

UGANDA / JUDGMENT

Lubega Saulo v Kabali and 4 Others (HCT-15-LD-CA 16 of 2017)

[2021] UGHC 33 (19 April 2021)

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COURT

High Court of Uganda

BEFORE

Ojok, J

CASE / FILE NUMBER

HCT-15-LD-CA 16 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MPIGI

HCT-15-LD-CA-16 OF 2017

(Original Kampala Civil Appeal No. 73 of 2016) (Arising from Mpigi Chief Magistrate's Misc. Application No. 09 of 2015)

LUBEGA SAULO=====APPELLANT

VERSUS

1. KABALI EZRA

- 10 2. VUNINGOMA JOSEPH

- 3. BUTEERA NATHAN

4. EZRA HERBERT KABALI

5. FRANK RUSHANGANWA=====RESPONDENTS

BEFORE: HON. JUSTICE OYUKO ANTHONY OJOK

JUDGMENT

Background

This appeal arises out of Judgment of Her Worship Bareebe Rosemary Ngabirano Chief Magistrate in Mpigi delivered on the 29th April, 2015 in which the Trial Court gave Judgment in favor of the Respondents. The Appellant being dissatisfied with the decision lodged this appeal on the following grounds:

- 1) That the Honorable Chief Magistrate's refusal or failure to review the evidence available to Court in respect to the land acquired by the 5th Respondent Frank Rushanganwa through the 1st Respondent perpetrated a fraud which should have been stopped but was not.
- 2) That the Honorable Chief Magistrate erred in law and equity by refusing to review the evidence already on file in relation to the 5th Respondent's acquisition of the land in issue, though the 1st 10 respondent perpetuated fraud and illegality.
- 3) That the Honorable Chief Magistrate erred in law when she refused to order a locus quo in respect to the land in issue as had been prayed by the Appellant which prejudiced the Applicant since it would have established with certainty who of the Applicant and the 5th Respondent physically and legally occupied the land in issue.

The Appellant prayed to this court to allow the appeal by setting aside the orders and decree in the Magistrate's Court.

20 Representation:

During the hearing of this Appeal Counsel Ryner Mugyezi represented the Appellant while Counsel Brian Kabaliza from Kabayiza, Kavuma, Mugerwa & Ali Advocates represented all the Respondents.

Both parties were directed to file written submissions by this Honorable Court.

submissions Both parties never filed submissions

Resolution by Court.

Duty of the first Appellate Court

It is the duty of the first Appellate Court to appreciate the evidence adduced in the trial Court, subject it to exhaustive scrutiny and re- evaluate evidence in order to reach its own conclusion taking into account the fact that it did not see the witness nor visit the locus. In the case of **Begumisa & others 10 Versus Tibabaga (2004) 2 E. A 17, Zaabwe Vs Orient Bank SCCA NO. 4 of 2006.**

In the case **Rwakijuma Kabagambe & 4 others Versus Bishop Clovis Sunday HCT-CV-CA-005/2009**, It was held that, "I am of the view that when Courts of law make a decision regarding land, they do two things simultaneously; they declare one party a trespasser and therefore order that party to leave the land. The second thing, the Courts do simultaneously, sometimes overtly but other times only by implication is to declare the other party the rightful owner of that property as against the trespassing party but also as against the rest of the world.*"

20 Under Sections 101, 102 and 103 of the evidence Act, whoever asserts a fact must prove it. It is clearly stipulated that: **"whoever wants Court to believe in the existence of a given set of facts must have the burden to prove their existence."**

Ground one

- 1) That the Honorable Chief Magistrate's refusal or failure to review the evidence available to Court in respect to the land acquired by the 5th Respondent Frank Rushanganwa through the 1st Respondent perpetrated fraud which should have been stopped but was not.
- 2) That the Honorable Chief Magistrate erred in law and equity by refusing to review the evidence already on file in relation to the 5th Respondent's acquisition of the land in issue though the 1st 10 Respondent perpetuated fraud and illegality

The 1st and 2nd grounds can be consolidated and I shall argue them concurrently and argue ground 3 separately.

The sale agreement between Joseph Vuningoma and Mirieri Nakimera dated 16th May 2001, on Block 95 Plot does not exist and is null and void since she had no right to sell yet she warrants herself as the Administrator of the Estate of the late Nasanairi Kinalwa yet the same was granted to Ezra Herbert Kabali (Grandson) on 15th May 2006. The Registrar was therefore right to cancel it.

The sale which was conducted between the 5th Respondent and the 1st Respondent did not prove any fraudulent act since the 1st ²⁰ Respondent acted as an administrator while transacting with the 5th Respondent. Ground one and two fails.

Ground Three

That the Honorable chief Magistrate erred in law when she refused to order a locus quo in respect to the land in issue as had been prayed by the Appellant which prejudiced the Applicant since it would have established with certainty who of the Appellant and the 5th Respondent physically and legally occupied the land in issue.

Where all issues are very clear, there is no need to visit locus. Like in this case there was a sale agreement stipulating the size of the land, signature of the vendor, purchaser, witnesses and amount paid and the reasoning in Page 5,6,7,8 & 9 of her judgment and record of proceedings from Page 10,14 to 10 42, I did not find any fault with the trial Chief Magistrate. Hence this ground also fails.

The appeal is hereby dismissed with costs to Respondents both in the lower Court and High Court.

Never the less, before reading the Judgment of this appeal, Counsel for the Appellant sought leave to be allowed to withdraw this appeal **under O.25 r1 of the Civil Procedure Rules** which leave was granted and the issue that remained was of costs.

Counsel for the Respondent never opposed the withdrawal but urged that costs be awarded together with Misc Application 1326 &1308 of 2016.

20 Counsel for the Appellant urged that costs should not be awarded to the Appellant because his client was an illiterate who did not know what was happening and was protected by the **Illiterate protection Act under S. 2 & 3 of the said Act** and that his client did not know how to read and write and all the documents did not bear a certificate of translation.

And if Court is inclined to award costs, then Counsel of the Appellant should pay for misconduct and negligence, he quoted the case of **Ayella Odoch Jimmy Joel Versus Kitgum District Local Government Lamuo District Local Government High Court Civil Appln. No. 26/2014 Justice Steven Mubiru ruled** that since the client had not given instruction to sue the second party at the hearing, Court found that Counsel had no instruction to sue the second party, and as such counsel was made to pay the costs. Also in the Supreme Court case of **Joel Kato and Anor Versus Nwuule Nalwagga Supreme Court Misc. Application No. 4/2021**, Court said that "I do not* 10 *think I was right to blame the Applicant for the delay in securing the records of proceedings from Court of Appeal, but to blame it on counsel since he was*

a Professional Advocate by training and experience," and as such he was made to pay costs.

In the instant case which is distinguishable from the above, here the Applicant instructed his Advocate to file Misc. Application 1327 /2017 for interim injunction arising from Misc. Application 1308 of 2016 for Stay of Execution and in both cases, the Appellant swore an affidavit in support of the applications and he never mentioned anywhere that he was illiterate nor was the jurat. Counsel for the Appellant filed Notice of Appeal at the same 20 time, applied for revision before the Chief Magistrate which was dismissed. By filing, the two options did not amount to negligence or misconduct, and as such I cannot fault the Counsel and order him to pay costs but order the Appellant to pay costs both in the Lower Court and High Court.

Right of appeal explained.

..... **Hon. Justice Oyuko Anthony Ojok. Judge**

Dated this 19th day of April 2021

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