

UGANDA / JUDGMENT

Asaba and 2 Others v Nyanjura (Civil Appeal 36 of 2020) [2023] UGHCLD 264 (31 August 2023)

[2023] UGHCLD 264

COURT

HC: Land Division (Uganda)

BEFORE

Serunkuma, J

CASE / FILE NUMBER

Civil Appeal 36 of 2020

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MASINDI CIVIL
APPEAL NO. 0036 OF 2020 [ARISING FROM CIVIL SUIT NO. 0031 OF 2015]**

| | 1. | ASABA HELLEN |

|---|---|-----|

| | 2. | BIRUNGI MADINA |

| | 3. | WASISI SHARON :::

APPELLANTS |

| 10 | | |

| | | VERSUS |

NYANJURA HARRIET OKECHO :::

RESPONDENT 15

BEFORE: Hon. Justice Isah Serunkuma.**JUDGEMENT**

20 This is a first appeal from the decision of the Grade One Magistrate of Masindi, Her Worship Biwaga Selsa, delivered on 15th September 2020 in Civil Suit No. 0031 of 2015.

The Appellants sued the respondent for recovery of the suit land situated at Kijura 25 South, Western Ward, Central Division in Masindi District, measuring one acre. They sought a declaration of beneficial interest in the suit land, an eviction order against the respondent, mesne profits, damages and costs of the suit. The appellants are children of the late Monica

Karungi who was the respondent's sister. The respondent is the appellants' maternal aunt and customary guardian. The appellants alleged that the respondent grabbed the suit land which belonged to their late mother, Karungi Monica, who purchased it in January 1991 from the late Kato Sunday Samuel.

On the other hand, the respondent contended that she bought the suit land from the late Kato Sunday Samuel on 21st January 1991 and She has since been in possession thereof.

10 The learned trial Magistrate found in favour of the respondent, dismissed the appellants' suit with costs and declared the respondent as the lawful owner of the suit land. She held that the appellants' evidence was hearsay and it fell below the standard required to discharge the onus of proof placed on them as the plaintiffs. On the other hand, the learned trial Magistrate found the respondent's evidence 15 more credible and held that the respondent purchased the suit land from the late Kato Sunday.

The Appellants being dissatisfied with the decision and orders of the trial court appealed against the judgment and orders on the following grounds:

- 20 1) The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 0031 of 2015 that the suit land belongs to the Respondent.
- 2) The learned trial Magistrate erred in law and fact when she totally disregarded the Appellants' evidence thereby arriving at a wrong decision in Civil Suit No.

0031 of 2015 that the appellants had not proved their case on a balance of probability.

- 3) The learned trial Magistrate erred in law and fact when she failed to find that the suit land belongs to the beneficiaries of the estate of the late Karungi 5 Monica.
- 4) The learned trial Magistrate erred in law and fact when she failed to find that the suit land was acquired by way of purchase from Sunday Samuel Kato on 21st January 1991.

On the basis of the above grounds, the appellants prayed that this appeal be allowed 10 and the decision of the lower court set aside with costs.

Representation

The appellants were represented by counsel Simon Kasangaki of M/S Kasangaki & Co. Advocates while the respondent was represented counsel William Lubega of

15 M/S Lubega, Babu & Co. Advocates. Both counsel were granted leave to file written submissions which duly take into consideration while analysing the merits of this case.

Appellants' submissions

20 Learned counsel for the appellants faulted the trial Magistrate's finding that the respondent is the lawful owner of the suit land. He referred to the evidence of the appellants to the effect that the appellants' mother purchased the suit land on 21st January 1991 at UGX 260,000/= from Kato Sunday Samuel and bequeathed the land to the appellants upon her demise in April 1991. Counsel referred to the trial court's proceedings at the locus visit on 30th 25 June 2020. He contended that the evidence

given by the appellants at the locus visit corroborated their testimonies taken in court.

Secondly, counsel submitted that the learned trial Magistrate failed to evaluate the

- 5 evidence as a whole. He relied on the case of *No. 0875 PTE Wepukhulu Nyunguli versus Uganda; Supreme Court Criminal Appeal No. 0021 of 2011* for the proposition that it is erroneous to selectively consider evidence favoring one side without any regard for the evidence adduced by the opposite side. Counsel contended that the appellants' evidence was not challenged in cross examination. He referred to the
- 10 case of *Habre International Co. Ltd versus Ebrahim Alarakhia Kassam & Ors; Civil Appeal No.004 of 1999 at page 108-9* for the proposition that where a party fails to challenge evidence, that evidence is accepted as true.

Respondent's submissions

Learned counsel for the respondent submitted that the trial Magistrate properly evaluated the evidence adduced by both parties and came to the right conclusion that the respondent is the lawful owner of the suit land. He referred to the evidence of the respondent to the effect that she purchased the suit land from Kato Samuel Sunday on 21st 20 January 1991 and executed a sale agreement to that effect. Counsel supported the learned trial Magistrate's finding that the appellants' evidence was hearsay and inadmissible. He contended that the appellants ought to have tendered in the sale agreement showing the purchase of the suit land by their late mother and a copy of the Will to prove that the suit land was bequeathed to them upon their mother's demise. In the premises, counsel submitted that this appeal is misconceived and it ought to be dismissed with costs.

Submissions in Rejoinder

- 5 In rejoinder, learned counsel for the appellants reiterated that the trial Magistrate failed to properly evaluate the evidence on record and totally disregarded the appellants' evidence. He explained that the appellants could not produce the purchase agreement and Will of their late mother because those documents were taken by the respondent as the customary guardian of the appellants.

- 10 Lastly, learned counsel submitted that since the parties are related, the learned trial Magistrate should not have awarded costs against the appellants. He prayed that each party bears its own costs of the appeal and in the trial court.

Court's analysis

15 I have carefully considered the written submissions of counsel, the record of appeal and the law applicable to the grounds of the appeal.

As a first appellate court, this court has a duty to re-evaluate the evidence given by the parties at trial and draw its own inferences of fact and law. *(See; Banco Arab*

20 *Espanol versus Bank of Uganda; Supreme Court Civil Appeal No.008 of 1998).*

The appellants raised four grounds of appeal which appear repetitive, contrary to Order 43 rule 1 of the Civil Procedure Rules. All the four grounds fault the trial Magistrate's finding that the respondent is the lawful owner of the suit land.

25 Accordingly, this court shall determine the grounds simultaneously.

The crux of the appeal is that the learned trial Magistrate erred in law and fact when she disregarded the appellants' evidence and entered judgment in favour of the respondent as the lawful owner of the suit land. By their pleadings on record, the 5 appellants claimed before the trial court that the respondent, being their customary guardian, abused her position when she fraudulently obtained the suit land which belonged to their late mother, Karungi Monica, who purchased it in January 1991 from the late Kato Sunday Samuel. The appellants claim that the suit land was bequeathed to them upon their mother's demise in April 1991. They sought an order 10 for recovery of the suit land and a declaration of beneficial interest in the suit land.

To prove their claim, the appellants averred that a sale agreement was executed between Karungi Monica and Kato Sunday Samuel, and witnessed by two people namely; the respondent and a one Nyakoojo Catherine. They further averred that 15 upon purchase of the land, the late Karungi Monica took possession thereof and used the land for cultivation while a portion of it was let out to a one Bakari Mugisa. The suit land was later handed over to a one Kabalimu Regina Akiiki as caretaker until 2014 when the respondent interfered with the appellants' possession of the land.

- 20 The appellants relied on the sworn testimonies of PW1 Asaba Hellen (the first appellant), PW2 Katongole Deborah, PW3 Kasigwa Abiyasali Byekwaso, PW4 Kabalimu Regina Akiiki, PW5 Bakari Mugisha, and PW6 Kiiza Fred. The trial court rightly observed that none of the above-mentioned witnesses was party to or witnessed the sale agreement concluded between the late Monica Karungi and Kato
- 25 Sunde Samuel, under which the appellants claim ownership of the suit land. Further,

the sale agreement and the Will of the late Monica Karungi were not produced before the trial Court in support of the appellants' claim. The appellants explained that the documents were in the custody of the respondent who was appointed as their customary guardian. The appellants sought to bridge this gap in their evidence

- 5 by relying on the secondary oral evidence of PW1 who was not present at the time of the purchase of the suit land, and did not witness the Sale agreement, but claimed to have seen the Sale Agreement in 1995 while staying at the respondent's place in Kampala.
- 10 In this Court's considered view, whereas such secondary evidence may be admissible as evidence through the oral accounts of the contents of the original document given by a person who claims to have seen the original document, in circumstances where the document appears to be in the possession of the person against whom the document is sought to be proved *(See sections 91, 62(e), and*
- 15 *64(1)(a) of the Evidence Act)*, the weight of such evidence is not sufficient to discharge the standard of proof required in cases where a party alleges fraud.

It is trite law that a party who alleges fraud assumes a higher standard of proof than the ordinary balance of probabilities in civil matters. To this effect, the Supreme Court clarified in the leading authority of *Kampala Bottlers Ltd versus Damanico (U) Ltd; SCCA No. 022 of 1992 [1993] UGSC 1*, that *'fraud must be strictly proved, the burden being heavier than one on balance of probabilities generally applied in civil matters.* (See also; *David Sejjaaka Nalima versus Rebecca Musoke; Civil Appeal No. 012 of 1985 [1986] UGSC 12).*

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On the basis of the above well-grounded principles which this Court is bound to follow, the Court cannot fault the finding of the learned trial Magistrate to the effect that the appellants failed to discharge the standard of proof required in cases where fraud is alleged. Accordingly, this appeal is without merit and the same must fail.

With regard to the contention of learned counsel for the appellants to the effect that each party must bear its own costs since the parties are relatives, this Court recognizes the cardinal principle of law that costs follow the event, and are awarded at the trial court's discretion. *(See Section 27 Civil Procedure Act, Kwizera Eddie*

10 *versus Attorney General; Constitutional Appeal No. 001 of 2008 [2017] UGSC 3).* It does not follow as a matter of course that where the parties are related, the court ought to refrain from awarding costs to a successful litigant. On the contrary, the trial court, while exercising its discretion to grant or decline to award costs in cases where the parties involved are relatives ought to carefully balance the successful party's right to recover costs, against the decision to decline the award of costs in

the interest of fostering reconciliation between the parties.

In the instant appeal, this court finds no reasons to fetter the trial Court's discretion to award costs to the respondents. The court is fortified in its decision by the holding

20 of the Supreme Court in the case of *Impressa Ing. Fortunato Federic versus Irene Nabwire (Suing by Her Next Friend Dr. Julius Wambette); Supreme Court Civil Appeal No. 003 of 2000,* where it was held that pursuant to section 27 of the Civil Procedure Act, the trial court has absolute discretion to determine by whom and to what extent costs are to be paid, and further that the appellate court must desist from fettering the trial court's discretion unless it is shown that the trial court erred in the exercise

of its discretionary powers. *(See also; Uganda Development Bank versus Muganga Construction Company (1981) HCB 35).*

In the instant appeal, learned counsel's submission that each party should bear its own costs since the parties are relatives, was smuggled in by the Appellants in their submissions in rejoinder thereby departing from their prayers contained in their Memorandum of Appeal to the effect that the costs of the appeal and of the proceedings in the lower court be awarded to the appellants. Accordingly, this court finds no justification for interfering with the trial court's discretion to award costs to

10 the respondent.

In the final result, this appeal is dismissed with costs to the respondent.

I so order.

Dated and delivered this 31 st of August 2023.

Isah Serunkuma

20 JUDGE

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