

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – LD – CA – 044 OF 2015

(Arising from FPT – 00 – CV – CS – LD – 056 of 2013)

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MWEBAZE BRIAN.....APPELLANT

VERSUS

MUTUYE DAN.....RESPONDENT

10 **BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE**

Judgment

The Appellant, Mwebaze Brian appealed to this Court against the judgment and orders of His Worship Ngamije Mbale Faisal, Magistrate Grade I delivered on 19/11/2015. The Respondent is Mutuye Dan.

15 **Brief back ground facts:**

The Appellant filed Civil Suit No. 056 of 2013 against the Respondent seeking for; a declaration that he is the lawful owner of the suit land, a declaration that the Defendant is a trespasser on the suit land, general damages, eviction and vacant possession order, permanent injunction and costs of the suit.

20 The Appellant having filed the above civil suit, the Respondent on the other hand filed a counter claim, whose causes of action were false arrest and malicious prosecution for which the Respondent was praying for transport for sureties and witnesses during a criminal trial in which the Appellant was a complainant, general and special damages.

At the hearing of this matter, it was the Plaintiff/Appellant’s case that the Plaintiff acquired
25 the suit land from his late father a one Mwesige Frank who had purchased the same from Evans Maniragaba (PW1) and Batalingaya John. It was also the Respondent’s case that the

Respondent applied for and was allocated the suit land by the Uganda Railway cooperation on recommendation of Kamwenge Town Council.

According to the Memorandum of appeal, the trial Magistrate dismissed the Respondent's counter claim and decided in favour of the Respondent in respect of the main suit.

5 Grounds of appeal:

1. That the learned trial Magistrate Grade one misdirected himself when he held that Kamwenge Town Council did not have authority to allocate the suit land to John Balingaya which issue was not before Court.
2. That the learned trial Magistrate Grade one misdirected himself when he dismissed
10 the Plaintiff's case and declared that the Defendant is the equitable owner of the suit land.
3. That the learned trial Magistrate misdirected himself when he awarded damages of Shs. 4,500,000/= (four million five hundred thousand shillings) to the Defendant which were not pleaded and proved.
- 15 4. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and came to a wrong decision.
5. That the learned trial Magistrate misdirected himself when he failed/refused to award costs for the counter claim to the Plaintiff/Appellant.

Representation:

20 M/s Ahabwe James & Co. Advocates represented the Appellant and M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates appeared for the Respondent. By consent both parties filed written submissions.

Needless to emphasise, the duty of this Court as a first Appellate Court is to re-hear the case on appeal by reconsidering all the material evidence before the trial Court and come to its
25 own conclusions. This Court has nevertheless to give allowance to the fact that it did not watch the demeanour of the witnesses as they testified in the lower Court. The cases on point are **Father Nasensio Begumisa & 3 Others versus Eric Tibesaga, S.C.C.A No. 17 of 2002** and **Kifamunte Henry versus Uganda, S.C.C.A No. 10 of 1997**.

Ground 1:

That the learned trial Magistrate Grade one misdirected himself when he held that Kamwenge Town Council did not have authority to allocate the suit land to John Batalingaya which issue was not before Court.

5 Counsel for the Appellant submitted that the Appellant proved his claim of ownership to the suit land by presenting three witnesses, Evans Maniragaba as PW1, Appellant as PW2 and Hannington Mwijuka as PW3.

10 Counsel for the Appellant made reference to the Appellant's evidence in the lower Court to the effect his late father the late Mwesige Frank purchased the suit land. The Appellant's said evidence was that the late Mwesige Frank purchased on 3/7/2002 from Evans Maniragaba (PW1) and John Batalingaya. They sold jointly and an agreement to that effect was admitted in evidence as PE1.

15 Further submissions were that the Appellant evidence was supported by PW3, Mwijuke Hannington, an uncle to the Appellant. It was submitted that PW3 held the land as a caretaker for the benefit of the Appellant and other children of the late Mwesige Frank. And that PW3 testified that the Respondent trespassed on the suit land in 2011. Counsel for the Respondent on the other hand submitted that the Respondent added that he applied for the said disputed plot from Kamwenge Town Council on 2nd May 2011 measuring 50 x 40 metres. The Respondent's application was tendered and admitted as DE1. The Respondent further stated that he was referred to Uganda Railway Corporation and when he reached there, he was 20 informed that the land was not falling within the railway level crossing of Ibanda-Fort Portal road. A letter from Uganda Railway Corporation was tendered in Court and admitted as DE2. The Respondent approached Kamwenge Town Council which allocated him the suit plot to build thereon a slant building. The Respondent went ahead to make building plans which were approved by Kamwenge Town Council on 25th July 2011. Receipts of payment dated 25 25th July 2011 were tendered and admitted as DE3. The building plans were also put on Court record as DID-1. The Respondent stated that the plot of John Batalingaya from whom the Appellant's father bought the suit land is different from the suit land.

30 Counsel for the Respondent reiterated that the plot in dispute was formerly used by Uganda Railways Corporation and Kamwenge Town Council, and John Batalingaya from whom Appellant's father bought. Reference was also made to the evidence of DW2, Byamukama Geoffrey. DW2's testimony was that Respondent (Defendant) was allocated land by Kamwenge Town Council.

Counsel for the Respondent concluded that since the land belonged to Kamwenge Town Council which had the right of sale or allocation to willing developers like the Defendant (now Respondent).

I have carefully considered the submissions on both sides and studied the record of proceedings. I have also read and internalised the judgment of the lower Court. The finding of this Court is that the testimony of PW1, Evarce Manilagaba, a Councillor with Kamwenge Town Council was very instructive. He testified that himself and one John Batalingaya sold the disputed land to Frank Mwesigye, the father of the Appellant and an agreement was made dated 3/7/2002. The sales agreement was tendered in PE1. PW1 was emphatic that at the time of sale, there was a foundation of a building he was putting up and that after the death of Mwesige, one Mwesuka, his brother levelled the same.

PW1 denied the Defendant's/Respondent's ownership over the disputed land. PW1 was also emphatic that the suit land has never belonged to Uganda Railways Corporation. What is intriguing about the Respondent's case is that on page 7 of the record of the lower Court, PW1 stated:-

“At one time, before the Defendant laid his claim on the suit land came to me wondering on to whom the suit land belonged. I told him I had sold it to Frank Mwesigye. He went ahead and asked if I could help him to acquire it (i.e the suit land). I told him I could not because then it belonged to Frank Mweisgye and that an agreement had been made. I advised him to approach the Frank Mwesigye's family if he wanted to acquire it. I am not sure if he ever went there. Currently there is a foundation for the house that the Defendant is attempting to put up.”

This Court has been left wondering why the Defendant/Respondent made clandestine approach to get the same land from PW1, and when rejected the laid other claims of allocation from Kamwenge Town Council. I also found PW1 as a consistent and straight forward because even at the locus in quo on page 22 of the record, he maintained that he sold the disputed land to the late Mwesigye Frank together with a fellow businessman. He described the location as neighbouring Birungi in the West, South-Katama, North- park road and East- Mbarara road.

PW1 concluded that the sale agreement to the late Frank was concluded in the chambers of Advocate Musana. The evidence of PW1 was corroborated in all material particulars and

facts by that of PW3, Mwisuke Hannington, a brother of late Frank Mwesigye. PW3 confirmed that the plot in dispute, in Kamwenge Town Council and approximately 50 x 100 boarders Birungi, Mbarara-Ibanda road and park road. PW3 added that after the death of Frank Mwesigye in 2003, he continued clearing the plot in dispute. What is interesting is that
5 on page 14 of the proceedings, PW3 testified that in 2011, the Defendant approached him about the same plot. PW3 categorically told him that the plot belonged to the Estate of late Frank Mwesigye. The Defendant did not stop there but approached PW3 second time with a view of buying the said plot but PW3, Mwisuke Hannington rebuked him that the plot belongs to the children of the deceased.

10 Again, this Court has taken note of the clandestine and underground methods of the Defendant/ Respondent to acquire the plot in dispute before the matter went to Court. I also agree with the submissions of Counsel for the Appellant that there was no consistency in the evidence of the Respondent as to how he acquired the plot in dispute.

Counsel for the Appellant drew Court's attention to the written statement of Defence of the
15 Defendant (the Respondent) filed in the lower Court on **6/8/2013**. Under paragraph 3(1) thereof, the Respondent claimed that he lawfully applied for and obtained the suit land from Kamwenge Town Council on 3/3/2011. Then two years later on **6/2/2015**, the Respondent filed an amended written statement of Defence. Under paragraph 3(1), the Respondent changed and claimed he acquired the suit land from Uganda Railways Corporation through
20 Kamwenge Town Council by a letter dated 3/3/2011. And while giving his evidence as DW1 on page 16 of the proceedings, the Respondent changed that he acquired the plot in dispute from Kamwenge Town Council on 2/3/2011. In my view, a person who changes positions like a chameleon changing colours is not a reliable and truthful witness.

Furthermore, the Respondent was relying on letters exhibited as **DEI** and **DEII**. In **DE1**, the
25 Respondent wrote to the managing Director of Uganda Railways Corporation requesting for the plot in dispute. **DEII** is a reply clearly stating that the suit plot/land does not belong to Uganda Railways Corporation. Uganda Railways Corporation could not give the Respondent what they did not own. In any case, those letters were written in 2011, 9 years after the Appellant's father had bought the same in 2002.

30 So the equitable doctrine of first in time first served is in favour of the Appellant whose father bought in 2002, as opposed to the Respondent who allegedly applied for the same in 2011. In his judgment on page 5, the trial Magistrate held that the endorsement of the

Respondent's letter (DE1) by the Town Clerk of Kamwenge implied that he had certified himself that the **suit plot did not belong to any person but to Uganda Railways Corporation**. That was contrary to exhibit DEII where Uganda Railways Corporation's reply dated 8/7/2011 and signed by Bwayo Patrick, stated that the plot does not fall within the
5 Railway reserve.

The trial Magistrate did not properly evaluate the evidence in that regard and erroneously decided in favour of the Respondent. Secondly, the trial Magistrate greatly erred when he decided in favour of the Respondent on the basis that Batingaya John did not tell the Court in criminal in FPT – 06 – CR – CO – 290 of 2011 how he had acquired the plot which he sold
10 to the Appellant.

This is where I disagree with the submissions of Counsel for the Respondent that the equitable interest of the Respondent takes priority prior to that of John Batingaya. The case in Court was between **Brian Mwebaze and Mutuye Dan, and not between John Batingaya and Mutuye Dan**. It was erroneous therefore for the trial Magistrate to have
15 ruled on an issue relating to John Batingaya who was not a party to the case in question. In the premises, I do hereby find and hold that ground 1 of appeal succeeds.

Ground 2:

That the learned trial Magistrate Grade one misdirected himself when he dismissed the Plaintiff's case and declared that the Defendant s the equitable owner of the suit land.

20 I have already found and held that the Respondent was unreliable witness who changed positions as to how and from whom he acquired the disputed land, whether Kamwenge Town Council or Uganda Railways Corporation. This was under ground1.

I have also talked about the clandestine and under hand methods of the Respondents when he approached both PW1 and PW3 to sell him the land in question and they refused. The trial
25 Magistrate's declaration of the Respondent as an equitable owner of the suit land was therefore erroneous as the Respondent did not go to Court with cleans hands.

Secondly, and as correctly submitted by Counsel for the Appellant, **an equitable interest** in land cannot be acquired from one who does not have the interest. This is brought out in the testimony of DW11, Byamukama Geoffrey, the LCIII Chairperson Kamwenge Town

Council. During cross-examination by Counsel for the Appellant on pages 19 and 20 of the LCIII Chairperson had this to say:-

“**The plot in issue was allocated to the defendant in 2011. The Application is dated 02/3/2011. We were not sure whether the plot in issue belonged to town Council or not because of the demarcation...**”

That is where this Court doubts the version that of the Respondent was allocated by Kamwenge Town Council because the Council could not allocate what they were not sure.

In any case, by that time of 02/3/2011 when the Defendant/Respondent allegedly applied, the Appellant’s father had bought it in 2002 and that sale agreement was admitted in evidence as **PE1**. The same was not challenged by the Respondent and his witnesses. In equity, the Appellant’s interest therefore takes precedence over that of the Respondent who applied much later.

The trial Magistrate therefore greatly erred when he decided in favour of the Respondent. The other factor is that there were even no minutes from Kamwenge Town Council under which the Respondent was alleged allocated the plot in issue. An urban authority cannot make allocations of land without sitting and having minutes to that effect.

Sections 59(1) (a) of the Land Act cited by the trial Magistrate in his judgment was not applicable. Counsel for the Respondent submitted that John Batalingaya never testified to clarify where and when he acquired the suit land from Kamwenge Town Council before selling to Appellant’s father. With due respect, I disagree with that submission as the trial was not between John Batalingaya and Respondent. The trial was between the Respondent and the Appellant whose father, Mwesigye Frank was **a bona fide purchaser for value**.

In Omar Salim Mukasa versus Muhammed Ojara and Another, [2006] Vol. 1 at page 114, the Court of Appeal held that a purchaser is a bonafide purchaser for value without notice when he/she is not a party to any fraud. In this case, the Respondent did not raise any issue of fraud either on the part of the Appellant or his father through whom he acquired the plot in dispute.

I therefore agree with the submissions of Counsel for the Appellant that the trial Magistrate misdirected himself when he dismissed the Plaintiff’s/Appellant’s case and declared the Respondent as the equitable owner. In fact it should have been the other way round since as

already noted there were inconsistencies in the pleadings of the Respondent and evidence on record by the Respondent and his witnesses. Ground 2 of appeal also succeeds.

Ground 3:

That the learned trial Magistrate misdirected himself when he awarded damages of Shs. 5 4,500,000/= (four million five hundred thousand shillings) to the Defendant which were not pleaded and proved.

Counsel for the Appellant submitted that the Respondent in the Counter claim whose claim was based on malicious prosecution and unlawful arrest was dismissed by the trial Magistrate. He therefore wondered why the trial Magistrate awarded general damages of 10 UGX 4,500,000/= after dismissing the counter claim on which general damages were pleaded. He concluded that since the Respondent never possessed nor own the suit land, then he could not be awarded general damages.

Counsel for the Respondent on the other hand submitted that the cardinal principle of awarding general damages is to put the aggrieved person or a person affected by the acts of 15 another in a position which he or she was in before suffering an injury, loss, inconvenience, mental anguish, pain and suffering.

He added that the award of general damages to the Respondent was not intended to enrich the Respondent but to put him in a situation where he was before momentary compensation.

In **Crown Beverages Ltd versus Sendu Edward, S.C.C.A No.1 of 2005**, the Supreme Court 20 held that an Appellate Court can interfere with the award of damages by the trial Court where it misdirected itself and/or acted on a wrong principle. In my view, this is a fit and proper case where this Court will interfere with the award of general damages to the Respondent because the counter-claim with malicious prosecution and unlawful arrest upon the Respondent based that claim was dismissed.

25 Secondly, the Respondent did not plead nor prove the award of general damages during the trial. The award general damages to the Respondent were based on a wrong principle and the same is hereby disallowed. Ground 3 is therefore hereby decided in favour of the Respondent.

Ground 4:

That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and came to a wrong decision.

This ground of appeal has already been tackled underground 1 of appeal and decided in favour of the Appellant.

5 **Ground 5:**

That the learned trial Magistrate misdirected himself when he failed/refused to award costs for the counter claim to the Plaintiff/Appellant.

Counsel for the Appellant submitted that whereas the trial Magistrate dismissed the Respondents counter claim, he did not award costs to the Appellant. Counsel for the Respondent on the other hand submitted that the trial Magistrate was right to dismiss the counter-claim for malicious prosecution without costs as the issue was neglected by both sides.

I shall not dwell very much on this issue because under **Section 27(2)** of the Civil Procedure Act, costs follow the event. Having dismissed the counter-claim the trial Magistrate should not have denied the Appellant costs based on the criminal case. It was a counter-claim which was before him and so he misdirected himself when he failed to award costs to the Appellant following the dismissal of the counter-claim. Ground 5 of appeal therefore succeeds.

Having allowed all grounds of appeal, I do hereby allow the appeal and set aside the judgment and orders of the lower court.

20 Secondly, I also do hereby award costs to the Appellant in this Court and the lower Court.

Thirdly, I do hereby award costs to the Appellant in the counter claim.

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WILSON MASALU MUSENE

25 **JUDGE**

19/12/2018