

UGANDA / JUDGMENT

Busiku v Mafabi (Civil Appeal 66 of 2023) [2024] UGHC 189 (5 April 2024)

[2024] UGHC 189

COURT

High Court of Uganda

BEFORE

Adonyo, J

CASE / FILE NUMBER

Civil Appeal 66 of 2023

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The Republic of Uganda**In the High Court of Uganda Holden at Soroti****Civil Appeal No. 66 of 2023****(Arising from Civil Suit No. 004 of 2021 of the Chief Magistrate's Court of Kumi at Bukedea)**

Busiku Rogers (Attorney) ::::::::::::::::::::::::::::::

Versus

Mafabi Paul ::::::::::: Respondents

Before: Hon. Justice Dr Henry Peter Adonyo**Judgement**

(An appeal against the judgment and orders in Civil Suit No. 004 of 2021 of the Chief Magistrate's *Court of Kumi at Bukedea delivered on 11/07/2023 by HW Kimono Juliana Magistrate Grade One)*

1. Background:

Busiku Rogers, the plaintiff) (now appellant) filed Civil Suit No. 004 of 2021 against Mafabi Paul, the defendant (now respondent) for an eviction order or an order for vacant possession, general damages, special damages, a permanent injunction, costs of the suit.

2. The appellant/plaintiff's claim:

The plaintiff alleged that Bbuyi Iddi Makawa donated powers of attorney dated 15th December 2019 to him (Busiku Rogers) and as a result he took physical possession

of

and use of all 18 acres of land belonging to Bbuyi Iddi in Busano village, Busano parish, Aminit sub county Bukedea district.

About March 2021, when the plaintiff had ploughed 02 acres of the land by tractor and in preparation to plant crops, the defendant is said to unlawfully have entered the suit land claiming it as his, re-ploughed the land and planted crops.

- Despite several demands, the defendant refused to vacate the land and continued 10 trespassing.

- 3. The defendants' / respondents' claim:

The defendant contends that he is the lawful owner of the suit land measuring 02 acres, which he purchased at a consideration of shs. 4,000,000/= from Bbuyi Iddi

Makawa under an agreement dated 16th February 2020, executed in the presence 15 of the LC1, LC2 and other residents of the area.

The defendant contends that the plaintiff interrupted the defendant's use of the suit land, prompting the defendant to report the plaintiff to the Local Council Court who failed to raise any issue with the LCs but instead disappeared.

The defendant questioned the authenticity and scope of the Special Powers of Attorney dated 15th December 2019 and contends that the special powers of attorney were for the donee to recover all land and execution in a case vide Bukedea Magistrate Grade One Court Civil Suit No. 0009 of 2014.

The defendant conversely stated that the powers of attorney do not extend to the suit land bought directly from Bbuyi Iddi Makawa. 25

- At the trial in the lower court, five issues formed the basis of the trial magistrate's determination of the dispute and these are:
 - a) Whether or not there was a sale of land in the agreement dated 16th February 2020 between Bbuyi Iddi Makawa and the defendant, if so.
 - b) Whether the defendant is a trespasser.
 - c) Whether the lawful attorney of Bbuyi Iddi Makawa has **locus standi** to bring the suit before the court now,

- d) Whether there is a relationship between the suit land in Bukedea Magistrate Grade One Court Civil Suit No. 009 of 2014 and the suit land before the court now and;
- e) Whether there was a suit and proceedings in LCI court in Busano village, 15 Busano parish, Aminit sub county Bukedea district.

The trial Magistrate received evidence from the parties and visited the *locus in quo*.

The trial court found that the plaintiff had failed to prove his case and disprove the evidence that Bbuyi Iddi Makawa signed a sale agreement of 16th February 2020 giving the defendant 02 acres of land and thus concluded that under the 20 circumstances it could not declare that the defendant's occupation of the suit land with eucalyptus trees a trespass.

The court also found that the plaintiff, lawful attorney of Bbuyi Iddi Makawa, had locus standi to bring the suit before the court now because it was unclear if Bbuyi

meant it for Bukedea Magistrate Grade One Court Civil Suit No. 009 of 2014 or the 25 suit then before as it found that concluded that the defendant had failed to disprove that Bbuyi Iddi Makawa had signed on the said powers of attorney.

- The court, however, noted that the orders sought by the plaintiff, that is, an eviction $\$ \backslash \mathrm{mathsf{S}} \backslash$ order or an order for vacant possession, general damages, special damages, permanent injunction and costs, could not be granted as it ruled as follows;
- a) For the eviction order or the order for vacant possession, it remained unclear whether Bbuyi Iddi did not sign or write his name on the sale agreement of 16 February 2020. The plaintiff side insisted that the Bbuyi Iddi Makawa did not sign the agreement and left it as is. The court is left at a loss by the plaintiff's inability to disprove the defendant's evidence that Bbuyi Iddi Makawa signed or wrote his name on the agreement. As such, it is equally difficult to determine or declare the defendant a trespasser in the suit land, which he occupies by eucalyptus trees (see: temporary application pleadings and sketch map from the locus in quo visit). It is, therefore, not tenable in law to order for eviction or vacant possession of the suit land against the defendant under such circumstances.
- b) General damages: It is trite that general damages are granted to compensate an aggrieved party by putting him in the position he was in before the injury complained of. In the case before the court, the plaintiff failed to prove the injury he suffered, that is, the defendant's trespass, and as such, general damages ought not to be granted.
- c) Special damages: In John Eletu vs Uganda Airlines (1984) HCB 40, special damages must be specifically pleaded and proved to be granted. The court perused the amended plaint; special damages were not specifically pleaded and, unsurprisingly, not pleaded.
- d) Permanent injunction: A permanent injunction against, I presume (NB: the pleadings simply state 'permanent injunction'), further trespass cannot be

- granted because, as earlier found in this judgment, the plaintiff side failed to prove that the defendant is unlawfully occupying the suit land by failing to disprove the defendant's claim that Bbuyi Iddi Makawa signed on the agreement dated 16 February 2020. As a result, the court failed to declare the defendant a trespasser in the suit-land.
- *e)* Each party is to bear his or her costs in the suit under section 27(2) of the Civil Procedure Act, cap 71.*

The lower court ruled against the plaintiff who has now appealed to this Honourable Court.

- 4. Grounds of Appeal:

- According to the memorandum of appeal, the appellant raised five grounds of 15 appeal as follows:
- a) The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on the court record, leading to a miscarriage of justice.
- b) The learned trial magistrate erred in law and, in fact, when she failed to evaluate the evidence of court witness Bbuyi Iddi on court record and believe that the plaintiff was a lawful attorney.
- c) The trial magistrate erred in law and fact when she believed the contradictory and inconsistent evidence of the respondent.
- d) The trial magistrate erred in law and, in fact, when she believed and held that it was very difficult to determine that the respondent was a trespasser into the suit land.

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- e) The trial magistrate erred in law and, in fact, when she failed to evaluate the evidence of a court witness on court record to believe whether or not there was a sale or purchase of the suit land by the respondent.

The appellant prayed that the appeal be allowed, the judgement and orders of the lower court be quashed or and set aside and he be granted costs herein and in the 10 court below.

5. Duty of the first appellate court:

This is the first appeal from the learned magistrate's decision. The duty of the first appellate court is to scrutinise and re-evaluate all the evidence on record to arrive at a fair and just decision.

This duty was well laid down in the case of *Kifamunte Henry vs Uganda SCCA No.* 10/1997, where it was pointed out.

> "The first appellate court has a duty to review the evidence of the case and to reconsider the material before the trial judge. The appellate court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it."

In the case *Father Nanensio Begumisa and three others vs Eric Tiberaga* SCCA 17 of *2000; [2004] KALR 236*, the obligation of a first appellate court was pointed as being;

> "...under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and reappraisal before coming to its own conclusion."

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See also: *Baguma Fred vs Uganda* SCCA No. 7 of 2004. \$\mathsf{S}\$

6. Power of the Appellate Court:

Section 80 of the Civil Procedure Act, Cap 71, grants the High Court appellate powers to determine a case to its finality.

Resolving this appeal involves considering the above legal position regarding the duty and legal obligation of the first appellate court. 10

7. Representation:

The appellant was self-represented, whereas M/s Dagira & Company Advocates represented the respondent. The parties were directed by this court to file written submissions as follows;

- The appellant was to file written submissions by 5th December 2023 and serve 15 upon the respondent/counsel, then;
- The respondent was to file his written submissions by 28th December 2023 \$\quad \bullet\$ and in case of a rejoinder, if necessary to be filed before 10th January 2024.

According to the court file record, the appellant's submissions were received by this court on 4th/12/2023 as scheduled. However, by 28th December 2023, the 20 respondent had not filed his submissions.

On 3rd January 2024, the appellant filed his submissions in rejoinder, but he complained of the respondent's failure to obey the court order.

When the matter came up for mention on 10th January 2024, the appellant was in court and the respondent was absent. The court noted that the appellant had 25

- complied with the schedule for filing his submissions and that on file there were only \$\mathsf{S}\$ the respondent's submissions on the cross-appeal. The respondent had not complied with filing his submissions on the instant appeal in accordance with the earlier given schedule. The file was then forwarded by the Deputy Registrar of this court for further management.
- On 22nd January 2024, the court received the respondent's submissions though 10 there was no affidavit of service evidencing the service of the same onto the appellant.

This behaviour of the respondent makes him susceptible to being held in contempt of the court order on late filing of his submissions without first seeking leave to do

15 SO.

> That being the case, I will disregard the respondent's submissions and determine this appeal on the basis only of the appellant's submissions though I must add that in law submissions are not pleadings but simply a guide to each party's respective case and are not binding on the court in determining the dispute.

20 For that reason, I am of the view that the appellant has not been prejudiced by the respondent's failure to file submissions in time or its expunging due to late filing on record of the court.

For the cross-appeal, only the respondent in the cross-appeal submitted; I will consider the respondent's submissions on the cross-appeal.

As this is a civil suit/appeal, the appellant has the burden of proof. to prove his case 25 on a balance of probabilities.

See: Sections 101 and 102 of the Evidence Act, Cap 6 and Nsubuga vs Kawuma \$ \mathsf{S} \\$ [1978] HCB 307.

Also, in the case of *Erumiya Ebyetu v. Gusberito [1985] HCB 64* it was held that;

"where the plaintiff leaves his case in equilibrium, the court is not entitled to incline the balance in his favour. The plaintiff must prove his case against the defendant to the required standard."

8. Determination:

The appellant's counsel submitted on all the grounds concurrently and jointly; however, I will determine this appeal in the following manner.

I will start with ground 1, then ground 2 and ground 5, then ground 3, and then ground 4 on the basis that it is my considered view that the issue of ownership of 15 the suit land is the most noticeable.

- Ground 1:

The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on the court record, leading to a miscarriage of justice.

This ground of appeal was not properly formulated because the wording was not 20 precise. Under Order 43 Rule 1(2) of the Civil Procedure Rules, it is provided that the memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds shall be numbered consecutively.

This ground of appeal that "The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on the court record, leading to a miscarriage of justice" is not concise.

It is too general and vague since it does not point to the specific evidence before the court that the appellant is alluding to, which the trial magistrate erred in law and fact to evaluate properly.

A ground of appeal is required to not be narrative and must challenge a holding, a ratio decidendi, and specify points wrongly decided.

In the case of Celtel Uganda Limited T/A Zain Uganda v Karungi (Civil Appeal No 73 of 2013) 2021 UGCA 93, the court noted that a ground such as the one in the instant

appeal of "The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on the court record, leading to a miscarriage of justice" when assessed within the purview of Rule 86(1) of the Court of Appeal Rules which is similarly worded as Order 43 rule 1(2) of the Civil Procedure Rules, is clearly a ground that did not specify in what way and in what specific aspect of the decision being appealed against was wrongly decided by the court.

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In arriving to that conclusion, the judge relied on the Supreme Court decision of Ranchobhai Shivbhai Patel Ltd and Another vs Henry Wambuga and Another Civil Appeal No. 06 of 2017 (unreported), where the court considered the import of Rule 82(1) of the Supreme Court Rules, which is also similarly worded as Rule 86(1) of the Rules of the Court of Appeal and held that the impugned ground of appeal which had been worded thus that "The learned Justices of the Court of Appeal erred in law and in fact when they failed to evaluate the evidence on record and thereby arrived at

- "a wrong conclusion" is too general and does not specify in what way and in which specific areas the learned Justices of Appeal failed to evaluate the evidence. It does not set out the particular wrong decision arrived at by the learned Justices of Appeal as pointed by Mugamba, JSC who wrote the lead Judgment with the concurrence of the other members of the Court.
- Given the Supreme Court decision cited above, I am of the considered view that I emboldened that ground one of this appeal, which faults the trial magistrate's "failure in law and, in fact, to properly evaluate the evidence on the court record, leading to a miscarriage of justice" without specifying the subject matter of the case, as being too general, narrative and not concise.
- This ground does not set out how the trial magistrate failed to evaluate evidence and no instances of evidence are pointed out in which the trial magistrate is alleged to have wrongly evaluated any evidence presented before the court and as such I would find that it contravenes the provisions of Order 43 rule 1 (2) of the CPR and is for which reason I would strike it out.

- However, as this Court is a first appellate court, I am enjoined to re-appraise the 20 whole evidence on the record and reach my own conclusions.
- Ground 5: $\frac{1}{2}$

The trial magistrate erred in law and, in fact, when she failed to evaluate the evidence of a court witness on court record to believe whether or not there was a sale or purchase of the suit land by the respondent.

- The appellant's counsel submitted that the testimony of Bbuyi Iddi alias Makawa, S "the donor" of the powers of attorney to the appellant, who was invited by the Court as Court Witness One (CW1), - the trial magistrate did not properly evaluate his evidence. The appellant's counsel submitted that the evidence of CW1 corroborated the appellant's documentary evidence – PEX1 and PEX2, respectively.
- The appellant's counsel submitted that the trial court in its ruling stated, "the court 10 realised that neither the plaintiff nor defendant brought the witness Bbuyi Iddi. If it were not for the court, the said witness would not have been here.

That from the record the witness owned the Powers of Attorney and the national identification card copy attached. CW1, however, denied the handwriting on the sale agreement dated 16th/02/2020, yet the defendant's amended WSD filed on the 15 court record claimed that he purchased the suit land at the amount of Shs. 4,000,000/= from Bbuyi Iddi -CW1, who was invited by the court as a court witness to clarify the purchase of the suit land, which he denied. Moreover, counsel contended that DW4 Mafabi Paul told the court that the signature on the National I. D of Bbuyi Iddi and that on his sale agreement of 16/02/2020 do not match, which 20 corroborates with the evidence of court witness 1 Bbuyi Iddi, who told the court that he signed the POA and the National I. D but that he did not know anything about the agreement dated 16/02/2020 and that face of sale of the suit land of the defendant remained hanging.

The perusal of the lower court judgement shows that the trial magistrate noted that 25 Bbuyi Iddi Makawa was called to court to clarify whether he signed the powers of attorney dated 15th December 2019 and whether he signed the sale agreement dated 16th February 2020.

Bbuyi Iddi Makawa (Court Witness 1) testified and told the court that the powers of S attorney were authentic but that his name and signature on the agreement were forged.

The court then engaged the services of a handwriting expert, but the parties frustrated that process for a record three times when the handwriting expert was meant to assess the handwriting of CW1 and make a finding and report to the trial court leaving the court to conclude that "obtaining the handwriting samples from Bbuyi Iddi Makawa was akin to squeezing water out of a stone. Court lifted its hands off the case file for onward transmission to the Chief Magistrate."

The trial magistrate also noted that in writing this judgment, the court discarded the evidence by Bbuyi Iddi Makawa as the owner the special powers of attorney dated 15 15 December 2019 and his denial of ever affixing his name and/or signature on the agreement dated 16 February 2020.

The trial magistrate further noted in her judgement that;

"The plaintiff side failed to disprove the defendant side evidence that Bbuyi Iddi Makawa signed the sale agreement of 16 February 2020; thus the court cannot under 20 the circumstances declare that the defendant's occupation of the suit land with eucalyptus trees to declare him a trespasser." She further noted that "the orders sought by the plaintiff, that is: an eviction order or an order for vacant possession, general damages, special damages, permanent injunction and costs, could not be granted because; For the eviction order or the order for vacant possession, it remained 25 unclear whether Bbuyi Iddi did not sign or write his name on the sale agreement of 16 February 2020. The plaintiff side insisted that the Bbuyi Iddi Makawa did not sign the

- agreement and left it as is. The court is left at a loss by the plaintiff's inability to S disprove the defendant's evidence that Bbuyi Iddi Makawa signed or wrote his name on the said agreement. As such, it is equally difficult to determine or declare the defendant a trespasser in the suit land, which he occupies by eucalyptus trees (see: temporary application pleadings and sketch map from the locus in quo visit). It is,
- therefore, not tenable in law to order for eviction or vacant possession of the suit land 10 against the defendant under such circumstances."

It is evident that Bbuyi Iddi alias Makawa to whom the appellant claims was the doner of the powers of attorney and to whom the respondent claims a sale to him of the suit land when called as a witness by the court to clarify whether he signed

- the powers of attorney dated 15th December 2019 and whether he signed the sale 15 agreement dated 16th February 2020 confirmed the power of attorney of the appellant but disputed the sale agreement of the respondent and when the trial magistrate tried to subject the handwritings in the sale agreement to an independent handwriting expert process the same was frustrated by both parties.
- The appellant on the other hand claims that the respondent trespassed on his land 20 for which he had powers of attorney. The appellant, as the plaintiff in the trial court and the appellant in this court, had the burden of proving that he owns the land through a power of attorney and that the defendant /respondent trespassed on that land.
- This is because "a power of attorney is an instrument granting someone authority to 25 act as agent or attorney-in-fact for the grantor. A special power of attorney limits the agent's authority to only a specified matter" (see: Black's Law Dictionary, 9th Edition, page 1290).

- The standard of proof expected in this aspect is that on a balance of probabilities. $\$ \backslash \mathrm{mathsf{S}} \$$ Hon Justice Stephen Mubiru, in the case of Odiya v Lukwiya & 3 Others (Civil Appeal No. 53 of 2018) [2019] UGHC 69 as "ownership of land is acquired by either; purchase, inheritance, gift, transmission by operation of law, prescription or adverse possession". I associate myself with that decision.
- In this case the acquisition of ownership of land by the plaintiff/appellant despite 10 the possession of a power of attorney must be shown through additional evidence that show that indeed he owned the land as stipulated by the grantor of powers of attorney.

However, upon perusal of the trial record, apart from adducing evidence of a power of attorney, there was no cogent evidence led by the appellant to prove that Bbuyi 15 owned the suit land.

Given the fact that the suit land is not said to be registered, the importance of ascertaining the root ownership cannot be under looked for as was equally held by Justice Mubiru Stephen in Okullo vs Opiyo Civil Appeal No. 26/2016 UGHCCD amplified a "claim of acquisition by purchase, when considering the validity of 20 a claimed purchase of unregistered land, the court needs first to establish the root of title. This means identifying, as far back in time as is possible, a proven original owner to use as a point of reference, to commence the chain of ownership which will end with the current owner. Once the root is established, it is then necessary to show an unbroken chain of ownership from the root to the 25 seller. Where one or more of the previous owners is known to have died whilst they still owned the property, and the sale was by the personal representative of the owner, then it is necessary to show how the deceased's legal interest in the

land passed to the personal representative of the deceased. In that case, the $\$ \backslash \mathrm{mathsf{S}} \$$ grant of probate (or letters of administration as the case may be) must be produced as part of the chain of ownership. In the alternative, there should be cogent evidence of inheritance under custom."

As Byamugisha J (as she then was) held in the case of *Ojwang vs Wilson Bagonza* CACA No. 25 of 2002 for one to claim an interest in land, the claim must be from 10 someone with an interest.

In this matter, neither the appellant nor the respondent demonstrated the interest that the donee of the appellant's powers of attorney nor the vendor in the sale agreement of the defendant/respondent had in the suit land to buttress the contention that the land belonged to either one to the persuasion of court's standard on a balance of probabilities.

Furthermore, when the authenticity of the signatures on the power of attorney and the sale agreement of the defendant/respondent was in dispute by either party, the trial magistrate rightly acting as an umpire summoned CW1 to testify in court since

it was claimed that he authored both exhibits of a power of attorney and a sale 20 agreement which were exhibited in court.

After this witness testified in court, the trial magistrate was not convinced and enlisted the services of a handwriting expert, however, that process was frustrated by both the parties.

Relying on Sections 43 and 44 of the Evidence Act, the trial judge had discretion over 25 whether to call a handwriting expert as a witness. It is my considered view that having already admitted PEX1 and DEX1, which are the documents in the contention

that would support the resolution of the dispute at hand, the opinion of the $\$ \{S\} \$$ handwriting expert by virtue of Sections 43, 44 and 72 of the Evidence Act, Cap 6 became relevant.

Furthermore, it is evident for the evidence of Court Witness 1 to have been adduced in evidence; it was incumbent for the parties to interest themselves in other person's

familiar with the handwriting of Court Witness 1 either to buttress his impugned 10 evidence confirming the power of attorney or his rejection of the sale agreement. But that was not done, and I would not fault the trial magistrate for rejecting that evidence in the absence of those missing pieces of evidence.

It is also evident that Bbuyi Iddi alias Makawa was not availed to the respondent for cross-examination, a cardinal requirement to verify the evidence in chief of a 15 particular witness that is enshrined under Order 18 of the Civil Procedure Rules. It is on record that the trial court denied the prayer of counsel for the respondent to have the witness cross-examined.

In the case of Hon. Kipoi Tonny Nsubuga v Ronny Waluku Wataka & 2 others [2012]

UGCA 6, the Court of Appeal held that failure to avail an appellant the opportunity 20 to cross-examine a witness amounts to an infringement of their right to a fair hearing enshrined under Article 28(1) of the Constitution.

Arising from the above, I would reject the appellant counsel's contention that apart from the trial magistrate summarising the evidence in the judgment, she did not

evaluate it and just made conclusions of the facts in favour of the respondent, hence 25 the miscarriage of justice.

I am persuaded that the trial magistrate rightly rejected the evidence of Court $\$ \{S\} \$$ Witness 1 - Bbuyi Iddi alias Makawa as it had a lot of inadequacies as already established above upon which grounds 2 and 5 were hinged. That being the case, then it is my finding these two grounds fail because the appellant did not adduce any cogent evidence to prove his ownership of the suit land.

Ground 3: 10

The trial magistrate erred in law and fact when she believed the contradictory and *inconsistent evidence of the respondent.*

Counsel for the appellant submitted that there were contradictions in the evidence of the respondent contending that DW1 Waniale Joseph told the court that the land sale agreement of the defendant (DEX1) which he signed was made on 16/02/2020 in Bukedea; however, DW2 Wabulakha Yefusa chairman LC1 Busano village, Busano parish, Aminit Subcounty, Bukedea District, told the court that the agreement was made at Buyaga, Bulambuli District. DW4 Mafabi Paul told the court that he bought the land from Makawa at 4,000,000/= on 16/02/2020, and he said that they measured in 106 strides and 87 feet and that Waniale Joseph came and signed. DW4 20 testified that in 2021, he entered the land with a tractor but found that the land had been dug. DW4 Mafabi Paul told the court that they wrote the agreement in Buyaga contrary to the evidence of DW1 Waniale Joseph, who testified that he was in the garden working and that Makawa came with the chairman found him there; they

measured the land, and they sat and made the agreement. 25

The appellant's counsel pointed out the contradictions in the evidence of DW1, DW2, and DW4 and the defendant's documentary evidence/ agreement date 16/02/2020, DEX1, inviting the court to consider them.

The appellant's counsel submitted on the contradictions in the evidence of DW2 Wabulakha Yefusa chairman LC1 Busano village, Busano parish, Aminit Sub-county, Bukedea District, who described the neighbours to the suit land as Busiku, the lower side was Makawa and then west is Siraji contrary to the evidence of DW3 Wetasa David Chairman LCII Busano village, Busano parish, Aminit Subcounty, Bukedea District who testified on that Bbuyi Iddi Alias Makawa had no land there in that area and is not a neighbour.

- It was evident that there were contradictions regarding the area where the DEX1 15 was signed from. However, DW2, DW3 and DW4 were consistent in their testimonies that the defendant bought the suit land in 2020 which is the same year reflected in DEX1.
- Weighing that fact as found in DEX1 with the testimonies of the witnesses presented by the defendant, I would find and conclude that the alleged inconsistencies were 20 minor and do not go to the root of the defence case for as was held in the case of Alfred Tajar versus Uganda EACA CR. AP. No.167 of 1969 while major inconsistencies in the evidence of the witness will lead to the rejection of his/her evidence, minor inconsistencies will not have the same result unless they point to deliberate falsehoods. In relations to this fact, I would find the inconsistencies minor as both 25 the witnesses testimonies and DEX1 relates to a sale consummated in 2020 which making both believable. Ground 3 therefore fails.

Ground 4:

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The trial magistrate erred in law and in fact when she believed and held that it is very difficult to determine that the respondent is a trespasser into the suit land.

In the case of Justine E. M. N Lutaaya versus Sterling Civil Engineering Co. SCCA No. 11 of 2002, trespass to land occurs "when a person makes an unauthorised entry upon

land, and thereby interfering with or portends to interfere, with another person's 10 lawful possession of that land."

Having found in grounds 2 and 5 that the appellant did not adduce evidence to prove ownership of the suit land, I would reject the view that the trial magistrate erred in law and, in fact, in holding that it is very difficult to determine that the respondent is a trespasser onto the suit land. The trial magistrate correctly found that the respondent was not a trespasser and as such ground 4 would fail.

9. Conclusion:

Since all the grounds have failed, I find that the instant appeal is unmeritorious, and it is hereby dismissed with each party to bear their own costs.

The judgement and orders of the trial magistrate in Civil Suit No. 004 of 2021 of the 20 Chief Magistrate's Court of Kumi at Bukedea delivered on 11/07/2023 by HW Kimono Juliana Magistrate Grade One are hereby upheld.

10. Cross Appeal: $\$ \backslash \text{mathsf{S}} \$$

The respondent (Mafabi Paul) cross-appealed with one ground that the learned trial magistrate erred in law and fact when she did not award costs to the *respondent/cross-appellant:*

Only the respondent in the cross-appeal filed his submissions which have been considered. \$10\$

The appellant's counsel did not file submissions to argue the cross-appeal in this matter.

Having failed to file submissions, the appellant in the cross-appeal is taken to have not disputed the cross-appeal.

- The contention of the cross appellant is that he was the successful party in the lower 15 trial court and should have been awarded costs. The law is that the discretion to determine costs in civil suits lies with the court or judge. This discretion is governed by Section 27(1) and (2) of the Civil Procedure Act of Uganda Act. The court or judge has the authority to decide who should bear the costs, the source of those costs, and the extent to which they are awarded. Therefore, the allocation of costs is 20
- considered discretionary under this provision.

Thus it was in the discretion of the lower trial court to award or not award costs though usually costs would follow the event. I will not interfere with that discretion of the lower court as I find no reason for doing so.

Accordingly, the cross appeal on non-award of costs to the respondent/cross-25 appellant by the lower trial court is dismissed with each party to bear own costs.

11. Conclusion: S

Both the appeal and the cross appeal fails for the reasons given above and as such both are dismissed for want of merit.

12. Orders:

- Both the appeal and cross appeal fails.
- The judgement and orders of the trial magistrate in Civil Suit No. 004 of 2021 of the Chief Magistrate's Court of Kumi at Bukedea delivered on 11/07/2023 by HW Kimono Juliana Magistrate Grade One are hereby upheld.
- The cross-appeal of the appellant (Mafabi Paul) is hereby dismissed. $\mathcal{L}$
- Each party to bear own costs in this appeal, in the cross appeal and in the $\tilde{\mathbf{w}}$ court below.

I so order.

Hon. Justice Dr Henry Peter Adonyo

Judge

05th April 2024

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Prepared on 13 October 2026 · Esheria