

UGANDA / JUDGMENT

Kabazi & Another v Kabejja (Civil Appeal 2 of 2017) [2023] UGHC 377 (12 June 2023)

[2023] UGHC 377

COURT

High Court of Uganda

BEFORE

Katamba Nkwanga, J

CASE / FILE NUMBER

Civil Appeal 2 of 2017

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MASAKA CIVIL APPEAL NO.02 OF 2017 (ARISING FROM CHIEF MAGISTRATES COURT AT KALISIZO CIVIL SUIT NO.69 OF 2012)

1. KABAZI

| 2.
SSALI CHARLES:.....APPELLANTS |

|-----|

| VERSUS |

| KABEJJA JOYCE:.....RESPONDENTS |

***Before; Hon. Justice Victoria Nakintu Nkwanga Katamba* JUDGEMENT.**

Introduction.

This judgement arises from an appeal to this Court from the decision of Her Worship Nambozo Joy, Magistrate Grade 1, delivered on 21st December 2016.

Background.

The Respondent who was the Plaintiff at the trial brought a suit against the Appellants for fraud and trespass to land. The Respondent also sought general damages, an eviction order and a permanent injunction.

It was the Respondent's case at trial that she owns land situate at Lusaka Kibutamu Road and through her agent, Masanda, she agreed to sell part of the land to the 1st Plaintiff. That the agreed portion to be purchased by the 1st Plaintiff was 50ft by 100ft at a purchase price of

Shs.1,000,000/=. An agreement was executed and a part payment made by the Plaintiff. Upon taking possession of the land, the 1st Defendant brought the 2nd Defendant to the land and they have since gone beyond the boundaries agreed. It was also alleged that the Defendants also altered the sale agreement with the consent or knowledge of the Plaintiff.

The Defendants initially had not filed a defence within the stipulated time however they later sought leave to file their defence and the same was granted. In their joint written statement of Defence, the Defendants denied being trespassers. They further stated they occupy the suit land in agreement with the agreement that was executed between the parties.

At the close of hearing, judgement was passed against the current Appellants. The Learned Trial Magistrate, Her Worship Nambozo Joy found that the Appellants were trespassers, she ordered them to vacate any portion on the suit land beyond the 50ft by 100ft. She also issued a permanent injunction and ordered the Appellants to pay general damages of Shs. 500,000/=.

Being dissatisfied with the above decision, the Appellants lodged on appeal to this Court on the grounds contained in the memorandum of Appeal;

1. The Trial Magistrate erred in law and fact when she failed to compound her mind on the verb used "EKITUNDU", meaning a portion that exceeds a plot which was used in the agreement tendered in as PEXH1 to contain that the Kibanja sold to Kabazzi really exceeded an acre so was worth to be measured as stated in the agreement of 2009.
2. The Trial Magistrate erred in law when she failed to realize the concocted evidence of PW2 (Ndawula Henry) who is the LC1 of Lusaka Village whose role in land matters ceased in 2004 and the Parish Committee or Parish wards were the first instance on land matters as the Appellant had bought in the year 2009 and the case was in 2011 wherein the Local Courts powers had lapsed.
3. The Trial Magistrate erred in law and fact when she failed to address contradictory evidence between PW1, PW2 and PW3 which was a ploy to cheat the Appellants so as to defeat justice more in particular as regards the sale agreements namely the 1st and 2nd Agreements.
4. The Trial Magistrate erred in law and fact when she failed to realize that the Respondent and her witnesses were intentionally in a ploy to cheat the Appellants more in particular when they all deliberately denied the witnesses on the agreement of 2009 and alleged it to have been made by the Respondent and yet it is common law that an agreement that exceeds two hundred shillings must bear the signatures of the vendor, purchaser and two witnesses.
5. The Trial Magistrate erred in law and in fact when she concluded the case without visiting locus to ascertain that much as the Respondent asserted that she sold to Kabazzi a Plot comprised in Buddu Block 670 Plots 35 and 44 measuring 56.91Hectares, as whether a mere plot(50ft by 100ft) and an acre for the portion that was sold to the 1st Appellant had definite other boundaries namely road to Kibutamu, Masanda Kiggundu and a playground.

6. The Trial Magistrate erred in law and fact when she failed to evaluate the evidence on record hence reaching to a wrong decision.

At the time of determination of this Appeal, the Respondent was never present or represented and neither did the Respondent file written submissions. I shall consider the preceeding issues later on in the Judgement.

The Appellants filed written submissions.

Submissions for the Appellants.

Grounds 2 and 5 were abandoned while Grounds 1, 4 and 6 were argued jointly.

It was submitted that the Learned Trial Magistrate failed to consider the inconsistencies in the Plaintiffs' evidence.

Counsel while relying on the case of Oryem David versus Omory Phillip, HCCS. No.100 of 2018, submitted that where there are grave inconsistencies in evidence, the evidence ought to be rejected. It was Counsel's submission that the PW1 told Court that she had sold a plot to the 1st Appellant and on a close look at the agreement there is no indication of any measurement. Counsel further stated that PW1 did not produce any agreement entered with the 1st Appellant but she also stated that the agreement that has a witness is the very agreement she signed.

On evaluation of evidence, it was submitted that the Learned Trial Magistrate misdirected herself when she failed to compound her mind on the verb used "Ekitundu" in Luganda meaning a portion that exceeds a plot which was used in the agreement.

It was submitted that a plot in Luganda is usually referred to as a "POLOTTI" and this evidence is enough to show that the 1st Appellant bought a portion of land and not a plot.

It was also submitted that the Trial Magistrate failed to call a handwriting expert to be able to determine whether the agreement was altered or not but rather she formed her own opinion that the document was altered and that she relied on the altered document in her decision.

It was submitted that the Court should reevaluate the evidence and come to its own conclusion.

Determination of Appeal.

The duty of the first appellate Court is to reconsider all evidence and material before the Trial Court and come up to its own conclusion and while doing so, the Appellate Court should not disregard the Judgment appealed from but should carefully consider it. In the event that the Trial Court erred, to warrant an interference by the Appellate Court, the error should have occasioned a miscarriage of justice. (see: *John Kafeero Sentongo versus Ssozi, COACA No.173 of 2012*)

Before I consider the grounds of appeal as argued by the Appellants, I am inclined to first consider the nature of the grounds of appeal as raised by the Appellants and the nonappearance of the Respondent.

On the grounds of appeal as raised by the Appellants, I find grounds 1 to 5 to be argumentative and they also contain narratives which offends *Order 41 Rule (2) of the Civil Procedure Rules.* Grounds raised ought to be concise and without any argument or narrative.

The grounds that offend the rule ought to have been struck off however, Courts are currently lenient with litigants and proceed to determine the Appeal in the interest of justice. (see; *Hellena Namazzi versus Banadda Kayondo and others, SCCA. No.16 of 2019*).

I am also alive to the fact that the Appellants were previously unrepresented and it is in the interest of justice that the Appeal be resolved on its merits.

Regarding the nonappearance of the Respondent, it is my opinion that my findings on the issue can be contextualized if I also consider a brief background of the events leading to the determination of this Appeal.

From the Court record, when the trial Court determined the matter in the Respondents favor and the Respondent commenced execution proceedings, the Appellants filed the appeal and also applied for a stay of execution vide HCMA. No.48 of 2019. There is also an affidavit of service deposed by Icumar Priscilla and filed in Court on 10th December 2019 and it is to the effect that the failure to effect Court process on the Respondent. The Appellants applied for substituted service vide HCMA. No.03 of 2020. The same was granted on 20th February 2020 on conditions that the following orders were complied with;

1. The Appellants were put 6 radio Announcements in Luganda on CBS Radio.
2. Summons were to be placed onto the disputed land, LC1 office, sub county headquarters and police post of the area.
3. An advertisement was to be placed in Bukedde newspaper.
4. The Appellants were to file a return within 60 days.

Besides a Bukedde newspaper dated 7th March 2020 with a notices at page 22, other orders as passed by this Court were not complied with.

It is also my observation that with regards to hearing notices issued on 08th April 2021 with respect to this Appeal, the notices were also not served on the Respondent. On record is an affidavit deposed by Ssempijja Alex a court process server attached to Masaka High Court.

The Affidavit is dated 30th April 2021 and it was filed in Court on 10th May 2021. It is to the effect that there was total failure of service of Court Process on the Respondent.

There was never an application for extension of time within which to serve nor was there an application for substituted service as was the case in HCMA. No.48 of 2019.

When the matter came up on 7th February 2022, service had not yet been effected. When the matter came up again on 6th March 2023, the Appellants were ordered to file and serve written submissions on the Respondent by 27th March 2023. There is no proof that the orders were ever complied with despite the fact that the Appellants were represented.

To date, no proof of service of hearing notices or the submissions or sufficient reason for nonservice has been adduced.

Under *Order 41 Rule 11 of the Civil Procedure Rules*, it is provided that; *Notice of the day fixed for hearing of the appeal shall be served on the respondent or on his or her advocate in the manner provided for the service on a defendant of a summons to enter appearance; and all the provisions applicable to that summons, and to proceedings with reference to the service of the summons, shall apply to the service of the notice.*

In the case of *Edison Kanyabware v. Pastori Tumwebaze SCCA 6/2004*. The Supreme Court held that: "*Order 5 rule 17 (now 16) of the Civil Procedure Rules provides that where summons have been served on the defendant or his agent or other person on his behalf, the serving officer shall in all cases make or annex or cause to be annexed to the original summons an affidavit of service stating the time and manner in which summons was served..... The provisions of this rule is mandatory, it was not complied with in the instant case. What the rule stipulates about service of summons, in my opinion applies equally to service of hearing notices*."

Other authorities also consider the effect of non-service of Court process. Where there has been failure to serve court process, the matter shall be dismissed. (see; *Bitamisi v Rwabuganda Supreme Court Civil Appeal No. 16 of 2014*).

In applying the above principles to the facts before this Court, it is my finding that this matter stands be dismissed due to the fact that the Respondent was never served with hearing notices with respect to this Appeal. Secondly, when the matter came up on 6th March 2023, the

Appellants were represented by Mr. Habyarimana Matia. Counsel however, never raised the issue nor sought Court's indulgence on the matter.

The Appellants were ordered to file and serve written submissions on the Respondent however, there is no proof of service. This also supports the fact that the Court orders were never complied with and yet Court orders ought to be complied with.

I am therefore inclined to find that this Appeal is incompetent for non-service of Court process on the Respondent as stipulated by law.

This should have been the end of this Appeal however, in the interest of justice and though moot and academic at this point, I shall address the grounds of appeal raised by the Appellants.

Counsel submitted that there were contradictions in the PW1's evidence that is; PW1 told Court that she had sold a plot to the 1st Appellant and yet on a close look at the agreement there is no indication of any measurement. Secondly, that PW1 did not produce any agreement entered with

the 1st Appellant but she also stated that the agreement that has a witness is the very agreement she signed.

Counsel also submitted that the failed to employ the services of a hand writing expert to determine whether the agreement had been altered. It was also counsel's contention that the Learned trial Magistrate did not properly evaluate the evidence.

At trial, the Learned Trial Magistrate **interalia** the evidence supported the fact the Defendants had altered the agreement to reflect that the Plaintiff had sold more than 50ft by 100ft of her land which was not the case. The Learned Trial Magistrate also made a finding that the Plaintiff had sold 50ft by 100ft and the Defendants had since encroached on land beyond the portion sold to them and as a result, they were trespassers on the suit land.

Considering the above, it is my finding that the success or failure of the Plaintiffs case largely depends on the agreement between the Plaintiff and the Defendant. A careful consideration of the agreement and the testimony of witnesses assists Court in reaching a finding of whether the Plaintiff sold more than 50ft by 100ft and whether the agreement was altered.

It was not disputed that the parties entered a land sale agreement. The dispute is whether the agreement was altered to reflect a size not agreed upon.

A copy of the agreement executed between the parties was tendered in evidence together with its certificate of translation and marked PEXH1.

Counsel submitted that the Trial Court ought to have engaged an expert on hand writing before coming up to such a conclusion.

I would like to first note that it is not the duty of this Court to employ services of experts. The evidential burden rests on litigants to prove their respective cases and if the Plaintiff and Defendants considered it necessary to adduce evidence by way of an expert in handwriting, they should have done so. (see; **Musyakulu Charles versus Muwonge Patrick, HCCS. No.52 of 2014**).

Secondly, even though Court may in some circumstances rely on the evidence of experts, it was held in **Premchandra Sheno and Another versus Maximov Oleg, Supreme Court Civil Appeal. No.9 of 2003** cited with approval in **Suluman versus Uganda, Supreme Court Criminal Appeal No. 294 of 2015**, that the Court may as experts of experts make findings on handwriting without a need for an expert opinion.

On my own observation of PEXH1, I notice that the agreement was altered. Additions were made to agreement just before the signature of the vendor and the additions are in a handwriting inconsistent with the rest of the handwriting of the agreement. I also observe that the 3 witnesses at the end of the agreement are part of the alteration.

In support of this observation, I also find observe that the evidence of the Plaintiff was very consistent even upon cross examination that the Plaintiff only sold 50ft by 100ft but the agreement was altered. In further coming to conclusion that the agreement was altered, DW1 stated that it was the Plaintiff that drafted the entire the agreement. Dw3 also stated that the Plaintiff drafted the entire agreement. If the evidence as stated points to the fact the Plaintiff drafted the entire agreement, the only conclusion that can be reached is that the agreement was altered because it contains two different hand writings.

I also observe that the while the Plaintiff's evidence was consistent on the fact that the Plaintiff had only sold 50ft by 100ft on the suit land. In considering the evidence for the Defence, DW2 was never certain of the size he bought. In Court he stated that he suspected that he had bought 1 acre and at locus, he stated that he bought about 1 acre. In considering these statements together with the Plaintiff's evidence that the size of the land was never put into the agreement. It can be concluded that the evidence supports the fact that the intention was in the agreement was 50ft by 100ft and not 1 acre or according to the alterations.

I associate with the decision in the case of *Oryem David versus Omory Phillip, HCCS. No.100 of 2018,* as cited for the Appellant. It was observed that, "it is trite law that grave inconsistencies and contradictions unless satisfactorily explained will usually but not necessarily result in the evidence of a witness being rejected. Minor ones unless they point to deliberate untruthfulness will be ignored.*"

It was further observed that, "What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material, i.e "essential" to the determination of the case. Material aspects of evidence vary from case to case but generally in a trial, materiality is determined on the basis of the relative importance between the point being offered by the contradictory evidence and its consequences to the determination of any of the facts or issues necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central or that is only collateral to the outcome of the case*."

Counsel submitted that PW1 told Court that she had sold a plot to the 1st Appellant and yet on a close look at the agreement there is no indication of any measurement. Secondly, that PW1 did not produce any agreement entered with the 1st Appellant but she also stated that the agreement that has a witness is the very agreement she signed.

I find the above submissions to be devoid of merit because according to the evidence, there were no grave inconsistencies in the Plaintiff's evidence. PW1 stated that she indeed drafted the document PEXh1 however, there were alterations made. As matter of fact, all the parties relied on PEXh1 albeit with reservations.

I also find that the evidence supports the fact the Defendants have since enroached on land beyond 50ft by 100ft land sold to them. Besides the testimonies of PW1, PW2 and PW3 which is the effect that the 2nd Defendant was encroaching on the Plaintiff's land, DW3 stated that the 2

nd Defendant removed boundary marks on orders of the 1st Defendant. It is my observation that the the Defendant never denied being in occupation of land beyond the 50ft and 100ft. The Defence's main contention was that they were in occupation and utilizing land that measures atleast an 1acre having bought the same from the Plaintiff. Having observed that this is not the case. It is my finding that the evidence supports the fact that the Defendants are trespassing on the Plaintiff's land.

Though moot, it is therefore my finding that the Learned Trial Magistrate properly evaluated the evidence and came to a correct finding.

As earlier observed this Appeal failed on the issue of the Respondent never having been served with court process however, even if the Appeal was to be determined on merits, the same is still devoid on merit.

This Appeal is hereby dismissed . Since the Respondent never appeared nor filed a response to this Appeal, I make no order as to costs.

I so order.

Dated and delivered electronically at Masaka this 12th day of June, 2023.

Victoria Nakintu Nkwanga Katamba.

Judge.

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Prepared on 14 October 2026 · Esheria