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

HCT-04-CV-CA-0091/2013
(ARISING FROM MBALE CIVIL SUIT NO. 009/2002)

ANTHONY D. ANYOLITHO.....APPELLANT
VERSUS
ROSE MUTONYI.....RESPONDENT

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

JUDGMENT

The appellant **Anthony D. Anyolitho** being dissatisfied and aggrieved by the judgment of **His Worship Kule Moses Lubangula** Magistrate Grade I Mbale.

The grounds were that;

1. The learned trial Magistrate erred in law and fact when he failed to judiciously scrutinise, evaluate and appraise the evidence before him as a result of which he reached a wrong decision.
2. The judgment is so riddled with misdirections and irreconcilable contradictions as to amount to a failure of justice.
3. The learned trial Magistrate erred in law and fact when he declined to visit the locus in quo.
4. The learned trial Magistrate erred in law and fact when he evinced bias against the appellant by distorting facts.
5. The decision appealed from has occasioned a miscarriage of justice.

Appellant prayed for appeal to be allowed. Decision be set aside and judgment be entered for appellant and costs here and below be awarded to the appellant.

The duty of a first appellate court is to review the evidence and subject it to a fresh scrutiny.

The brief facts of the case giving rise to the appeal are as follows:
Plaintiff sued defendant for special damages for trespass and for an eviction order, and permanent injunction, arising from the fact that on or about the 5th of May 2007, defendant unlawfully and without any claim of right broke and entered upon plaintiff's piece of land situated at Nyanza Cell, Namatala Ward, Industrial Division, Mbale Municipality commonly known as Plot 2 and Plot No.3 Bupoto Close and has since been trespassing thereon. (See paragraph 3 of plaintiff's amended plaint).

In his amended summary of evidence the plaintiff informed court that he would call evidence to show that the land was purchased under customary holding in 1977 by plaintiff. That defendant's sister rented one of the structures put up by plaintiff on the land. Later the defendant's sister and other tenants were allowed by plaintiff to construct temporary grass thatched structures on the land. In 1991 the Municipal Council offered the whole land to the Seventh Day Adventist Church and the plaintiff and his tenants were to be compensated for their structures. Later SDA church failed and the land was reallocated by the Municipal Council to the market vendors and plaintiff applied for the remainder which he was allocated. He surveyed it and produced 5 plots. Defendant trespassed on plots 2 and 3 and erected thereon structures; without plaintiff's consent.

The defendant filed an amended statement of defence and counter claim in which she denied all the plaintiff's allegations. She pleaded in paragraph 4 of her written statement of defence that she purchased the suit land from the plaintiff as a customary piece of land in 1986.

She averred that on 12th May 2006 she applied for a lease from the District Land Board for Plot No.3 Bupoto Close. She pleaded in paragraph 6 that she is the legal proprietor of the suit land, and further also in paragraph 7, that plaintiff trespassed on her land and damaged her property. In paragraph 8 she claimed to be the one who had undistributed possession since 1986 and hence would plead limitation against plaintiff.

In the counter claim she claimed that she is a bonafide purchaser for value; and lawful owner of the disputed land. She pleaded fraud under paragraphs 3 and 4 and raised the particulars of fraud. Plaintiff replied to the same.

I have further perused and analysed the evidence called by both plaintiff and defendant in the lower court as proof of their allegations above.

Plaintiff filed a reply to the amended written statement of defence and in it denied all allegations and in paragraph 2, 3, 4, 5, 6 and 7 of the said reply averred fraud on part of defendant.

In his prosecution of the plaintiff's case he called **PW.1 Anthony Anyolitho**, who confirmed that in 1984 he came to know defendant when she came to join her sister who was his tenant called **Kakayi Mary**. In 1991 **Kakayi** built her hut on the land. He made his first application for the land in 1994 then was transferred to

Luwero till 1997 when he retired. However he had already surveyed the plots. These were plots 1-5. He gave out some of the plots to his nephew and sister (plots 1 and 4). He gave plot 5 to his cousin brother **Okello Charles** (late). He applied to the Chief planner to have a subdivision of the plots which was approved. He submitted his development plan for plot 1 and 2. The problem was on plot No.3, on which defendant (**Mutonyi**) has constructed her house. Plaintiff denied the fact that he ever sold the land to defendant. He averred that the alleged agreement was a forgery. He testified at length how he was intending to compensate Rose (defendant) and how the thugs came on the land forcefully and built thereon.

Later on checking with Municipal Council he found that plot 3 and another had the same entry. Plot for **John Wambi** and **Rose Mutonyi** were made under one number. The entry made for plot 3 was in fresh ink with a fresh writing; showing that it was forged. He further referred to documents cited in pleadings including Survey Instrument No.MM3B in respect of **Wambi**, and entries made on plots 1, 2 and 3, and plot 31 Pallisa Road- all which prove that forgeries were being committed. He stated that Rose's title be cancelled for being tainted with fraud.

In cross-examination he showed that he bought the land from **Zahiru** son of Sheikh Khalid. They registered it in his daughter's names called **Wazemba Zubedda** on 21st November 1977. She is now dead.

PW.2 Nasike Aisha wife to PW.1 informed court that **Rose Mutonyi** was introduced on that land by her, to stand in for purposes of compensation. She also imputed on page 32 of proceeding bad faith on **Mutonyi** who instigated others not

to accept PW.1 as owner but to claim the portions as their own. She collaborated PW.1's evidence in all material particular.

PW.3 Namara Edison a land surveyor in charge of all surveyors in the Mbale Municipality confirmed that the leasehold title for Plot 3 Bupoto belonging to **Anyolitho Anthony** dated 22.1.2010 he also confirmed that the subdivision "of plot 1-3 is not authorised by the relevant authority. The required steps were not followed.....ISMM31/93 was issued by **John Wambi** for Plot 13 along Pallisa road and the survey should be cancelled and field surveyor who did so be punished....there is no survey instruction for this plot it is illegally obtained....."

In defence **DW.1 Rose Mutonyi** stated she bought the land from plaintiff in 1986 for shs. 500,000/= and an agreement identified as Exh.DID.1 was made.
In 1991 Municipal Council people told her they had given the land to SDA Church. She then realised the land was for the Municipal Council not **Anyolitho** who sold to her. The Municipal Council advised them to apply for their respective plots which she did. She filled in form 8 by "thumb marking" since she didn't know how to read or write. (Application for lease). Upon payment she was given a five year lease. Later she was issued with a title in respect of Plot No.3 which she had applied for. Title deed was issued and was exhibited as Exhibit D.3. After getting the title she began constructing and completed and is now residing in the house.

DW.2 Maswere Nabusafe as area LC.I Chairman attended the assessment meeting when defendant and other squatters on that land were listed for possible compensation. He confirmed that plaintiff wanted to represent the tenants but **Rose Mutonyi** refused and preferred to represent herself.

DW.3 Peter Mudebo retired surveyor, gave technical findings on the reopening of the boundaries. The report was as a result of the court order that boundaries be reopened. **PW.3 Namara Edison** also gave a report in which he detailed findings showing how the various subdivisions were done.

Various documents were exhibited for both plaintiff and defendant.

In their submissions on appeal both counsel addressed court on two issues.

1. Who is the rightful owner of the suit land?
2. What remedies are available to the parties?

The trial Magistrate in his judgment found that the suit land belongs to defendant (Respondent).

Having reviewed all evidence and considered all arguments raised on appeal I now make the following findings:

Who is the owner of the disputed land?

Plaintiff (appellant) traces his ownership customarily that is since 1977. Later he opted to purchase from the Municipal Council as per his evidence. On the other hand Respondent (defendant said she came on the land first as a tenant of the appellant, then in 1986 purchased it from the appellant. She later realised that it was the Municipal Council who were owners. She opted to purchase and was therefore a bonafide purchaser who has a title. Counsel argued that her title was good title as against that of the plaintiff.

(See **Nabende**'s submissions at page 182).

In my opinion the rights of both parties can be stated as the rights of a "master-servant" relationship. This was public land. The plaintiff came on it in 1977. He attained the status of a caretaker. He then invited the defendant who also recognised him as such until 1986- when she claims she bought a portion from him. However, the status of defendant/respondent's purchase was never conclusively proved in court. I note on page 3 and 4 of the Respondent's submission that he attempted to argue that as a licensee plaintiff could not sale to the defendant. This defence operates to defeat the pleadings defendant relied on in paragraph 4 of her own written statement of defence that she purchased the land from the plaintiff as a customary piece of land in 1986. If the argument is sustained then it gives credence to counsel for appellant's attack on this agreement that its validity is questionable.

It is interesting to note that counsel for defence/respondent wants to disown the agreement as a legal nonentity, but again wants to rely on it to justify the respondent's stay on the land. The question to answer therefore is does it have any evidential value? The trial Magistrate never went into an examination of this question and it's my view that this failure led him to a wrong conclusion.

Evidence on record through PW.2 and DW.3 shows that the respondent harboured intentions of denying appellant's claim to that plot as long ago as at the time of the Municipal Council's meetings. It should be noted however that her claim on that land according to her plaint began in 1986 when she purportedly purchased the land from the plaintiff (Appellant). This is positioned side by side the denial by her of the plaintiff's legal status thereon since 1977. This means that, if court is to go by **Counsel Nabende**'s argument that appellant had no right to sale and that the

sale was a nullity, then it means that the respondent's occupation of the plot was also based on an illegal transaction which cannot be sustained by this Court.

The above finding is also further strengthened by the legal addegage that:

> "*A party is bound by his pleadings*."

I agree with counsel for appellant when he argues that the trial Magistrate did not evaluate this evidence and subject it to the guiding principles of proof required under the Evidence Act.

The sales agreement on which he relied was not proved and ought not to have been relied on as such.

The parties all alluded to fraud in their pleadings.

The law is that fraud must be specifically proved/pleaded. See *JWR Kazzora v. M.K.S Rukuba HCB (199405) 58*; where **Tabaro K** (as he then was) held:

> "*a party relying on fraud must specifically plead it and particulars of the alleged fraud must be stated on the face of pleadings*."

In this case, through the evidence of the witnesses **PW.3, Namara** and the defence witnesses (DW.3), it was shown that there were deliberate irregularities, illegalities and criminal acts committed in the course of this transaction as a whole. PW.3 in his evidence even called for the prosecution of the surveyor who committed the alleged unauthorised survey, vide the documents which were exhibited before court and which resulted into the falsified titling process.

It was held in the Supreme Court case of *Kampala Bottlers Ltd V. Damanico U. Ltd (1994-95) HCB 49* held that:

> "*For a party to plead fraud in registration of land, the party must prove that the fraud was attributable either directly or by necessary application, that is the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act*." (By **Wambuzi** C.J. **Order** JSC, **Platt** JSC).

It is my finding that as rightly pointed out by **Counsel Wegoye** for appellant an illegality once brought to the attention of court, supersedes all questions of pleadings- it cannot be allowed to stand.

See case of *Makula International Ltd v. His Eminence Cardinal Wamala Nsubuga [1982] HCB 11* (per **Musoke P, Lubogo V.P**. and **Nyamuchancho J.A**.).

In this case, the trial Magistrate invoked section 59 of RTA and kept a blind eye on the irregularities. I fault him because the respondent is not innocent. She was all along aware of appellant's interests in that plot. She had been a tenant. She could not have gone ahead to apply for a surveyed plot and used the names of another party and then came to court and claim to be bonafide; her poverty and illiteracy notwithstanding. See case of *Musisi v. Grindlays Bank (U) Ltd & 2 Ors (1983) HCB 41, Masika C.J.* (as he then was).

Which held that;

> "*a person who becomes a registered person through a fraudulent act by himself or to which he is a party or*

with full knowledge of the fraud so as to be a bonafide purchaser is a registered proprietor through fraud."

I agree with appellant's submissions and application of the law that under section 6 (2), 9 (4) and 33(2) of the Land Act to the facts of this case. The respondent had duties and responsibilities under the law towards her neighbours to put them on notice before she surveyed. She did not do so and this was fatal to the registration process before titling the land.

Counsel for Respondent down plays this effect on page 6 of his submissions stating that;

"*even if the process of survey was fraudulent or didn't follow steps it can't be imputed on respondent and that section 59 of the RTA protects her*."

My view is that there is no blanket protection under the law for applicants of land who have obligations under other sections of the law to do certain responsibilities, who fail to do so, (e.g the need to inform neighbours before survey). Such people cannot seek protection under section 59 RTA. This is because, "he who goes to equity must do so with clean hands." In this case, the Respondent's hands were not clean.

See holding in *Musisi v. Grindlays Bank (U) Ltd* case above, which further held that;

"*the act of registration is the mere formal entry of particulars in the register book relating to the land. Fraud may thus intrude into the long process at any stage but that would not render the other stages free and the whole transaction*

becomes tainted with fraud. It was therefore immaterial in the instant case at what stage the fraud was committed."

On the question of consenting not to visit the locus. It has been held that the visiting of locus in land cases of this nature is mandatory. The failure or option not so to do is fatal.

In the cases of *Waibi v. Byandala 1982 HCB 29*, quoting *Desouza v. Uganda (1967) E.A. 784, and Fernades v. Noronha (1969) EA 506*. The principle is that visiting the locus enables the trial court to check on the evidence given, though it's not to be used to fill in gaps.

By the holdings above failure to visit locus is fatal to a trial.
In this case the so called expert reports brought out issues which court could have only appreciated if it had visited locus.

I hold that the failure so to do was fatal and occasioned a miscarriage of justice, and rendered the trial void.

Having found as above I find that this appeal has proved that under;

Ground 1- the Magistrate erred in law and fact when he failed to properly evaluate and analyse the evidence on record.
Ground 2- The judgment is riddled with misdirections and led to a failure of justice.
Ground 3. Bias was not proved.
Ground 4- Magistrate erred in failing to visit the locus.

Ground 5- A miscarriage of justice occurred.

I find that the appeal succeeds under grounds 1, 2, 4 and 5.

The lower court judgment is accordingly set aside.

A retrial is hereby ordered to be conducted before the Chief Magistrate at Mbale.

Costs to abide the course. I so order.

Henry I. Kawesa
JUDGE
11.11.2014