

UGANDA / JUDGMENT

Kasekende George v Sanya Charles (Civil Appeal 33 of 2024)

[2025] UGHCLD 69 (21 May 2025)

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COURT

HC: Land Division (Uganda)

BEFORE

Naluzze Aisha Batala, J

CASE / FILE NUMBER

Civil Appeal 33 of 2024

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (LAND DIVISION) CIVIL APPEAL No.033 OF 2024

(Appeal from Chief Magistrate Court of Kajjansi vide Civil Suit No.063 of 2020)

KASEKENDE GEORGE ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

SANYA CHARLES ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE; HON. LADY JUSTICE NALUZZE AISHA BATALA JUDGMENT***Introduction;***

1. The Appellant brought this appeal against the respondent appealing against the decision of Her Worship Phionah Birungi Magistrate Grade One in Civil Suit No. 063 of 2020 by which judgment was entered in favor of the respondent for orders that; the respondent/plaintiff is the lawful purchaser for value, the appellant/defendant is declared a trespasser, an order for permanent injunction against the appellant/defendant, general damages of Ughs 4,000,000 and costs of the suit awarded to the respondent/plaintiff.

Background;

- 2. In the lower court, the respondent sued the appellant for orders that the appellant/defendant is a trespasser on the suit land, a permanent injunction be issued restraining the defendant and his agents from any further dealings on land, compensation for the destruction of the plaintiff's property by the defendant, an eviction order against the defendant, general damages, interest and costs of the suit.
- 3. The brief facts of the case in the lower court were that, the respondent/plaintiff purchased the suit land on the 5th of July 2012 as a Kibanja from Ssemayenje Ivan at a sum of Ugx 6,000,000 and has been carrying out tree plantation there on.
- 4. Later around 2016, the respondent was offered a legal interest in the said suit land comprised in Busiro Block 498 Plot 369 at a consideration of Ugshs 6,000,000 by Kasi Abubakar, Ssenduga Yasin and Nyanzi Sentamu.
- 5. The respondent accepted the offer where he paid a consideration of Ugshs 4,000,000 as the first installment to the above mentioned

persons and a memorandum of understanding was signed in favor of the respondent.

- 6. Kasi Abubakar, Ssenduga Yasin and Nyanzi Sentamu defaulted on their obligations to handover the certificate of title to the respondent/plaintiff and the respondent filed Civil Suit No.038 of 2018 in the Chief Magistrate Court of Wakiso against the three persons.
- 7. A consent judgment was executed between the plaintiff and the three sellers wherein they agreed to handover a duplicate certificate of title to the respondent/plaintiff however the same was never done.
- 8. To the respondent's surprise in June 2020, the appellant/defendant interfered with his possession and use of the suit land by illegally entering the same and destroying his crops.
- 9. The appellant contends that the suit land belonged to his great grandfather the late Bunjo Makabugo Ezekia where his grandfather Kizito Kezekia was the administrator of the estate of the late Bunjo Makabugo Ezekia.
- 10. The administrator Kizito Kezekia sub divided the estate of the late Bunjo Makabugo Ezekia and gave the suit land to the

appellant and his sister Nalwoga Betty. The appellant was handed over duly signed transfer forms and certificate of title however when he submitted the same to the land office to have it registered in his names, it was rejected due to the caveat that was lodged by the respondent.

- 11. The trial magistrate entered judgment for the respondent and awarded the reliefs mentioned earlier.
- 12. Being dissatisfied with the said decisions, the appellant appealed on the following grounds;

- *i) That the Trial Magistrate erred in law and fact when she declined to consider the appellant's submissions after the court granted the appellant leave to file the submissions out of time.*
- *ii) That the Trial Magistrate erred in law and fact when she held that the suit land was part of the 20 acres paid to Abubakar, Yasin and Nyanzi Sentemu by the registered proprietor Kizito Kezekia as their payment for survey works whereas not.*
- *iii) That the Trial Magistrate erred in law and fact when she held that Abubakar, Yasin and Nyanzi Sentamu*

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were agents of the registered proprietor Kizito Kezekia when there is no agency agreement tendered in court.

- *iv) That the Trial Magistrate erred in law and fact when she held that the title deed for the suit land was returned to the registered proprietor Kizito Kezekia in error when there was no evidence led, to prove the element.*
- *v) That the learned Trial Magistrate erred in law and fact when she failed to establish from the evidence adduced in court, that the respondent did not qualify as a Kibanja holder on the suit land.*
- *vi) The learned Trial Magistrate erred in law and fact when she relied on evidence volunteered at locus by persons who were not called as witnesses during trial.*
- *vii) That the learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on the record and thereafter considering inadmissible exhibits tendered in court by the respondent, thereby coming to a wrong decision that the suit land belongs to the respondent.*

viii) That the learned Trial Magistrate erred in fact and law when she failed to properly evaluate the evidence on the record and thereby awarding excessive general damages to the respondent.

Representation;

13. At the hearing of the appeal, the appellant was represented by M/S Makeera & Co. Advocates whereas the respondent was represented by M/S Luzige, Lubega, Kavuma & Co. Advocates. Both parties proceeded by way of written submissions which this court considered in the determination of this appeal. In arguing the appeal, counsel for the appellant addressed grounds 1,4,6 & 8 separately and then addressed grounds 2,3,5 & 7 jointly.

Duty of the appellate court;

- 14. This being a first appeal, this court is under an obligation to rehear the case by subjecting the evidence presented to the court below to a fresh scrutiny and re-appraisal before coming to its own conclusion. *(See*; *Nanensio Begumisa and three Others vs Eric Tiberaga SCCA 17 of 2000)*
- 15. It is a well-settled principle of law that on a first appeal, the parties are entitled to obtain from the appellate 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, the nature of this duty was put more appropriately in **Selle vs Associated Motor Boat Co. [1968] EA 123**.

- 16. An appeal is by way of retrial and the principles upon which this Court acts in such an appeal are well settled, briefly put they are; *that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect*.
- *17.* In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. *(See; Abdul Hameed Saif*

Vs Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)

Power of the appellate court;

18. Section 80(i) of the Civil Procedure Act grants the high court appellate powers to determine a case to its finality, providing that subject to such conditions and limitations as may be prescribed in the appellate court shall have the power to determine a case finally. The appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the act on courts of original jurisdiction in respect of suits instituted in it.

Analysis and determination of the grounds of appeal;

Ground 1; that the learned trial Magistrate erred in law and fact when she declined to consider the appellant's submissions yet the court granted the appellant leave to file his submissions out of time.

19. Counsel for the appellant submitted that at Page 2 of the trial magistrate's judgment she declined to consider the appellant's submissions because they were filed out of time. Court directed the respondent/plaintiff to file and serve his submissions on or before 16th

November 2023, the appellant/defendant by 16th December 2023, rejoinder on or before 23rd December 2023, the matter was fixed for judgment on 30th January 2024. The respondent/plaintiff instead filed his submissions on 16th January 2024 and served the appellant's lawyers on 24th January 2024, 6 days to the date of Judgment. The appellant on 30th January 2024 sought and was granted leave to file and serve his submissions out of time.

- 20. Counsel further submitted that it was wrong for the trial magistrate to turn around and ignore the appellant submissions in her final judgment despite granting him leave to file them out of time.
- 21. Counsel for the respondent submitted that the civil procedure rules under order 17 rule 4 provide that where any party to a suit to whom time has been granted fails to produce his or her evidence or to cause the attendance of his or her witness or to perform any other necessary act to the further progress of the suit for which time has been allowed, the court may notwithstanding the default, proceed to decide the suit immediately.
- 22. It was the submission of counsel for the respondent that the appellant even after being granted leave to file the submissions out of time, he failed to file the same as per the schedules and court

in the decision of **Susan Theophil Mbilinyi vs Ivanune Jeru Misc. Civil Revision No.03 of 2023** held that it is not a matter of choice to file submissions as scheduled by court, where one fails to file submissions it is tantamount to failure to prosecute ones' case.

- 23. I take note of the submissions made by both counsel, my perusal of the record of proceedings at page 27 indicates that the appellant sought leave to file his submissions out of time, which leave was granted and he was supposed to file the same by the 14th of February 2024 and the respondent was to file any rejoinder by 21st of February 2024.
- *24.* Item 15 on the index of the record of appeal (appellant's submissions) indicates that they were filed in the trial court on the 23rd of February 2024 and served onto the respondent on the 1st of March 2024. The trial magistrate in her judgment at page 79- 78 of the record of appeal, she stated that "before I delve into resolving the issues, it should be noted that the parties were given timelines within which to file submissions. Both parties did not comply and in the cases of Amrit Goval vs Harichand Goval and 3 ors CA No. 109 of 2009 which dealt with failure*

to adhere to court orders in respect of given timelines, court observed that the discretion of court on how to proceed where a party has not made submissions.... Fortified by the foregoing provisions of the rules, I decided to proceed with the determination of the suit in absence of submissions, I therefore relied on the evidence on record to determine the suit.

- 25. It's true the appellant was granted leave to file his submissions out of time (by the 14th of February 2024) however the appellant filed his submissions on the 23rd of February 2024 way out of the time he was supposed to file. The trial magistrate in her judgment decided not to rely on submissions from both parties since they never complied with the directives.
- 26. In agreement with the case law referred to by the trial magistrate in her judgment, specifically the decision in *Byaruhanga Joseph vs Nalongo Elizabeth Wandera CA 062 of 2014* where court held that failure to adhere to court orders in respect of given timelines, the discretion is with the court on how to proceed.
- 27. In the instant case, the appellant was granted leave to file his submissions out of time and he instead filed the same out of the time court had directed after granting him the said leave. The trial magistrate did not only consider the submissions of the appellant but she never considered the respondent's submissions as well.
- 28. I find it wrong and misplaced to state that she erred both at law and fact when she failed to consider the submissions of the appellant thereby occasioning a miscarriage of justice. The appellant ought to have complied with the directives of court and filed his submissions with in time but where he failed to do so, he left court with the discretion on whether to consider the said submissions filed out of the provided time or not.
- 29. It's to the finding of this court that there was no any error in law and fact where the trial magistrate disregarded the submissions of both the appellant and the respondent for being filed out time. Therefore, ground 1 is resolved in the negative.

Grounds 2 and 3; That the trial magistrate erred in law and fact when she held that the suit land was part of the 20 acres paid to

Abubakar, Yasin and Nyanzi Sentemu by the registered proprietor Kizito Kezekia as their payment for survey works whereas not. That the trial magistrate erred in law and fact when she held that Abubakar, Yasin and Nyanzi Sentamu were agents of the registered proprietor Kizito Kezekia when there is no agency agreement tendered in court.

- 30. Counsel for the appellant submitted that the trial magistrate in her judgment held that DW3 authorized Kasi Abubakar, Ssedunga Yasin and Nyanzi Sentamu to survey the land and issue titles to bibanja holders, the said averment was an error of fact because DW3 never mentioned anywhere that he authorized the said persons to issue titles to Bibanja holders.
- 31. The only admission DW3 made at the hearing was that he negotiated, agreed to pay and indeed paid a commission of 20 acres to the said Kasi Abubakar, Ssedunga Yasin and Nyanzi Snetamu for their work of surveying and subdividing the Estate for which DW3 was administrator and part of the land for which DW3 paid to the three persons was a neighboring plot comprised in Plot 369.

- 32. Counsel for the appellant further submitted that the trial magistrate erred in law and fact when she concluded that the respondent purchased the suit land from DW3's agents yet there was no any agency arrangement between DW3 and the said persons.
- 33. In reply counsel for the respondent submitted that DW3 accepted during cross examination that he entered into a memorandum of understanding with Kasi Abubaker, Ssedunga Yasin and Nyanzi Sentamu to open up boundaries with the help of surveyors and also measure the bibanjas for various squatters/tenants and subdivide the bibanjas where necessary, issue land titles to the bibanja holders on the land and DW3 surrendered 20 acres of land free from any encumbrances to Kasi Abubakar, Ssedunga Yasin and Nyanzi Sentamu as costs for facilitating the whole process of making titles on Block 498 Plot 12 land at Ngongolo, Wakiso District.
- 34. Counsel further stated that in this case the landlord consented by giving authority to his agents to measure the bibanjas for various tenants and subdivide the bibanjas where necessary. That

the said memorandum of understanding created a legal relationship between the parties in regard to the suit land.

Analysis by court;

- 35. The memorandum of understanding dated 29th June 2015 marked PID1 during trial signed between Kizito Kezekia as the 1st party and Kasi Abubaker, Ssedunga Yasin and Nyanzi Sentamu as the 2nd parties on the following terms;
- *a) That the 2nd parties to open up boundaries with the help of a surveyor on the land comprised in Block 498 Plot 12 land at Ngongolo, Wakiso district.*
- *b) That the 2nd parties in the presence of the 1st party and tenants shall measure the bibanjas for various tenants and subdivide the bibanjas where necessary.*
- *c) That the 1st party surrenders 20 acres of land free of any encumbrances to the 2nd parties for the costs of facilitating the whole exercise and process of making titles.*
- *d) That after the exercise in "a" and "b", the 2nd parties shall facilitate the process of making land titles for the 1st party and other interested party thereon (emphasis mine)*
- 36. DW3 Kizito Kezekia in his witness statement under paragraph 10 stated that he was handed over the title deeds for land that was subdivided by three persons and these titles included that for the suit land.
- 37. The trial magistrate in her judgement at page 82 of the record of proceedings held that the issue to determine is whether the plaintiff has any interest as a Kibanja holder in the suit land. She further stated that among the terms agreed upon between DW3 and Kasi Abubakar, Ssedunga Yasin and Nyanzi Sentamu was that they were to process titles for certain bibanja holders.

- 38. In the case of *Owembabazi Enid v. Guarantee Trust Bank Limited, Civil Suit No. 63 of 2019, Justice Stephen Mubiru* defined a Kibanja as follows: *" A Kibanja is a form of land holding or tenancy that is subject to the customs and traditions of the Baganda, characterized by user rights and ownership of developments on land in perpetuity, subject to payment of an annual rent (busuulu) and correct social behavior, distinct and separate from ownership of the land on which the developments are made and in respect of which the user and occupancy rights exist."*
- 39. In the instant case, the respondent claimed to have acquired a Kibanja on the suit land from one Ssemayanje Ivan who had acquired the said Kibanja as gift inter vivos from his grandmother. The respondent had the burden to prove that he acquired the said Kibanja in accordance with the provisions of section 34 of the land Act.
- *40.* Its trite that for a sale or assignment of a Kibanja from one holder to another to be valid under the law, the registered owner must render his consent and a sale of a Kibanja without the said consent is null and void. *(See; Jennifer Nsubuga vs Micheal Mukundane and Anor, CA 208 of 2018.)*
- *41.* During the cross examination of the respondent at page 8 of the record of proceedings he stated that at the time of purchase of the said Kibanja from Ssemayanja Ivan he was never introduced to the land lord and he has never paid any Busulu ever since he acquired the Kibanja.
- *42.* The respondent further stated that at the time he purchased the legal interest in the said Kibanja from Yasin, Kasi and Ssendungu he was told that the owner of the land had passed on and that with time his representatives were to come and see away forward. He was later told that the owner was Bunjo and he was able to find out the details of the said owner and that the three persons were his representatives.
- *43.* PW2 Ssemayanje Ivan in his cross examination at page 99 of the record of proceedings stated that he used to hear that the land where the Kibanja that was given to him by his grandmother sits belonged to a one Bunjo and that he had never bothered to find the owner of the said land. That after being given the said Kibanja he sold it immediately.
- *44.* It was the evidence of the respondent at page 96 of the record of proceedings that its true Plot 369 was registered in his names but there were no transfer forms from the purported sellers and he only based on the memorandum of understanding to infer that the three persons had a legal interest in the suit land.
- *45.* I find this to be a case of due diligence at the time of purchase of both the Kibanja and the legal interest by the respondent. The respondent averred to be the lawful owner of the Kibanja on the suit land, the onus was on him to prove to court that he purchased the same with the consent of the registered owner since, the

agreement adduced in court was never signed nor witnessed by anyone claiming to be the landlord.

- *46.* The standard of due diligence imposed on a purchaser of unregistered land is much higher than that expected of a purchaser of registered land.
- *47.* The law prohibits acquisition of a Kibanja on land without the consent of the registered owner, the failure by the respondent to prove that he purchased the said Kibanja with the consent of the registered owner means that he did not lawfully acquire the disputed Kibanja on the suit land. *(See; Kato Hussein vs Going*

Joseph CS 260 of 2017)

- *48.* As to the purchase of the legal interest by the respondent, the respondent clearly stated in his cross examination that the transfer forms presented to him did not entail the names of the purported sellers and that the only evidence he based on to purchase the legal interest was the memorandum of understanding.
- *49.* Had the respondent conducted due diligence before the purchase of the legal interest he would have discovered that the land was registered in the names of Kizito Kezekia not the three

persons. The said three people never appeared anywhere on the certificate of title nor transfer forms as the owners of the said land.

- *50.* Even after being told that the said land belonged to Bunjo family went ahead to transact with other persons other than the registered proprietor.
- *51.* The principles of law in regards to due diligence have been well explored by courts and decided upon, I will draw reference to my decision in **James Wole vs Nowerina Musoke CA 031 of 2023** where I relied on the celebrated decision of **Hajji Nasser Katende vs Vithalidas & Co ltd CACA No.84 of 2003** where court emphasized the value of land property and the need for thorough investigations before the purchase of land, court further noted that land is not vegetables that are bought from unknown sellers. Land is valuable property and buyers are expected to make thorough investigations not only on the land itself but of the sellers before making any purchase.
- *52.* Therefore, I find that the trial magistrate erred in law and fact to hold that the respondent had a Kibanja on the suit land and that Kasi Abubakar, Ssendunga Yasin and Nyanzi Sentamu had

the authority to make offers of sale to the plaintiff/respondent. Hence, grounds 2 and 3 are resolved in the affirmative.

Ground 4; That the learned trial Magistrate erred in law and fact when she held that the title deed for the suit land was returned to the registered proprietor in error.

- 53. Counsel for the appellant submitted that the respondent did not lead any evidence whatsoever to prove that the suit property belonged to Kasi Abubakar, Ssedunga Yasina and Nyanzi Sentamu whom he alleges to derive ownership from.
- 54. In reply counsel for the respondent submitted that the land lord granted authority the three persons via the memorandum of understanding and the respondent dealt with them basing on the said understanding.
- 55. The memorandum of understanding stated that Kasi, Ssedunga and Sentamu were to facilitate the process of making titles to the suit land to DW3 and other interested parties. DW3 as the registered proprietor the said titles were supposed to be returned to him, the respondent was not party to the memorandum of

understanding, why would the three persons return the title to him.

- 56. It was only righteous as per the memorandum of understanding to return the issued titles to the registered owner as the person whom they agreed with in the understanding.
- 57. Therefore, this ground is resolved in the affirmative.

Ground 5 and 7; That the learned trial magistrate erred in law and fact when she failed to establish from the evidence in court, that the respondent did not qualify as a Kibanja holder on the suit land.

The learned trial magistrate erred in fact and law when she failed to properly evaluate the evidence on record and thereafter considered inadmissible exhibits tendered in court by the respondent, thereby coming to a wrong decision that the suit land belongs to the respondent.

58. These two grounds stem from ground 2 and 3, my resolution of the said grounds answer the instant grounds. Having found that the respondent's Kibanja falls short of the requirements of a valid Kibanja on grounds that there was no any consent and knowledge from the land lord despite being told about the same, the

respondent cannot be considered a Kibanja holder at law and the suit land could not be said to belong to him.

59. Therefore, grounds 5 and 7 are resolved in the affirmative.

Ground 6; That the learned trial magistrate erred in law and fact when she relied on evidence volunteered at locus in quo by persons who were never called as witnesses during trial.

- 60. Counsel for the appellant submitted that the trial magistrate in her judgment at page 3 she held that it was confirmed at locus visit that indeed the suit portion belonged to PW2 and he did sell his portion including the titled portion registered in the name of the plaintiff." that the court never elaborated the source of the evidence.

- 61. In reply counsel for the respondent submitted that during locus in quo, court can take evidence from the area local leaders in order to confirm issues in question, it's not unlawful but court does it at its own discretion to make a fair judgment.
- 62. The trial magistrate in her judgement at page 3 stated that *it was however confirmed at locus that indeed the suit portion belonged to PW2 and he did sell his portion including the titled*

portion. However, the trial magistrate did not specifically state that the said evidence came from the local authorities, during a locus visit court can make its own observations to reach a just finding.

63. I find the allegations that the trial magistrate relied on evidence of parties who were not called as witnesses and that she did not disclose the source of the said information to be misplaced and misconceived in the instant case and I therefore resolve this ground in the negative

Ground 8; That the learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on the record and thereby awarding excessive general damages to the respondent.

- 64. Counsel for the appellant submitted that the trial magistrate ordered the appellant to pay the respondent general damages to the tune of Ugshs 4,000,000 which the respondent was not entitled to.
- 65. Counsel for the respondent submitted that the award of general damages was justified as compensation for the destruction of the properties on the suit land that belonged to the respondent.
- 66. It's trite that the appellant court has no jurisdiction to interfere with an award of damages unless the trial court reached the same based on wrong principles or the award is unreasonably high or low. *(See; Uganda wildlife Authority vs Kuluo Joseph Andrew Civil Appeal No.03 of 2011)*
- 67. In the instant case, the trial magistrate awarded the respondent Ugshs 4,000,000 as general damages for the inconvenience caused to the plaintiff. Having found that the respondent acquired both the Kibanja and the legal interest illegally, the award of general damages was not necessary in the case at hand.
- 68. Therefore, ground 8 is resolved in the affirmative.
- 69. It's the conclusion of this court that the instant appeal succeeds with the following orders;
- i) The decision and orders of the lower court vide Civil Suit No. 063 of 2022 are hereby set aside.

- ii) The appellant is awarded costs of this appeal and in the lower court.

I SO ORDER.

NALUZZE AISHA BATALA

Ag. JUDGE.

21st /05/2025

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