able to identify the boundaries of their respective claims using natural well known accepted features such as trees or buildings and other prominent objects evidence of human activities on the land such as footpaths that have existed thereon for a considerable period of time, particularly those that existed before the dispute.

Accordingly, my findings and decision are that the learned Trial Magistrate erred both in law and fact when she admitted the documents in question in the form that she did; however, this cannot be faulted on any of the litigants in this case who were clearly unrepresented at the time, but lay at the door of Court. As such,

I also wish to go record that where there were unrepresented litigants in the lower Court; as such, the trial court owed them a duty to assist them present their respective evidence in a manner that is acceptable without necessarily descending into the arena. This in my view was not done in this case and it is not surprising that the resultant judgment is faulty.

I therefore rely on **Section 80 of the Civil Procedure Act** expounds on the powers of the appellate Court and reads as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-

a) to determine the case finally;
b) to remand a case;
c) to frame issues and refer them for trial;
d) to take additional evidence or to require such evidence to be taken;
e) to order a new trial.

(2) subject to subsection (1), the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted in it."

In that regard my decision in view of the above is that no meaningful analysis and resolution of the grounds in this Appeal will resolve this case. This matter requires to be tried *denovo* before the Magistrate Grade 1 Court of Kamuli so that any documents that the parties are presenting are properly translated and exhibited in Court. This will enable them to be properly analyzed and relied upon in a final Judgement of court.

Finally, it is now well-established law that costs generally follow the event as per **S. 27 (2) of the Civil Procedure Act Cap 71.** It provides that *subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid.*
See ***Francis Butagira vs. Deborah Mukasa Civil Appeal No. 6 of 1989*** *(SC) and* ***Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35****.* Indeed, in the case of ***Sutherland vs. Canada (Attorney General) 2008 BCCA 27*** it was held that courts should not depart from this rule except in special circumstances, as a successful litigant has a 'reasonable expectation' of obtaining an order for costs.

In this appeal, it is noted that this matter is not yet finalized. The costs shall therefore abide in the outcome of the decision of the retrial *denovo.*

Judgment is entered in the following terms.

1. All the Grounds of the Appeal cannot be fully resolved because of the checkered history of this case which started in LC Courts and then Land Tribunal before it ended in the Magistrates Court at Kamuli.

2. It is directed that the suit be returned to the Magistrate Grade 1 Court of Kamuli and is placed before the current Magistrate Grade 1 for a retrial *denovo.*
3. **Alternatively,** given the time this matter has spent in court and in view of the nature of dispute involved, the parties are encouraged to explore Alternative Mediation before a qualified Court annexed Mediator.
4. Costs shall abide in the outcome of the retrial.

I SO ORDER

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
28/03/2024

This Judgement shall be delivered by the Magistrate Grade 1 attached to the chambers of the Resident Judge of the High Court Jinja who shall also explain the right of appeal against this Judgement to the Court of Appeal of Uganda.

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JUSTICE DR. WINIFRED N NABISINDE
JUDGE
28/03/2024