

UGANDA / JUDGMENT

Kavuma v Mbabazi (Civil Appeal 12 of 2022) [2023] UGHCLD 196 (11 July 2023)

[2023] UGHCLD 196

COURT

HC: Land Division (Uganda)

BEFORE

Nkonge, J

CASE / FILE NUMBER

Civil Appeal 12 of 2022

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(LAND DIVISION)****CIVIL APPEAL NO.012 OF 2022****(Arising from Wakiso Chief Magistrates Court Civil Suit No.117 of S \$2017)\$****KAVUMA RONALD:.....****VERSUS****ROBINAH MBABAZI:.....****Before: Lady Justice Alexandra Nkonge Rugadya.** **$\sqrt{\quad}$** **Judgment.****Background to the appeal:**

This appeal arises out of the judgment of **Her Worship Nyadoi Esther**, the

Magistrate Grade 1 at the Chief Magistrates Court of Wakiso delivered 15 on $\$1^{\text{st}}$ March 2022.

The respondent, Ms. Robinah Mbabazi instituted Civil Suit No.117 of 2017 against the appellant, seeking an order of specific performance requiring the appellant to provide an access road linking the suit land comprised in **Busiro**

Block 263 plot 451 land at Senge Naluvule, Wakiso district to the public 20 highway, general damages, costs of the suit and interest thereon.

The claim as set out in the amended plaint is that by an agreement dated 27th July, 2015, she purchased the suit land measuring approximately 130 ft x 105 ft. from the defendant/appellant at **Ug. Shs. 18,500,000/=**

(Uganda Shillings eighteen million five hundred thousand only). 25

A payment of **Ug.x 18,000,000/= (Uganda shillings eighteen million only)** was made, and it was agreed between the two that the remaining balance of

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Ug. Shs. 500,000/= (Uganda Shillings five hundred thousand, only, was to be paid after the defendant / appellant had fulfilled the terms of the purchase agreement to wit; delivering all the documents of ownership, including a fully executed transfer instrument in favor of the plaintiff, complete with an access road.

It was claimed that the plot is located immediately behind the appellant/ defendant's house which formally belonged to one Kyagaba Charles; and could only be accessed through the appellant's adjacent plot where the provision for an access road had already been made by him.

That the plaintiff/ respondent had also informed the defendant /appellant of her intention to develop the parcel of land that was the subject of the sale agreement. 10

Since the execution of the purchase agreement she had demanded from the defendant a reasonable means of access to the public highway but the defendant had remained adamant despite several meetings held in respect of the same. Instead he sent potential buyers to purchase the property from the plaintiff.

That the defendant/ appellant had proposed the provision of an access road linking the plaintiff's land to the public highway but later changed his mind

and blatantly declined to discuss the issue, although he surrendered the mother title on which the suit land falls to the plaintiff/respondent for purposes of providing an access road, not exceeding 20 feet. 20

In addition, that not only has the plaintiff lodged a caveat on the suit land in a bid to protect her registrable interest in the suit land but she has also

engaged a professional whose report shows that there is no other way through which the plaintiff/respondent can access her land except through the adjacent plot. t\

That although the defendant/ appellant has on numerous occasions tried to contact her over the same, he has intentionally frustrated the plaintiff's plans to develop the suit property.

It was her further contention that without an access road provided by the defendant/appellant, it will be impossible to develop the plot of land thereby occasioning her economic loss and great inconvenience.

That as a matter of law every plot of land falling within a planning area ought to have an access road before any economic developments on any such plot are approved, and this was reiterated by the Wakiso District Planner.

That while the defendant/ appellant has already executed transfer forms in favor of the plaintiff/respondent, the same shall be rendered nugatory if no provision was made for the access road.

According to her therefore such actions amounted to a breach of the laws of access to public roads, for which the respondent was entitled to the reliefs sought. 10

Defence bu the appelldnt:

In his WSD during the trial, the defendant/appellant however claimed that

the plaintiff/respondent had no cause of action against him, and that her suit was not only misconceived, and vexatious, but also an abuse of court process. 15

He denied that a breach of the sale agreement dated 27h July 2015 was committed. That he has never been availed a copy of the said agreement

despite repeated demands for the same because he signed the agreement together with his witnesses at M/s Baklza &, Co. Aduocates, in the absence of the plaintiff/ appellant. 20

He had left the agreement at the office of Mr. Chris Bakiza pending their signatures. According to the said sale agreement, it was agreed between

them that the purchasers would acquire access road from his adjacent neighbors, at their own cost. 25

That because at the time of signing the agreement, it was known to the purchasers that Kyagaba Charles, the previous owner of the land never provided an access road to the suit land, it was agreed that the purchasers

acquire an access road from the adjacent neighbors'land which only used for 30

cultivation, not through the defendant's land comprised in **Block 263 plot 451** which is fully developed with the defendant's matrimonial home and rentals, as alleged.

The defendant further averred that when he approached his neighbors together with Chris Bakiza, in respect of the issue of the access road, the $\$$ neighbors set certain conditions before the plaintiff/respondent could be granted an access road.

However the plaintiff and Mr. Chris Bakiza who had custody of the certificate of title resorted to harassing the defendant/appellant after they had refused to meet the said conditions.

Decision by the trial court:

The learned Magistrate Grade 1 in her judgment dated 1st March, 2022 held as follows:

1. the plaintiff is entitled to an access road on Busiro Block 263 plot 451 Land at Senge Naluvule Wakiso district provided to her by the defendant at no cost. This should be done after the payment of the balance of the purchase price to the defendant amounting to UGX 500,000/= in the area where the defendant deliberately blocked the access road by constructing a room as an extension of his house down towards the graveyard into the plaintiff's land. It should be constructed at the plaintiff's cost;
- 2. the plaintiff is hereby awarded general damages of Ugx \$5,000,000/= (Five million shillings only);
- 3. plaintiff is hereby awarded the costs of the suit;
- 25
- 4. interest on 2 & 3 above at the court rate from the date of judgment till payment in full.

Being dissatisfied with the judgment, the defendant filed this appeal raising six (6) grounds:

Un Part

- 7. The learned trial magistrate erred in law and fact when she held that the respondent is entitled to an access road through the appellant's land at no cost;
- 2. The learned trial magistrate erred in law and fact when she held that the appellant was legally bound to grant the respondent access to her plot;
- 3. The learned trial magistrate erred in law and fact when she awarded the respondent general damages of Ugx. x 5,000,000 without justification;
- 4. The learned trial magistrate erred in law and fact when she awarded the respondent interest on both the general damages and costs;
- 5. The learned trial magistrate erred in law and fact when she failed to hold that the suit was a nullity and in violation of Regulation 4 of the Advocates (Professional Conduct) Regulations.
- 6. The learned trial magistrate erred in law and fact when she considered the respondent's written submissions which were filed out of time without leave of court.

20 Representation.

The appellant herein is represented by M/s Jollg Mutumba & Co. Adaocates while the respondent was represented by M/s Bakiza & Co. Adaocates.

25 Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

Determtnation of the appeal:

This being a first appeal, the duty of this court as highlighted in the case of KiJamunte Henry V Uganda, S,C Crimlnal Appeal No. 70 of 7997 is to review the evidence of the case, to reconsider the materials before the trial

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judge and make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

This court is under an obligation to subject the evidence presented at trial to fresh and exhaustive scrutiny and a re-appraisal before coming to its own conclusion on issues of fact as well as of law. It must also make due allowance for the fact that it has neither seen nor heard the witnesses and so ought to weigh the conflicting evidence before drawing its own inference. (See: Father Nanenslo Begumlsa and three others os Eric T'lberaga SCCA 17 OF 2000 [2004] KLRA 236, cited with approval in Oaoga Poti us Wakunga Clull Appeal No. 0073 OF 2014.)

Ground S:The learned trtal maqlstrate erred in law and fact when she Regula:tlon 4 of the Aduocates fessional Conductl Reaulations. failed to hold that the suit was a nulllta and In uiolation of

15 Before dealing with the rest of the grounds, I find it appropriate to dispose of the preliminary objection raised by the appellant. Counsel for the appellant point of contention was that the trial court ought to have dealt with the objection they raised that learned counsel Chris Bakiza who testified as Put4 was in violation of regulation 4 of the Aduocates (ProJessional Conduct) Regulations.

20 Regulation 4 bars an advocate from accepting instructions from any person in respect of a contentious or non-contentious matter, if the matter involves a former client and the advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in that matter.

The objection was initially raised by the learned counsel for the defendant / appellant during the submissions. In overruling the same, the trial court noted that the plaintiff never responded to the objection in a rejoinder. 25

However, court found that Mr. Chris Bakiza had once represented the defendant. He had bought the suit land jointly with the plaintiff. That however when misunderstandings arose between the parties the suit was filed, wherein

30 he gave evidence on his own behalf.

⁶ V/t'b

The trial court came to the conclusion that since the learned counsel did not represent the plaintiff during the trial, this was neither illegal nor prejudicial to the defendant.

5 It is the appellant's claim that Put4 as his former counsel had drafted both the sale agreement: PEExh 7, between him and the respondent as joint buyers; and that it was the same lawyer who had drafted an earlier agreement between him as the buyer and one Charles Kyagaba, the previous owner of the disputed land on 19th July, 2008. (DEExh 7),

Pur4 through his firm however also went ahead and drafted the plaint and an amended plaint for the plaintiff/ respondent and even testified against him. Counsel submitted that having had prior knowledge and information about his client's dealings rendered the suit a nullity as it violated Regulation 4 of the Advocates (Professional Conduct) Regulations. 10

In the submissions, counsel for the respondent argued however that the transactions had been made between Pu4 in his individual capacity as a joint buyer with the respondent/ plaintiff but not as a lawyer; and that the law as cited did not prevent him from entering into a commercial transaction and seeking reliefs against his former client. 15

Consideration by court:

The undisputed evidence led by the defendant during the trial was that the lawyer had been known to him as his counsel, even before he met the plaintiff. The trial court in its ruling noted that in the submissions there had been no rejoinder to the said objection. 20

Indeed Put4 in his evidence did not deny the fact that the appellant was his acquaintance and that he had he had previously handled matters for him as his counsel. 25

From the record the firm of Put4, M/s Bakiza & Co. Advocates took up instructions for the plaintiff/ respondent having been instrumental in the filing of the main suit against the defendant in 2077 .

Subsequent to that, witness statements for the plaintiff was filed by the said firm, for the plaintiff on 15th March, 2019.

The record indicates that Pu4 testified on 11th July, 2019. An amended suit was filed on 23rd December, 2020 and the circumstances under which this could have happened when the trial was ongoing remain unclear.

Suffice to note that on 27th August, 2020 new counsel took over the matter. It is not clear if this was new firm or 'new' counsel from the same firm of Jlls Bakiza and Co, Adaocates.

What this court was able to note however was that on 23rd September, 2020 the record read as follows: 10

> Counsel in personal conduct was asked to go to appear before the Famili Division today by senior partner of the firm of Counsel B okiza. (emphasis mine).

This shows therefore that from 2017 to September, 2020 and at all material times during the trial including the time when the learned counsel was testifying, the same firm represented the plaintiff/ respondent. 15

The trial court was fully aware of that fact but chose to brush it off without giving it any serious thought as to how it would affect Regulation 4.

With all due respect to counsel for the respondent's submission, the contention went beyond entering into commercial transaction and seeking relief, as he wanted court to tlink. Pw4 was not in any case party to the suit. As a matter of fact, the sale transactions between a client and his former counsel would have been the least of this court's concern. 20

Of serious concern was that Put4, as early as 19th July, 2008 as appellant's counsel had prepared the first agreement for the sale of the suit land between the appellant and one Charles Kyagaba, the original owner of the suit land. 25

Pur4, jointly with the plaintiff/respondent later on entered into a joint agreement for the purchase of that same suit land from the appellant on 27th July, 2015.

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Winen Put4 sold his share of the suit land to the respondent on 17th September, 2017 the issue of availing an access road to the purchaser which was a key term in both agreements remaining unresolved.

Pw4 therefore also had every reason to know that as former counsel to one of the parties he would be required to testify during the trial in the suit which he filed, not only as the lawyer who drafted both agreements, but also as previous purchaser of the suit property from his former client. 5

Learned counsel Bakiza's firm went on to file the main suit and amended suit for the plaintiff/ respondent as well as witness statements and submissions and did not stop at that.

His firm represented the plaintiff /respondent in court for a substantial part of the trial and even testified against his former client in respect of the same transaction between them.

It was therefore absurd, to say the least, that the respondent as the plaintiff was, during the trial duly represented by the firm owned by former counsel for the defendant/ appellant, the same firm which had drafted the agreement between the two litigants for the land which was the subject of the suit. 15

This was not only absurd but regulation 4. also irregular, and against the spirit of

In the view of this court, it matters least that the preliminary objection as pointed out by the counsel for the respondent was raised at the stage of filing submissions. The plaintiffs side could have filed a rejoinder in rebuttal, which it did not to. 20

Order 6 rules 27, 28, 29 of the CPR which I will not reproduce here are quite clear on that point. 25

A party is entitled to raise by his/her pleading a preliminary point of law which may be disposed of by court at or after hearing. But that would not stop the party from raising the objection, by way of submissions, for as long as the other party is given the chance to respond to it; and indeed court would

not have been barred from addressing the point of law raised at the stage of submissions.

The argument also therefore that the late submission prejudiced the respondent / plaintiff could not have been far from the truth. On the contrary,

it was prejudicial to the appellant against whom the decision based largely on $\$ \{S\}$ the testimony of his former counsel/opposing counsel/plaintiff's key witness, was based, which testimony in my view was so central to the entire case.

Justice should not only be done but also seen to be done; and once an irregularity is drawn to the attention of court it cannot be ignored as it overrides all manner of pleadings. (Makula vs H. E Cardinal Nsubuga

$\$ [1982] \$)$ HCB.

I am inclined to agree therefore that the irregularity rendered the entire process invalid and therefore a mistrial.

For those reasons, the matter is referred for court assisted mediation and in case of failure to resolve the impasse, a retrial is ordered before another trial 15 magistrate.

Costs of this appeal are to be paid by the firm of M/s Bakiza & Co. Advocates.

Rugadya Alexandi

Judge

11th July, 2023

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