

UGANDA / JUDGMENT

Baluku Alai Juma v Thembo Wilson Mugoha (Criminal Session 6 of 2024) [2025] UGHC 400 (18 February 2025) [2025] UGHC 400

COURT

High Court of Uganda

BEFORE

David S.L. Makumbi, J

CASE / FILE NUMBER

Criminal Session 6 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KASESE

HCT-25-LD-CA-0006-2024

(FORMERLY FORT PORTAL HCT-01-LD-CA-0019-2023)

(ARISING FROM KAS-02-CV-CS-LD-0019-2018)

BALUKU ALAI JUMA=====APPELLANT

VERSUS

THEMBO WILSON MUGOHA=====RESPONDENT

BEFORE JUSTICE DAVID S. L. MAKUMBI

JUDGMENT

REPRESENTATION:

Appellant represented by M/S Spero Advocates.

Respondent unrepresented.

BACKGROUND:

This is an appeal by which the Appellant, being aggrieved and dissatisfied with the judgment and orders of His Worship Karakire Edgar, Magistrate Grade 1 in Civil Suit No. KAS-02-CV-CS-LD-0019-2018 appealed against the same on the following grounds:

1. The learned Trial Magistrate erred in law and fact when he failed to find that the Plaintiff's suit was *res judicata* and that the Plaintiff had sued a wrong party.
2. The learned Trial Magistrate erred in law and fact when he ignored and instead upheld material contradictions and departures that marred the Plaintiff's suit and failed to find that the Plaintiff had failed to discharge the burden of proof.
3. The learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence concerning ownership of the suit land and failed to find that the same belonged to the late Spranza Mary Naziwa.
4. The learned Trial Magistrate erred in law and fact when he declared the Respondent as the owner of the suit land.

The Appellant accordingly made the following prayers:

1. The Appeal be allowed.
2. The judgment and orders of the lower court be set aside.
3. The suit land be declared to belong to the estate of the late Spranza Mary Naziwa.
4. The costs of the appeal and the lower court be awarded to the Appellant.

The brief facts in this matter are as follows.

The Plaintiff/Respondent filed a suit against the Defendant/Appellant on 25th September 2018 in the lower Court by which he sought orders for recovery of land: permanent injunction restraining the Defendant from trespass, conversion and interference with the suit land; declaration that the Defendant had no interest and title over the suit land; declaration that the Defendant's claim is time-barred; order granting quiet and vacant possession of the suit land to the Plaintiff; eviction orders against the Defendant; and, order for damages, mesne profits and costs of the suit.

The Plaintiff/Respondent's cause of action was founded on the fact that the suit land located in Kinyamaseke II Cell, Kinyamaseke Town Council, Kasese district and held under customary tenure belonged to him having validly purchased the same for valuable consideration from one Kyayaba Makaku in 1994 as shown in a sales agreement executed in 2002 upon completion of payment. The Plaintiff/Respondent averred that he had been in quiet possession of the suit land since 1994 and that early in 2018 the Defendant/Appellant had claimed ownership of the suit land without colour of right started to interfere with the Plaintiff/Respondent's right to quiet and vacant possession by trespassing on the suit land and cultivating thereon.

The Plaintiff/Respondent contended that he had a valid title and that the Defendant/Appellant's grandmother who was alive at the time of the suit had no interest or title to pass on to him and that furthermore the Defendant/Appellant did not have any Letters of Administration entitling him to act in his grandmother's stead. The Plaintiff/Respondent also claimed adverse possession from 1994 to 2018 without interruption.

In response to the above, the Defendant/Appellant contended that the suit was *res judicata* as the subject matter had previously been conclusively determined by the Kinyamaseke Parish LCII Court between the same parties. It was further contended that the suit barred by limitations and that the suit was frivolous, vexatious and also premature and misconceived.

The Defendant/Appellant contended before the lower Court that the suit land was acquired by the Defendant/Appellant's grandparents in 1970 from a village elder Kyababa Makaku. The Defendant/Appellant further contended that the Plaintiff/Respondent's claim was founded on fraud and bad faith and prayed Court to dismiss the same.

His Worship Edgar Karakire subsequently heard the matter and delivered judgment on 15th March 2023. In his judgment, His Worship Karakire addressed the following issues:

1. Whether the suit was *res judicata*.
2. Who was the rightful owner of the suit land.
3. Whether the Defendant trespassed on the suit land.
4. Remedies available to the parties.

Based on the issues above, the lower Court decided as follows.

As concerns the question of *res judicata* the lower Court was unable to determine the issue as the Defendant had placed reliance on a document admitted for identification purposes which document was not translated or certified.

As concerns the rightful owner of the suit land, His Worship Karakire held that the Plaintiff's evidence was more credible as the defence witnesses did not have firsthand knowledge of the matter and furthermore there was no documentary evidence in support of their narrative. His Worship Karakire further held that it was not in contention that the Plaintiff was in possession of the suit land since 1994. He also held that the available documentary evidence adduced by the Plaintiff in the form of a purchase agreement appeared to have been tampered with but went on to hold that the said document held probative value as it was witnessed by several people who confirmed it as true. He therefore held that the evidence of the Defendant was not sufficient to establish fraud and assail the sound evidence of the Plaintiff and on a balance of probabilities the Plaintiff was the rightful owner of the land.

As concerns whether the Defendant was a trespasser, His Worship Karakire held that based on the locus visit it was not in contention that the Plaintiff was in occupation of the suit land. However, it was also held that by the Defendant's own admission he had been going onto the land since 2015 and that since the Plaintiff was adjudged rightful owner, it followed that the Defendant was committing acts of trespass.

In terms of remedies His Worship Karakire declared the Plaintiff as rightful owner of the suit land and that the Defendant was a trespasser. Furthermore a permanent injunction was issued against the Defendant barring him and his agents from trespassing. Each party was required to meet its own costs.

It is on the basis of the above that the Appellant being aggrieved and dissatisfied filed this present appeal.

Duty of the First Appellate Court:

The duty of this Court as a first appellate court as laid down by the Supreme Court in the case of **Father Nanensio Begumisa and three others v. Eric Tiberaga Civil Appeal No. 17 of 2000** is as follows,

“It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.”

This Court therefore has a duty to re-evaluate the evidence before the lower Court in its entirety and the subsequent decision of the Court and reach its own decision on the correctness of the decision of the lower Court taking into account the arguments of the parties in the appeal.

ANALYSIS OF THE GROUNDS OF APPEAL:

Ground 1:

The Learned Trial Magistrate erred in law and fact when he failed to find that the Plaintiff's suit was Res Judicata and the Plaintiff sued a wrong party.

Submissions.

Counsel for the Appellant argued that the Kinyamaseke LC 2 Court had previously heard and determined that the suit land belonged to Spranza Naziwa Mary and the said Court was a validly established Court within the provisions of the Local Council Courts Act. Furthermore, the Plaintiff/Respondent had testified before Court and accepted that the matter had previously been heard by the LC 2 Court and the matter had been decided against him. Counsel further argued that the Trial Magistrate was wrong not to have considered the copy of the untranslated and uncertified judgment which was admitted for identification purposes. He argued that under the provisions of Section 21(1) of the Local Council Courts Act the proceedings of the LC 2 Court shall

be in the language of the Court. Counsel referred to Section 7 of the Civil Procedure Act and the cases of **Boutique Shazim Ltd v Norattan Bhatia and Another – Civil Appeal No. 36 of 2007** and **Amrit Goyal v Harichand Goyal and 3 Others – Court of Appeal Civil Appeal No. 109 of 204** to further argue that the matter had been previously determined and that therefore the Plaintiff/Respondent's only recourse was by way of appeal.

The Respondent who was self-represented argued in response that res judicata was an afterthought having not been raised as a preliminary objection before the lower court. He further argued that the LC 2 was not a competent court to handle a suit involving the estate of an insane person who was later deceased. The Respondent went on to argue that the LC2 Court did not have jurisdiction to hear a suit concerning inheritance by a third person who had never utilized or occupied the suit land. He further argued that the Appellant lacked locus standi before the lower court and that there was no evidence to prove the link between the Appellant and the late Spranza Mary Naziwa.

Counsel for the Appellant argued in rejoinder that at the time of institution of the suit Spranza Mary Naziwa was actually alive and the Respondent had confirmed as much and not taken issue over the same.

Analysis:

I have considered Ground 1 in the context of the pleadings, proceedings and decision of the lower Court.

Counsel for the Appellant argued at length regarding the fact that the matter in issue had been previously determined by the LC 2 Court in Kinyamaseke. For his part the Respondent in this matter argued that the question of res judicata was an afterthought having never been raised before the lower Court. However, it is clear from the Written Statement of Defence that the question of res judicata was among the issues raised as an intended preliminary objection in Paragraph 3. The Defendant/Appellant indicated therein that he intended to raise the following preliminary objections at the commencement of the suit:

1. The suit is res judicata having been conclusively determined by Kinyamaseke Parish LC 2 Court between the same parties and in respect to the same piece of land whose judgment has never been appealed.
2. The suit is time-barred by limitations being a claim of land acquired in 1970.
3. The suit before the Court is bad in law made in bad faith, frivolous, vexatious, prolix and an abuse of court process.
4. The institution of this suit before a demand notice/notice of intention to sue renders it premature and misconceived.

From the above, it is clear that the Defendant/Appellant intended to raise the aforementioned objections prior to the commencement of the trial. However, from my examination of the lower Court record I did not find any indication that the Defendant/Appellant raised the said preliminary objections. I noted from the judgment of the learned Trial Magistrate that he had framed the following issues as the basis for his judgment:

1. Whether the suit is **res judicata**?
2. Who is the rightful owner of the suit land?
3. Whether the defendant trespassed on the suit land?
4. What remedies are available to the parties?

I found it curious that the learned Trial Magistrate saw fit to pick only one of the intended preliminary objections and traverse it as an issue. I also find it curious that the learned Trial Magistrate traversed an intended preliminary objection that was never argued **inter partes**. It was improper and irregular on the part of the learned Trial Magistrate to proceed to determine the question of **res judicata** when it was clear that the Plaintiff had no opportunity to reply. It was clear that the objections were raised in the context of intended arguments and not as substantive arguments. By deciding upon intended arguments, the Trial Magistrate made a decision on the same without granting the Plaintiff a right to be heard. However, in as much as the Trial Magistrate resolved the issue in favour of the Plaintiff there was no prejudice occasioned.

In my view the issue of **res judicata** never should have been framed as an issue as it was never formally pleaded and argued before the lower Court. Paragraph 3 of the Written Statement of Defence communicated an intention to raise preliminary objections and since it is clear from the lower Court record that the objections were never raised before Court, it is automatically presumed that the Defendant/Appellant abandoned the objections.

It is therefore also clear that it is not open to the Defendant to raise the same on appeal before this Court as the said arguments were never substantively raised before the lower Court beyond a mere expression of intention to raise preliminary objections. The guiding principle in this regard lies in the decision of the Supreme Court in **Interfreight Forwarders v East African Development Bank (1990-1994) EA 117 at Page 125** where it was held that,

**“The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial ... Thus issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on*

a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by amendment of pleadings.”* – Emphasis underlined mine.

By the holding of the Supreme Court above, it is clear that pleadings serve not just to communicate the actual matters for trial but even the interlocutory proceedings such as preliminary objections. The Court can therefore only frame issues from preliminary objections provided that the same are specifically pleaded before the Court for determination as points of law at the earliest possible opportunity (see **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] 1 EA 696**). In this matter there is no evidence that the question of res judicata was ever formally raised before the lower Court and it was therefore erroneous for the Trial Magistrate to have raised the same as an issue for determination.

I should also point out that even if the issue of *res judicata* had in fact been argued before the lower Court, the central premise upon which it was being raised was that there was a judgment of the LC 2 Court in Kinyamaseke. However, the Appellant raised the issue based upon a copy of the said judgment which was admitted on the lower Court record for identification as “D IDEx 1”. Section 63 of the Evidence Act provides that documents must be proved by primary evidence save for cases specified under Section 64 of the Evidence Act. There is no indication on the Court record that the document in question was ever admitted as primary evidence or as an exception covered under Section 64 of the Evidence Act. It was therefore not open to the Appellant to smuggle it in as a ground of appeal when it was neither argued as a preliminary objection nor was Court invited to take judicial notice of the same.

Counsel for the Appellant also argued that based upon the LC 2 Court judgment, the Respondent/Plaintiff had sued the wrong party before the lower Court. However for the reasons explained above, this argument is clearly not sustainable.

I therefore find that that Ground 1 fails.

Analysis and Determination of Ground 2:

The learned Trial Magistrate erred in law and fact when he ignored and instead upheld material contradictions and departures that marred the Plaintiff’s suit and failed to find that the Plaintiff had failed to discharge the burden of proof.

Submissions:

Counsel for the Appellant argued that the burden of proof was upon the Respondent as Plaintiff before the lower Court and that to the extent of the contradictions and departure from pleadings he had failed to discharge the burden of proof on a balance of probabilities. Counsel cited the case of **Godfrey Sebanakita v Fuelex (U) Ltd – SCCA No. 4 of 2016**. Counsel pointed out that the Plaintiff now Respondent had pleaded before the lower court that he was the owner of the suit land and had validly purchased the same for valuable consideration from Kyababa Makaku in 1994. However, during his testimony before Court he testified that it was his father who

purchased the suit land in 1994 and finalized payment in 2002. Counsel quoted the Plaintiff's testimony in Chief where he stated, “*The land is mine. My father bought it in 1994 and finalized payment in 2002 ... My father is dead, he gave it to me before he died.”*

Counsel pointed out that the Plaintiff had further explained that his father gave him the suit land in 1997 and that he used it for two years. Counsel argued that the Plaintiff had departed from his pleadings as a purchaser for value to being a beneficiary of a gift inter vivos. Furthermore PW2 Bwambale Selle testified during cross-examination that it was the Plaintiff's father who purchased the suit land and PW4 Sibendire Charles Mandela testified that the Plaintiff was given the suit land in 1994. Counsel argued that the Plaintiff's evidence was a departure from his pleadings and cited the case of **Interfreight Forwarders (U) Ltd v East African Development Bank – SCCA No. 33 of 1992**.

Counsel for the Appellant further highlighted inconsistencies evident in the Plaintiff's purchase agreement and that the Trial Magistrate had found that the Plaintiff's documentary evidence was impacted in an adverse way and was tainted with alterations and tinkering. Counsel then highlighted the fact that despite the Trial Magistrate's findings he had gone ahead to find the same document to have some probative value having been witnessed by several people and bore the stamp of the area Local Council Chairperson.

Counsel for the Appellant also challenged the finding that the agreement was corroborated by oral testimony. He pointed out that whereas the Plaintiff testified that his father had given him the suit land in 1997, the purchase agreement for the suit land was effected in 2002. Counsel further referred to the evidence of a lady called Yozofina Muhindo at the locus visit who was examined and informed court that the Plaintiff bought the suit land from his brother in law Makaku Kyababa.

Counsel for the Appellant also pointed out that the Trial Magistrate had wrongly shifted the burden of proof to the Defendant when he found that the Defendant had not produced any documentary proof of his case.

In response to the above, the Respondent argued that the Trial Magistrate was correct to have found that the land belonged to the Plaintiff. He cited Article 126(2)(e) of the Constitution further argued that the Appellant was relying on technicalities of minor inconsistencies. He argued that there was evidence that the Plaintiff's father had bought the suit land from the Ridge Leader called Makaku. The Respondent argued that the allegations of the Appellant were not sufficient to defeat his interest in the suit land.

Counsel for the Appellant argued in rejoinder that Article 126(2)(e) could not serve to cure the departure from pleadings and the grave contradictions apparent in the Respondent's evidence before the lower Court.

Analysis:

I have considered the pleadings, proceedings and decision of the lower Court in the context of Ground 2. The learned Trial Magistrate addressed two issues upon which this Ground is raised. The issues in this regard were:

1. Who is the rightful owner of the suit land?
2. Whether the Defendant trespassed on the suit land?

In order to address the issues above, the lower Court would have to be guided by the legal standards related to evidence in civil matters as established in Sections 101 to 104 and 106 of the Evidence Act.

In determining the rightful owner of the suit land in this matter, the Trial Magistrate relied both on oral testimony and documentary evidence in the form of an agreement dated 12th September 2002. He held in particular as follows.

“My finding was that the account for the plaintiff was the more credible and believable. Not only were some of the defence witnesses testifying about information which they did not have first-hand knowledge of (such as the defendant DW1 testifying how his grandmother acquired the land in 1970 before he was born); also, no documentary evidence at all was adduced to further establish their narrative. It is fair to say none existed.

* ... *

As for documentary evidence, I have already observed that some of the documents adduced by the plaintiff, particularly the purchase agreement, were tainted with alterations and tinkering. Be that as it may, aside from the dates being tinkered with, I felt that the said purchase agreement possessed some probative value. This is because it was witnessed by several people, and it even bore a stamp of the local area Chairperson. I found that at the very least it offered corroboration to the associated oral testimonies. Therefore because all the plaintiff witnesses confirmed it to be true that the father to the plaintiff acquired the land from the ridge leader Makaku in 1994, I believed this evidence as being true.

* ... *

I note that for ascertaining the truth, the court does not consider the number of witnesses but rather the quality of their evidence ... On the whole I found that the quality of evidence from the plaintiff side was better than that from the defence and as such the balance of probabilities favoured the plaintiff. His witnesses adduced evidence of such a quality that a tribunal properly directing itself on the law would say ‘we think it more probably than not’ that the burden is discharged ... I conclude that the plaintiff is the rightful owner of the suit land.”

From the above, I noted that the Trial Magistrate based his decision on ownership partly on the documentary evidence of a purchase agreement that the plaintiff alluded to in his pleadings (see Paragraph 4(ii) of the Plaintiff). However, upon closer examination of the lower Court record I did

not see any indication therein to suggest that the Respondent/Plaintiff had ever formally applied to Court to have the document tendered in as an exhibit for the Plaintiff. Section 104 of the Evidence Act provides that the burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give that evidence. In as much as the Respondent/Plaintiff sought to rely upon the terms the said purchase agreement as proof of his ownership, it was upon the Respondent/Plaintiff to prove the existence and validity of the said purchase agreement before he could rely upon it as proof of ownership. This could only have been done by applying to Court to have the same tendered into Court as an exhibit in his case.

Unfortunately it is apparent that the lower Court unduly relied upon the said document even when by the Trial Magistrate's own observation there was reason to question the authenticity of the document. It is also not even clear whether the original purchase agreement was ever made available for the lower Court to examine. This ultimately calls into question whether the document in question was primary or secondary evidence. In either case the Plaintiff would have needed to prove to Court that the document qualified to be admitted in evidence as either primary or secondary evidence in accordance with either Section 63 or Section 64 of the Evidence Act. The failure of the Plaintiff to have formally tendered the purchase agreement in evidence meant that the Defendant was denied the chance to challenge its admissibility which runs contrary to the Defendant's right to fair trial. There is also no evidence that the purchase agreement was an agreed fact at the time of the scheduling conference.

It is also noteworthy that the copy of the purchase agreement on the court record appears to have been made in Lukonzo and the English translation of the same is made by one Biira Sylvia an office typist without confirmation and certification of the capacity in which she makes the translation.

The concerns raised by Counsel for the Appellant with regard to the inconsistencies in the evidence of the Plaintiff witnesses with the pleadings are in my view academic in light of the fact that the Plaintiff's witnesses were all testifying in corroboration of a purchase agreement that was not tendered in evidence and therefore never formally proved before court. It should be noted that an article does not become an exhibit, until it has been formally proved and admitted in court as evidence (see **Uganda Breweries Ltd v Uganda Railways Corporation – Supreme Court Civil Appeal No. 6 of 2001**).

I therefore find that the Trial Magistrate was wrong to have relied upon a document that was never formally admitted in evidence and more so where there was reason to believe that the said document may have been tampered with.

The Respondent/Plaintiff's cause of action before the lower Court was premised entirely on the fact that he was the owner of the suit land having validly purchased the same for valuable consideration from one Kyababa Makaku in 1994 pursuant to a sales agreement that he attached to the plaint. This same sales agreement was also the one that the lower Court referred to in its judgment. Furthermore, all of the Plaintiff's witnesses including himself testified primarily with

reference to the same purchase agreement. In the book *The Law of Evidence in Uganda* by Cornelius Henry Mukiibi, he notes at Page 89 that as a rule, under the common law, a party relying on words used in a document for any purpose other than for identifying it, must, as a general rule, produce primary or secondary evidence of its contents. The same author cites the case of *Augustien v Challis (1847) 1 Exch 279* in which a landlord was called as a witness made reference to a lease which was not produced as documentary evidence in court. It was held in that case that the evidence of the landlord was inadmissible because the moment it appeared that there was a lease, he could not speak about its contents without producing the original lease document itself.

In this matter, the Respondent/Plaintiff testified as PW1 before the lower Court and he testified about the existence of a purchase agreement in the following terms,

“The land is in Kinyamaseke Town Council. It is 1 acre, approximately 40ft by 160ft. It is mine. My father bought it. At first he bought it in 1994, and the second payment was in 2022. I have the agreement, but I have not carried it today.”

From the above, it is clear that the Respondent/Plaintiff testified in Court about an agreement which was not available in original form before Court and furthermore was never even formally admitted in evidence. This meant that the testimony of the Respondent/Plaintiff and that of all the rest of the Plaintiff witnesses was inadmissible to the extent that it referenced a purchase agreement that was neither admitted in evidence nor available in its original form according to the lower Court record.

I therefore uphold Ground 2 on the basis that the purchase agreement upon which the Respondent/Plaintiff’s case was never formally admitted in evidence and to that extent was therefore never formally proved. In the absence of proof of the authenticity and validity of the purchase agreement, the Respondent/Plaintiff’s case before the lower Court could not stand as even the testimony of all of the Respondent/Plaintiff witnesses was primarily in corroboration of the said agreement. The Trial Magistrate therefore erred to the extent that he held that the Plaintiff had discharged the burden of proving that he was the owner of the suit land.

This Court’s finding also settles ground 4 as it is clear that the Respondent could not be declared as owner of the suit land having failed to prove ownership before the lower Court.

Ground 4 of the appeal is therefore accordingly upheld.

This only leaves the question of Ground 3.

Analysis and Determination of Ground 3:

The learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence concerning ownership of the suit land and failed to find that the same belonged to the late Spranza Mary Naziwa.

Submissions:

Counsel for the Appellant argued Ground 3 and 4 jointly to the effect that the Plaintiff failed to prove that he purchased the suit land in 1994 as claimed in the plaint but rather that it was his father and that furthermore the Plaintiff failed to prove the gift inter vivos in 1997 before his father had purchased the land around 2002 or 2009. It was therefore erroneous on the part of the Trial Magistrate to have concluded he was the rightful owner of the land. Counsel further argued that the Defendant had pleaded in his Written Statement of Defence that the suit land had been acquired by his grandparents in the 1970s and that he had continued to use the same land as grandson from the 1990s when after his grandmother had gone insane and his grandfather had passed away. This was consistent with the testimonies of the Defendant's witnesses who even contested the authenticity of the Plaintiff's purchase agreement. It was on this basis that Counsel argued that grounds 3 and 4 should succeed.

The Respondent argued in response to Ground 3 that the Appellant was claiming the suit land through his grandmother without the locus standi to do so as he did not hold Letters of Administration to the suit land. He prayed Court to find that the Respondent was the lawful owner of the suit land having received the same from his late father as a gift inter vivos.

Counsel for the Appellant argued in rejoinder concerning Ground 3 that the contradictions in the Respondent's evidence could not sustain his claim of ownership.

Analysis:

In light of the analysis and decision concerning Ground 2 I find that Ground 3 partly succeeds to the extent that the Trial Magistrate did in fact fail to properly evaluate the evidence concerning ownership of the suit land. However, I do find also find that this ground substantially fails to the extent that by praying this Court find that the Trial Magistrate failed to find that the land belonged to the late Mary Spranza Naziwa, the Appellant seeks to appeal an issue that he never pleaded before the lower Court. As much as the Appellant did raise did contest the Respondent's ownership of the suit land, he never prayed for the lower Court to declare that the suit land belonged to the late Spranza Mary Naziwa. It follows therefore that being bound by his pleadings by virtue of Order 6 Rule 7 of the Civil Procedure Rules (see also the case of **Interfreight Forwarders (U) Ltd v East African Development Bank** cited above) it was not open to the Appellant to seek through Ground 3 a remedy that he did not specifically plead before the lower Court.

The only way that the evidence of the Appellant/Defendant concerning ownership of the suit land before the lower Court would have been relevant in this regard would have been if the Appellant/Defendant had filed a counter-claim against the Respondent/Plaintiff before the lower Court which in this case was never done.

Ground 3 of this appeal therefore substantially fails.

REMEDIES:

In the circumstances and considering that the last testimony before the lower Court was given nearly five years ago, it may not be practical in terms of cost and convenience to the parties to order a full retrial of this matter. Section 80(1)(d) of the Civil Procedure Act provides that subject to such conditions and limitations as may be prescribed, an appellate court shall have power to take additional evidence or to require such evidence to be taken.

This Court is not in position to make its own decision in this matter concerning the owner of the suit land because there is vital documentary evidence that was never proved before the lower Court despite being relied upon in the judgment of the lower Court.

In the circumstances I will require that in line with Section 37 of the Judicature Act and in the interests of justice and finality in adjudicating this matter, the suit concluded before the lower Court will be referred back to a Magistrate of appropriate jurisdiction to cause the following:

1. The Respondent/Plaintiff should formally tender in an original copy of the purchase agreement against which he based his claim of ownership of the suit land.
2. The Appellant/Defendant should formally tender in a certified copy of the Kinyamaseke LC 2 Court judgment concerning the suit land along with an officially translated copy.

Once the above has been done then the relevant Magistrate should proceed to re-evaluate the testimony of all the witnesses in this matter in relation to the documents above and render a decision on who the rightful owner of the suit land is. This in my view should suffice to cure the mistake of the lower Court in proceeding to hear and evaluate evidence based on documents that were never formally proved before Court.

ORDERS:

1. The Appeal succeeds in part.
2. The Judgment and Decree of the lower Court in Kasese Chief Magistrate Civil Suit **KAS-02-CV-CS-0019-2018** is hereby set aside.
3. The suit before the lower Court is hereby referred back to the Chief Magistrate Kasese for allocation to the relevant Magistrate G1 who will re-evaluate the evidence in the terms explained in the remedies and render a fresh judgment.
4. Each party shall bear its own costs in this appeal.
5. The costs in the lower Court shall be awarded to the successful party upon re-evaluation of the evidence in the terms outlined in the remedies above.

I so order.

David S. L. Makumbi

JUDGE

18/02/25

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Prepared on 14 October 2026 · Esheria