THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0082-2010
(Arising from Mbale Civil Suit No. 105/2006)

GIDUDU MOSES :::::::::::::::::::::::::::::: APPELLANT

VERSUS

MUHAMED ALI KIGOZI :::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellant being aggrieved and dissatisfied with the judgment, decree and orders of **His Worship Robert Mukanza** of 24th August 2010 appealed to this Honourable Court on the following grounds.

1. That the learned trial Magistrate erred in law and fact when he found that appellant had failed to prove ownership of the suit land.
2. That the learned trial Magistrate grossly misdirected himself when he refused to properly evaluate the agreements exhibited in court by appellants thereby causing an injustice.
3. The learned trial Magistrate wrongly evaluated the evidence on record and arrived at a wrong decision.

The duty of a first appellate court as held in *PANDYA V. R (1957) EA 366* and *KIFAMUTE HENRY V. UGANDA SCC APP. NO. 10 OF 1997* is to review the

entire lower court evidence, subjecting it to a fresh scrutiny and coming up with its own conclusions thereon.

The brief facts are that, the respondent sued appellant for vacant possession of an acre of land situate in Doko Nsambya village. In the lower court appellant was the 3rd defendant while **D.1 Hajji Rashid Nganga** was sued as the caretaker, while **D.2 Makamba** and **D.3- Gidudu** were described as "people unknown" to the claimant." The respondent prayed for vacant possession, damages for trespass, value of 5000 bricks and 4 trips of white river sand and other consequential reliefs. The appellant (respondent below) denied the above allegations in essence, stating that the land belonged to **Haji Rashid Nganga**, (D.1) who went on selling it to different people including those who later sold theirs to D.2 and D.3. It was further revealed in the Written Statement of Defence signed by D.2 and D.3 that **D.2 Makamba** bought the land and house thereon in 2001 from **Abubaker Kasyeba** who in turn bought it in 1983 from D.1 (**Rashid Nganga**). The 3rd Respondent (Appellant) bought the land and house thereon in 2006 from **Isa Kibugo** who also bought from late **Masudi**. Agreements of sale were attached to their respective pleadings.

In court, the plaintiff called **PW.1 Mohamed Ali Kigosi** who told court that he bought the land in question from **Rashid Nganga** on 12.12.1984. After buying it he went to Kenya upto 1998. He sent the said **Nganga** money to construct a house for him on the land but he did not and disappeared, so the plaintiff went back and returned in 2000. When he went to the disputed land he found when 2 houses were built on it. After reporting to LCs, he fenced the land, then the defendants (**Makamba** and **Gidudu**) came up claiming ownership. He exhibited a sale agreement which court marked as Exhibit P.1.

PW.2 Hakim Kwenima, said the land is at Doko Nsambya in Mutoto Sub-county and belongs to **Ali Kigozi**. That he bought it from **Nganga** on 12.12.1984. The witness claimed he was present, together with Aliyu Katimpa and Haji Yusuf **Mzee, Abdulla, Walusimbi**, and that **Rashid Agaga** care took the land. The witness bought for plaintiff 5000 bricks and sand in 1991, and ferried them on the land. That while on the site, **D.1 Hajji Nganga** chased him away.

PW.2 Abdulla Walusimbi, said he was present when the plaintiff bought the land from **Nganga** in their presence (himself, **Ali Katimpa, Akim,** (**Ali Kawesa**?).

PW.4 Apollo Mutashwera- a Government Analyst informed court of his findings regarding the Exhibit XY, submitted for determination whether the signature of the seller was of **Haji Nganga**. In his opinion, "it is probable that the writer of the specimen wrote the questionable signature in the agreement."

In defence **DW.1 Haji Rashid Nganga** stated that the land in dispute is his having bought it from **Amisi Ibrahim** *alias* **Mandazi**. He said he sold part of it on the east to **Ibrahim Mungodi**, on the west he sold to **Aramanzani Bumba**, in the centre to **Hakim Pomo**, and yet another part he sold to **Mohamed** (not **Kigozi**). He also clarified that plaintiff was his brother-in-law, and he had sold him some piece of land in Kerekerene Ikiki in Budaka but plaintiff didn't buy any land from him in Doko as alleged. He complained that plaintiff had failed to produce the original alleged sale agreement and also brought none of the alleged signatories to the agreement or witnesses to the same.

In cross-examination he conceded to having sold land to **Ibrahim Mugondi** in 1983 (20ft by 150ft), **Aramadhan Bumba** (20 ft by 150ft) and **Hakim Pomu**. He

consented being the author of agreement dated 8.5.1983 for two rooms in Doko not a plot. He denied the second agreement as not his.

Court admitted the agreement of 8.5.1983 as DE.1 and second agreement as D.2.

On further examination by court he denied ever having sold the land to plaintiff and said he had nothing to do with the agreement of 12.12.1984. He said he had nothing to do with the exhibited agreement.

In cross-examination he clarified that the land he sold the land to plaintiff at Kerekerene in Budaka, for which he was caretaker.

DW.2 Hajji Ibrahim Mugondi confirmed that he bought land from **Mzee Nganga**. He also sold to **Mubaraka Kasyeba**, who later sold to **Makamba**. He confirmed that plaintiff came in 2006 and fenced off land he had sold to **Mubaraka Kasyeba**, claiming it as his. **Kigozi** was charged of criminal trespass.

In cross-examination he confirmed that 1st defendant sold plaintiff land at Kerekerene.

DW.3 Makamba Joseph stated that he bought the piece of land from **Kasyeba** on 21/4/2000.

DW.IV Kasyeba Abubakar said he sold land to **Makamba**. He bought the land from **Ibrahim Mugondi**. He sold it on 21.4.2000. He himself bought it in 1993.
DW.V Gidudu Moses said he bought the land from **Issa Kibugo** on 29/5/2006. He confirmed that he knew that **Haji Nganga** is the one who sold the land to those

who sold to him. He said he was not aware that the plaintiff bought the land earlier on from **Nganga**.

DW.VI Talya James, told court that **Gidudu** owned the land having purchased it from **Issa Kibugo. Issa Kibugo** bought it from **Masud. Masud from Bumba** who acquired it from **Rashid Nganga**. He is the LC.I of Doko Nsambya. He claimed plaintiff attempted to claim for the land in the LC.I office, but his documents (agreements) were not genuine.

DW.VII Hadya Nabuya, confirmed that the land was sold to **Gidudu** by **Issa. Issa** had bought from **Masud**; to whom they (witness) had sold it to. She lived in Dokolo since 1981 and **Kigozi** only surfaced in 2006.

Court visited locus, and then delivered judgment.

In his judgment the trial Magistrate considered three issues;

1. Whether the 1st defendant sold land to the plaintiff.
2. Whether 2nd and 3rd defendants trespassed on plaintiff's piece of land.
3. What remedies are available to the parties?

After reviewing all evidence in his opinion the learned trial Magistrate concluded that plaintiff had proved his case on balance of probabilities. He found for plaintiff and made various orders including vacant possession; hence this appeal.

Counsel for appellant in his submission concentrated on the fact that;

1. It was wrong for court to rely on a photocopy of an agreement as evidential proof of ownership contrary to section 63 of the Evidence Act; referring to

case of *Ben Byabashaija v. Attorney General Civil Suit No. 134/91 (1992) KAI 161 and Kananura Melvin Consultant Engineers & Others v. Couce Kabanda, Civil Appeal 31/92* which held that where the original agreement is not available the copy is inadmissible. Counsel further goes to show that the entire case of plaintiff and the holding of the learned trial Magistrate hinged on the "agreement" which to him was not proved. He referred court to the entire defence evidence which denied in total the facts alluded to by plaintiff regarding the agreement. He also attacked the evidence of PW.3- the handwriting expert, as not conclusive proof of authenticity of the document. He invited court to find that there are two versions regarding this property which makes it unsafe to believe the plaintiff and disbelieve the defendant. He referred to *Benedicto Agena v. George Semafunu (1976) HCB 40*.

For those reasons are argued for setting aside the findings of the learned trial Magistrate on this ground.

Regarding the award of damages counsel argued that the court did not follow the law in reaching its conclusions on award of special damages and general damages and prayed that they be set aside by this court. Reference to *Kyambadde v. Mpigi District Administration 1983 HCB 44* holding that special damages must be strictly proved, and *Fulugensio Semako v. Edirisa Ssebugwawo (1979) HCB 15*, holding that in an action for damages, counsel should put before court all the court material which would enable it to arrived at a reasonable figure by way of damages.

Counsel for Respondents in submissions and also in sure rejoinder, maintained their case that appeal be dismissed, because:

- The agreement (original) got lost in court and its court which sent a photocopy, hence section 62 of the Evidence Act, would not come into force.

The opinion of the handwriting expert was not disputed and not discredited by cross-examination.
He reiterated that defendants were trespassers. On all grounds respondents invited court to find that the learned trial Magistrate properly evaluated the evidence and did not fault.

My findings are as follows:

Ground 1:
<u>That the Magistrate erred in law and fact when he found that appellant had failed to prove ownership of the suit land vis the Respondent's claim</u>.

From evidence on record, I find that the burden of proof of the fact of ownership is on he who alleges so. (See Evidence Act Sections 101). It's important from the onset to restate, what claim the plaintiff took to the court in the first place, what issues were before court, what evidence was called to prove, and whether the trial Magistrate made right conclusions of fact and law, thereon.

The claim was for vacant possession of land, and damages for trespass.

In a case of this nature, it is impossible to give an order of vacant possession without determining the property rights of the parties. In this case the plaintiff's

claim for vacant possession was premised on an alleged act of trespass on his land by defendants. He therefore needed to prove the alleged trespass.

In the case of *Sheikh Mohamed Lubowa vs. Kitara Enterprises Ltd Civil Appeal No.4 of 1987*, the Court of Appeal for East Africa held:

> " *In order to prove the alleged trespass, it was incumbent on the appellant to prove that the disputed land belonged to him, that the Respondent had entered upon that land and that the entry was unlawful in that it was made without his permission or that the Respondent had no claim or right or interest in the land.*"

Was the evidence in the lower court of such a nature to prove that appellant (defendants) were strangers/trespassers on that land? The evidence of PW.1, is that DW.1 sold the land to him and made an agreement (EX.1). The agreement was vehemently denied by DW.1 as forged. To prove this claim plaintiff called PW.2 who claimed he was present during the sale. PW.3 also said he was present during the sale. However it should be noted that none of them witnessed the sale agreement. PW.4 was the handwriting expert, whose opinion is on record. His finding was that probably the writings were by DW.1.

On the other hand DW.1 denied the alleged sale and the agreement. DW.1 explained how he sold land to different people. He said the land he sold to plaintiff is at Kerekerene in Budaka and it's the land for which he was a caretaker. The rest of the defence witnesses from D.2- DW.VII, all denied the alleged sale of land by defendant 1 to plaintiff. Instead, they showed how each one of them obtained title to their pieces of land by valid purchase from those who owned the said land.

The trial Magistrate in assessing this evidence, was swayed by the fact that while plaintiff produced an agreement (photocopy), the defendants did not produce any.

I must however point out that the oral evidence that was led in court, and cross-examinations on record do not at all show that plaintiff was able to destroy the evidence from the defence that each one of them obtained Title by purchase. DW.1 who plaintiff claimed sold the land denied it and did not deviate at all from this denial in court. He denied the authenticity of the agreement, which led court by its own motion to call for the expert opinion of PW.4.

That type of evidence in my view was too weak for the court to conclude that the issue of ownership and rights of the parties had been sufficiently answered.
This is because for trespass to be proved, the plaintiff needed to lead evidence to show that defendant's presence on the land was unauthorized, and was dully interfering with his own lawful possession of that land. (See **Halsbury's Laws of England 3rd Edition Vol.38** stating that:

> "*Trespass to land is unauthorized entry upon land*."

Also ***Justine E.M. N. Lutaaya v. Stirling Civil Engineering Company Civil Appeal No.11/2002*** (SC); defined trespass to land as follows;

> " *Trespass to land occurs when a person makes an unauthorized entry upon land, and thereby interferes or pretends to interfere with another person's lawful possession of that land*."

Given the claims of purchase put forward by **D.2- Makamba Joseph** and **D.3 Gidudu Moses** and their witnesses, it is my view and finding that they could not be legally called trespassers on this land. They obtained title from land vendors

who also came to court and confirmed so (see evidence of **DW.II- Hajji Mugondi**, showing that he bought land from **Mzee Nganga**, sold it to **Mubarak Kasyeba** who later sold to **Makamba (D.2). Mukamba Joseph (DW.3)** said he bought land from **Kasyeba.** This was corroborative of DW.2's evidence above.

DW.IV Kasyeba confirmed in court he sold land to **Mukamba** (**DW.3**) and further corroborated this evidence.

DW.V Gidudu Moses said he bought from **Issa Kibugo. DW.VI Talyanya James** confirmed **Gidudu**'s testimony above; showing how this land went on changing hands. **DW.VII Hadija Nabirye** also confirmed that **Issa**, sold the land to **Gidudu** and that **Issa** bought from **Masud**; to whom they (witness and her husband) had sold it to.

I am satisfied in my mind that the claim of possession of these lands as testified to by the defendants is so consistent, to be taken for trespass. The defendant's established by evidence in court that they held a claim of right to their respective pieces of land and could not therefore be found to be in trespass thereon.

I will now turn to the alleged expert evidence on the agreement, which seems to have convinced the trial Magistrate to hold that;

> "*The evidence on record is strong and overwhelming to the extent that there was an agreement of sell of the suit land by the first defendant to the plaintiff. Although the evidence of the handwriting expert is not conclusive. It has guided court to the conclusion that there was indeed an agreement of sale*. "
>
> *It's court's opinion that this issue is answered in the affirmative.*

The review of the evidence that led to that conclusion leaves much to be desired. First of all it's on record that the first defendant contested that agreement insisting that it was not authored by him and was forged. In his evidence he objected to the tendering of a photocopy asking for the original, which was never tendered in evidence. His on record having complained that there was none of those who claimed to witness the agreement having been called to testify. This agreement was subjected to expatriate opinion. In view of the defence's objection to it.

In his opinion which is recorded as PW.4 – the expert stated that his opinion was "more probable."

The law regarding such opinions was stated in Cross and Tapper on Evidence "Butterworth, 1995 8th Edition P.557 thus;

> "*Expert evidence is not necessarily conclusive on an issue under scrutiny. The evidential worth of expert evidence must be subjected to scrutiny before reliance upon it by courts*."

Further guidance on this subject was offered by *Sarkar's Law of Evidence 17th Edition 2010 page 1258*, stating that;

> "*The evidence of an expert is not conclusive. It's for the courts to assess the weight of that evidence and come to its own conclusion……. Such evidence must be received with caution, they are too often partisan- that is they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who had paid them to give evidence……"*

In the matter before court, the witness conceded to the difficulty of using a photocopy. He then goes ahead to say his opinion that; " it's very probable that the writer of the specimen wrote the questionable signatures in the agreement."

It is not clear from the evidence on record, how the specimens were got, what controls were employed and at what stage. The fact that this agreement presented by plaintiff had earlier on been suspect is also brought out in evidence of DW.VI **Talyanya James** who said at LC.I, the agreement was rejected as not genuine.

The court in taking the opinion of the expert therefore needed to subject it to great caution. In my view, this agreement needed corroboration from the author, and/or those who actually signed as witnesses in order to clothe it with the strength it needs to carry as an authentic agreement. This was not done, and therefore it was not right for the trial court to base on it alone to find as he did.

It's my finding and conclusion that the trial Magistrate for reasons discussed above failed to properly evaluate the evidence and hence reached a wrong conclusion regarding ownership of the land in question. This ground therefore succeeds.

Ground 2:

The trial Magistrate failed to properly evaluate the agreements exhibited to court by appellants thereby causing injustice.

The finding of this court is that there is evidence on record for the defence which the Magistrate never considered at all in his evaluation. There was no discussion of defence evidence in his determination of the first issue. This implies that the trial Magistrate did not evaluate the evidence as a whole but considered plaintiff's evidence in isolation of that of defence.

This is irregular (see pages 2 and 3 of lower court judgment). He never mentioned the agreements alleged by defendants while determining this question of ownership, though he casually referred to them on page 6 while determining trespass. He dismissed them for not showing the size of the land.
This failure when considered alongside the flaws already identified as discussed under ground 1, point at a failure by the trial Magistrate to properly evaluate all the evidence. I therefore hold that this ground succeeds as well.

The above finding also answers ground 3, which faults the trial Magistrate's failure to evaluate the evidence, which lead him to a wrong decision.

I agree and make a finding that it was not correct to conclude that D.2 and D.3's property rights on the suit lands could be negated by a purported sale transaction between D.1 and plaintiff, to which they were never privy. The law recognizes the doctrine of bonafide purchasers for value without notice, which doctrine comes out clearly from the defence evidence. This was not addressed by the trial Magistrate, before concluding the way he did. The evidence shows that defendants were the ones in actual possession of this land for a continuous period of over 20 years, since time of purported purchase by plaintiff. Plaintiff came to court with a photocopy of an agreement, denied by (D.1) as his only mode of possession.

In law, could he be said to have had a better title than D.2 and D.3, so as to maintain a cause in trespass? I do not think so. All in all, my view is that plaintiff never discharged the burden to prove his case against all defendants.

The findings of court were erroneous. This ground also succeeds. All in all the appeal succeeds. The judgment orders of the lower court are set aside. I order

that the remedy is for plaintiff to sue D.1, for recovery of whatever lands he claims he bought from him. I do not find D.2 and D.3 liable to him on the evidence on record. The status quo must revert to the status pertaining before the suit. I so order.

Costs of the appeal to appellant.

Henry I. Kawesa

JUDGE

06.11.2014