

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[LAND DIVISION]**  
**CIVIL APPEAL NO. 0114 OF 2017**  
**(ARISING FROM ENTEBBE CMC CIVIL SUIT NO. 085 OF**  
**2007)**

**NALUKWAAGO**  
**SPECIOZA:.....:APPLICANTS**  
**VERSUS**

**THE COMMISSIONER LAND**  
**REGISTRATION:.....:RESPONDENT**

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

**JUDGMENT**

The Appellant brought this appeal being aggrieved by and dissatisfied with the judgment and Decree of Her Worship Flavia N. Matovu delivered on 14<sup>th</sup> July 2011 at the Chief Magistrates Court of Entebbe at Entebbe on grounds that;

1. The learned trial Magistrate erred in law when she regarded the fact that there was no consideration passed to the Appellant's father thus arriving at a wrong conclusion.
2. The learned trial Magistrate erred in law and fact when she held that the consent of the wife and children in the

execution of the sale agreement was not necessary hence occasioning a miscarriage of justice.

The duty of this as Court as a first Appellate is stated in **Banco Arabe Espanol versus Bank of Uganda; SCCA No. 08 of 1998 (1997-2001)** UCL; as that of a reconsideration and re-evaluation of the evidence afresh.

The first Appellate Court has a duty to re-hear the case and to reconsider the materials before the trial Judge. The first Appellate Court must then make up its mind by carefully weighing and considering the evidence that was adduced at the trial.

In the lower Court, the evidence led was as follows:

The Plaintiff by his plaint dated 25<sup>th</sup> July 2007 sued the Defendants for unlawfully grabbing and encroachment of the suit kibanja, located in Buzzi village, destruction of property, unlawful eviction of the Plaintiffs and their parents from the same.

The Plaintiff called evidence of PW1; Nalukwaago Specioza, PW2; Nalukwago Magdalen, PW3; Haruna Nyondwe, PW4; Gabriel Minani and PW5; Kiiza Moses. These witnesses supported the Plaintiff's assertion as per the plaint above. The Defendant denied the above and called evidence through DW1; Buwule Hosea, DW2; Kizito Hannington, DW3; Mary Buwule and DW4; Sebavuma George

The Defendant's case was that he is the registered owner of the suit land comprised in Busiro Block 404, plot 26 and the Plaintiff

have no kibanja there on; but rather it is Mr. Minani Gabriel who previously owned it.

In 2004, the said Gabriel Minani voluntarily agreed with the Defendant to assign and surrender his kibanja to the Defendant at a consideration of shs. 2,700,000/- only (*two million, seven hundred thousand*) and the assignment and surrender was duly reduced into writing. The defence contends that when the compensation money was forwarded to Minani, he rejected the same. The defence and paragraph 17 of the written statement of defence stated that in consequence of the matters aforesaid the Defendant was by paying the compensation money and getting vacant possession of his land.

The learned trial Magistrate, after considering all the pleadings and evidence found in favour of the Defendant hence this appeal.

The appeal will be resolved as herebelow:

- (1) The learned trial Magistrate erred in law when she regarded the fact that there was no consideration passed to the Appellant's father thus arriving at a wrong conclusion.

The Appellants in submission argued that PW4 Gabriel Minani had testified that the agreement of 22<sup>nd</sup> January 2004 was a mere brick and amounted to nothing since no consideration passed, alternatively, Counsel for the Appellant argued that even if consideration was there, the Respondent breached the contract by failing to pay the shs. 2,700,000/- only (*two million, seven hundred thousand*), contrary to clause 2 (ii) thereof.

The Respondent's Counsel on the other hand argued that this issue never arose at the trial, but what was in issue was whether the Plaintiffs wrongly induced Gabriel Minani to reject compensation.

I will first of all, as a first Appellate Court, re-evaluate and re-appraisal the evidence on record on this matter and then reach my own conclusion thereon.

I do find that in the lower Court, it was the evidence of PW1; Nalukwago Specioza that Minani is her father and he had a kibanja in Buzzi of about 3 acres on which the dispute now arises. Before the dispute, she was staying on that kibanja with Kiiza who is her brother and their mother. They had on this kibanja coffee, bananas, jack fruits, mangoes and burial grounds; and a house.

When Minani Gabriel bought a plot in Kiboga, he left her and her mother there. She stated that Minani Gabriel never sold the kibanja to the Defendant.

During cross examination, she stated that the father gave the kibanja to herself and Kiiza, but he has powers over his kibanja and it is still her. She further testified that they have powers on the kibanja (*see lines; 5,6,7,8 and 9 of page 2 of the typed proceedings*). She also recognized the agreement annexed as 'B' and confined under line 29 (pg.2) that shs. 2,700,000/- million was to be paid to Minani Gabriel, but they refused him to receive the money.

PW2: Nalukwago Magdalena stated that the kibanja for Minani Gabriel and there are over 16 bodies buried there and that he had a house there, a wife who was the mother of the Plaintiff. She said her kibanja is near the disputed kibanja since 1941 and she was not aware that Minani sold the kibanja to the Defendant.

PW3; Haruna Nyondwe stated that Minani owned the kibanja in Buzzi. He then went to Kiboga and left her children and the Plaintiff there using the said kibanja on which existed Minani's house. The Plaintiffs informed him that the Defendant had demolished their house and he crosschecked and confirmed that it was no longer there.

PW4; Gabriel Minani said the Plaintiffs were in the kibanja. The Plaintiffs were in actual occupation while he was in Kiboga until one day the Defendant demolished his house. He further said that he has never sold the kibanja to the Defendant for shs. 2.700,000/- only (*two million, seven hundred thousand shillings*). That he was called by the Defendant at the local Council authorities so that they can discuss the issue of the kibanja. They told him to sign so that there was no more problem.

In cross-examination, he said that the document was read out to him after he had put his signature; and that was because the Defendant told him that he was finally handing over the kibanja to him (*see bullet 20 page 8 of the typed record, also 20-23*). The

witness said that he was not given a copy of the document and that the kibanja belongs to himself, his wife and the Plaintiffs, upon which he made a document to that effect. This witness further told Court that the Defendant never paid the shs. 2,700,000/-.

PW5; Kiiza Moses gave evidence that the kibanja is theirs and they were born on it. He confirmed that the father had never received the shs. 2,700,000/-. In cross examination, he said that they had been given a document of compensation by Minani.

The defence on the other side was as follows:

DWI; Buwule Hosea said that he was approached by Minani in November 2004. They met at the LC Buzzi in the presence of Buyinza, Kizito and Moses Busulwa. Minani told him that he wanted to return the kibanja and they negotiated a compensation of shs. 2,700,000/-. They made an agreement that; in consideration of shs. 2,700,000/-, in that the kibanja would revert back to the witness. He was to pay within 3 (*three*) months' time. He then sold 1 (*one*) acre of the land to Sebavuma in order to get money to pay Minani. He sold it on 28<sup>th</sup> December 2014, but never paid Minani his money because Minani did not go to pick the said money. He further said that he did not know the Plaintiff's interest on the land since his dealings were with Minani

DW2; Kizito Hannington was present when DW1 and Minani made the agreement for shs. 2,700,000/- and confirmed that they sold Minani's kibanja to Mr. Sebavuma before paying Minani.

DW3; May Buwule is the wife of DW1; Buwule and she said that DW1 has a title to the land. She said that the Plaintiffs were currently in occupation of the kibanja and cultivate thereon.

DW4; Sebavuma George Wilson said that he bought 1 acre of land from DW1; Defendant from land in Buzzi. That he saw the copy of an agreement where the transaction was concluded so he bought.

The document referred to were as described by the evidence. It further brings to question whether the learned trial Magistrate was right to disregard the fact that there was no consideration passed to the Appellant's father.

The facts as above indicate that the Plaintiffs claimed their interest in the land basing on Minani's rights thereto. This was pleaded in paragraph 4 of the plaint where its state; *"the Plaintiffs state that they are children of Muzei and maama Minani who lawfully acquired the suit kibanja, they grew up and stayed together with the said parents on the suit kibanja depending on the same for survival in terms of food supply to the family..."*

The evidence of PW4; Gabriel Minani was that the Plaintiffs are his children and had given them this land vide a document which PW5; Kiiza confirms. There is therefore no question about the annexure on the pleadings and were also exhibited in the Court

at the trial as per Court record. The magistrate considered all the evidence and concluded that the Plaintiffs failed to prove that they purchased or in any way lawfully acquired this interest from Minani. She further found and held that Minani, a bonafide occupant of the suit kibanja willingly and voluntarily surrendered his kibanja interest to the Defendant; his land lord.

The presence of his children or wife is not necessary since this was his property. The learned trial Magistrate held that the Plaintiffs only claimed interest in the Defendant's land through Minani who surrendered his interest to the landlord and he Plaintiffs' occupation of the same is unlawful and amounts to trespass.

I therefor do find that the finding above brings in issue; the question as to whether the transaction would pass in law as a valid surrender of rights by a kibanja holder to a landlord in view of the circumstances how the Plaintiffs came on this kibanja. They are biological children of Minani whose family had an equitable interest in this piece of land by virtue of their family relationship to Minani.

This type of transaction is prohibited under Section 40 of the Land Act. The evidence on record clearly shows that the piece of land/kibanja in issue is family land. The Plaintiffs are the children of Minani (PW1). PW1 Clearly told Court that the kibanja was where these children and their mother stayed and obtained sustainance. On page 9 of the record of proceedings bullet 4, the



witness PW4; Minani stated that; *“the kibanja belongs to me, and my wife and children”*.

PW1; Specioza Nalukwago on page 1 stated; *“I was staying on the very kibanja in Buzzi with Kiiza who is my brother and my mother and we had a coffee banana, jackfruit, mangoes, burial grounds and a house”*

PW2 also confirmed that the kibanja was for the family usage of Minani and his wife and had burial grounds. PW3 and PW5 also said that the kibanja was owned by Minani that they made an agreement which also shows that there were graves on the piece of land. This evidence is supported by DW3; May Buwule who revealed that the Plaintiffs are currently using the land.

With this evidence, all other transactions aside, it is trite law under Section 40(i) of the Land Act which states that;

*“no person shall sell, exchange transfer pledge, mortgage or lease any land or enter into any contract for sale, exchange, transfer, pledge, mortgage or lease any land or give away any land intervivos or enter into any other transaction in respect of land; contract for sale,*

- i) In case of land on which the person ordinarily resides with his or her spouse and from which they derive their sustenance except with prior written consent of the spouse*

- ii) *In case of land on which a person ordinarily resides with his or her dependent children of majority age, except with prior consent of the dependent children of majority age”*

The kibanja which this transaction relates was for all purposes and intents family land. Section 40 of the land Act above therefore operated to bar DW1 from dealing with it without the knowledge or consent of the Plaintiffs. This legal hiccup operates to fault the learned trial Magistrate in finding that the Plaintiffs had no interest in this kibanja. It also operates to fault the learned trial Magistrate in finding that Minani rightfully gave away his interests in the kibanja to the Defendant.

It was therefore wrong for the learned trial Magistrate to hold that the Plaintiffs were trespassers on this land. The entire transaction, the basis of his finding was illegal from the onset and amounted to a nullity. Even going by the ordinary laws of a contract, a contract where consideration has not been provided is *void abinitio*. The shs 2,700,000/- was a condition of this alleged transaction which by the Defendant’s own confession has never been paid. Worse still, the Defendant in disregard of his own bargain to pay in 3 (*three*) months, went ahead and sold off part of the kibanja to DW4; Sebavuma who himself also confessed having seen the alleged terms of the agreement and went ahead to buy!

The agreement stipulated a payment of 2.700,000/- (*two million, seven hundred thousand shillings*) in exchange for the kibanja within 3 months. In the absence of the satisfaction of this amount, the alleged exchange has never been satisfied. No rights ever passed on, and DW1 therefore, even on the strength of this agreement still carried out a fundamental breach when he sold off the kibanja. (See **Ronald Kasibante versus Shell Ug. Ltd; Civil Suit No. 542 of 2006 [2008] ULR 690**).

From whatever angle the said transaction is looked at, it is not tenable in law. It is illegal and void. I do uphold this ground of appeal. The finding on this ground also sufficiently answer the ground which postulates that the learned trial Magistrate erred in law and fact when she held that a consent of a wife and children in execution of a sale agreement was not necessary. Though the Respondent's Counsel stated that this ground is an afterthought, I find that the learned trial Magistrate specifically states so at the close of her reasoning under issue No.2 thus;

*"The presence of his children or wife is not necessary since this is his property..."*.

This conclusion was the basis for her findings that Minani was in his own right to sign away the family kibanja and the Plaintiffs should not complain whereafter she found them trespass.

As already discussed, this is a wrong conclusion. The learned trial Magistrate did not address her mind to Section 38A and 39 of the

Land Act. She did not also consider the *nexus* between the rights of land lords and bibanja holders and the competing interest on such land s as enshrined in the Land Act.

This type of scenario, was also carefully catered for under Section 38A(i) (2) and (3) and Section 39(1) and (4) of the Land Act. The Act further provides under Section 35 thereof for a system of mediation in lieu of statements akin to the one in this case.

If such had been done, the Defendant would not have jumped to sale the land/kibanja to a third party within a month of their transaction, before even paying the alleged shs. 2.700,000/- only in consideration.

All in all, the learned trial Magistrate’s findings were wrong and this ground as well proceed. Having considered the evidence and the law, I find that the appeal has been proved.

The judgment and orders of the learned trial Magistrate are set aside and replaced with a finding for the Appellants with costs here and below.

I so order.

.....

Henry I. Kawesa

**JUDGE**

9/05/2019

9/05/2019:

Matale Shafic for Appellants

Mutyaba Najib for Respondent.

Parties absent.

Court:

Judgment delivered in the presence of the parties above.

.....

Henry I. Kawesa

**JUDGE**

9/05/2019