

UGANDA / JUDGMENT

Zawedde & 2 Others v Nalwanga (Civil Appeal 7 of 2023) [2024] UGHCLD 101 (17 April 2024) [2024] UGHCLD 101

COURT

HC: Land Division (Uganda)

BEFORE

Nassuna Matovu, J

CASE / FILE NUMBER

Civil Appeal 7 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL APPEAL NO. 07 OF 2023

ARISING FROM ENTEBBE CIVIL SUIT NO. 83 OF 2014

1. ZAWEDDE ALICE
2. LUTEEBA ERIC
3. SSENKONGA RONALD APPELLANTS

VERSUS

NALWANGA ROBINAH RESPONDENT

BEF. ORE HON. LADY JUSTICE FLAVIA NASSUNA MATO\RT'

JUDGEMENT

1. INTRODUCTION

This appeal arose from the decision of court in Entebbe Civil Suit No. 83 of 2014 that was passed on 4th November 2022. The appellants being dissatisfied with the said decision lodged this appeal against the same. The grounds of appeal were laid in the memorandum of appeal that was lodged at court and endorsed by the Registrar on 16th January 2022. Briefly the grounds were that;

- a) the trial magistrate erred in law and in fact when she visited the locus in quo and conducted a hearing in the absence of the defendants and their counsel despite having been duly notified of their absence.
- b) the trial magistrate erred in law and in fact when she relied on the plaintiffs evidence gathered during the locus in quo visit without the defendants and their advocate to hold that the suit kibanja was bought by the plaintiff.
- c) The trial magistrate erred in law and fact when she held that the sale agreement dated 3'd January 2013 was valid yet the same agreement was thumb printed by the defendant without any translation as required by law.
- d) The trial magistrate erred in law and fact when she considered evidence of PW3 (Ssekibengo Jackson) who the plaintiffs counsel asked court to declare hostile for being too contradictory in his evidence thereby arriving at a wrong decision.
- e) The trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby awarding excessive damages based on court's finding at the locus which was in the absence of the defendants and their counsel.
- f) The trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record to hold that the plaintiff bought the suit kibanja and that the boundary marks and demarcation as shown to court by the plaintiff at the locus was true and authentic.

The appellants thus called upon this court to set aside the judgment and decree of the lower court with costs to them.

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2. BACKGROUND

- a) The appellants were widow, beneficiary and customary heir to late Misairi Lwanga. On 1st June 2000, they allegedly sold the suit Kibanja to the respondent, who was given vacant possession and she started utilising the same by planting trees thereon. Upon obtaining letters of administration to estate of late Lwanga, the appellants on 3'd January 2013

executed another sale agreement with the respondent in respect of the same kibanja by which she paid additional consideration of 1.6 million. The respondent allegedly enjoyed quiet possession of the said kibanja until 2013 when she learnt that the defendants had resold the same to third parties who were unknown to her. She reported the matter authorities but was not assisted. She therefore filed the case at Entebbe Chief magistrate's court by which she sought for vacant possession of the said kibanja, permanent injunction, general damages, special damages and costs of the case.

- b) The appellants on the other hand denied having executed any of the above mentioned Kibanja sale agreements. They instead maintained that the respondent had purchased a kibanja at Kisaba on 18th July 2002 and it was that kibanja that she had been occupying and utilising since then.
- c) The case went to full trial and at the trial court three issues were considered i.e.
 - Whether the plaintiff purchased a kibanja interest from the defendants in 2000. 1
 - Whether the plaintiff breached the terms of payment in the 1st agreement dated 1st March 2002
 - 111. Whether the 2nd agreement entered into on 3rd January 2013 was valid.
 - 1V. Whether the parties are entitled to the remedies sought.
- d) The court delivered judgment in favour of the respondent and made the following orders;
 - 1 The defendants/appellants give vacant possession of the suit kibanja to the plaintiff/respondent within 60 days from date of judgment.
 - 11. A permanent injunction issued against the defendants/appellants, their agents, assignees and all who derive title from them.
 - 111. Special damages of 4.6 million awarded to the respondent/plaintiff
 - IV. General damages of 20 million awarded to respondent/plaintiff
 - ^V Defendants/appellants to pay costs of the case.

The appellants were not satisfied with the above decision and thus lodged the instant appeal on the aforementioned grounds.

3. RESPONDENT'S EVIDENCE IN THE TRIAL COURT.

- a) PW1 was Na-lwanga Robinah. Briefly, she testified that she purchased the suit kibanja from the defendants in 2000 at Ug. Shs. 300,000/= which she paid in full. The neighbours to the said kibanja were Nalongo Joyce and Ssenyonga Stephen on the upper part, Welaga Temuteo on the eastern part, Bogere Sulait on the west and 1st and 2nd defendants on the lower part. After purchase she took possession, planted seedlings thereon and enjoyed quiet possession of the same

for 13 years. In 2013 when she wanted to borrow money and use the said kibanja as security, she realised that she had lost the sale agreement in relation to the same. She thus went back to the defendants for assistance. The defendant told her to buy the kibanja afresh and they agreed at 1.6 million which she also fully paid. After she had repurchased the said kibanja, the defendants then resold the same to one Mujunga Henry al infant and then mobilised people who chased her away from the said kibanja. They harvested her trees and also made charcoal from the same. In 2013 she discovered the agreement that she had made in 2000 and opted to keep the two agreements. She tendered both agreements to court.

In cross examination she stated that she paid the sum of Ug.shs. 300,000/= in instalments of 100,000/= and 200,000/=. That in 2013, the same kibanja was resold to Mujunga Henry by Namusoke Nasta who is a sibling to the defendants

- b) PW2 was Sikyomu George William Ssenyonzi. He testified that the suit kibanja formerly belonged to his late father Misairi Lwanga. That Lwanga bequeathed the suit kibanja to the three defendants who sold the same to the plaintiff. In 2013, the defendant told him that plaintiff was going to purchase the suit kibanja afresh because she had lost her sale agreement. This was done on 3rd January 2013, Ug.shs. 1.6 million was paid and he witnessed the transaction.
- c) PW3 was Ssekibengo Jackson. Briefly he testified that he was present when the defendants were paid Ug.shs. 1.6 million and he witnessed the transaction.
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- d) PW4 was Ssetabi John. His testimony was similar to that of PW1, PW2 and PW3.
- e) APPELLANTS, EVIDENCE IN THE TRIAL COURT
- a) DW1 was Kiiza Misairi. He testified that he was son to late Misairi Lwanga who died in 1995 and letters of administration to his estate were granted to the defendant in 2000. That on 18th and 20th and 22nd defendant sold a kibanja to plaintiff at Ug.shs. 1,000,000/= which Nalwanga paid in full. That DW1 drafted the sale agreement and Plaintiff started utilising the said kibanja. At the time of sale boundaries for the said kibanja were demarcated as running from kibanja of Mpajji to the kibanja of late Welaga and to Bogeele upwards in the north. In cross examination he stated that he did not know what happened in 2000 and only knew what transpired in 2002.
- b) DW2 was Zawedde Alice. Briefly, she testified that she was widow to late Misairi Lwanga. In 2000 they sold a kibanja to the plaintiff at Ug.shs. 300,000 of which plaintiff paid Ug.shs. 100,000 and was to pay the balance on 5th June 2000. However she did not pay the balance as agreed in spite of several demands. In July 2002, DW2's sons (2nd and 3rd defendant) sold their kibanja to plaintiff at Ug.shs. 1,000,000/=. An agreement to that effect was made and plaintiff started utilising the said kibanja. She denied having made any other sale of kibanja agreement. That plaintiff merely advanced her Ug.shs. 1,000,000/= to assist her in facilitating the release of her son but they

confused her and coerced her into signing a document which later reflected as if she had sold kibanja to plaintiff. In cross examination she stated that there was no condition as to payment of the balance of 200,000. That the plaintiff never paid the balance of Ug.shs. 200,000/= and they again sold to her another portion of Ug.shs. 1,000,000/=. She then utilised both kibanja.

- c) DW3 was Ssenyonga Ronald. His testimony was similar to that of DW2. In cross examination he stated that he knew they sold two kibanja to plaintiff. The one of 300,000 and the one of 1,000,000/=.
- d) DW4 was Lujeeba Eric. His testimony was more or less similar to that of DW1, DW2 and DW3.

0 PROCEEDINGS AT THE LOCUS

- a) The court visited locus and made observations as reflected on the court record (Page 30-32)

g) JUDGMENT OF THE TRIAL COURT

In her judgement, the trial magistrate found that the plaintiff had successfully proved that she had purchased the suit kibanja in 2000 at Ug.shs. 300,000/= out of which she paid Ug.shs. 100,000/= leaving a balance of Ug.shs. 200,000/=. Further that whereas there was no evidence to show that the plaintiff had paid the balance of 200,000/=: the defendants allowed her to utilise the land for a long time without making any demand. That they were therefore barred by limitation from claiming the said balance since they did not lodge

claim within a period of 6 years as required under the limitation Act.

The trial magistrate also found that the sale agreement that was executed on 1/3/2013 was not a fresh sale but that the defendants took advantage of the fact that the plaintiff had lost her previous agreement of 2000. The said agreement was in respect of the same land that had earlier been sold at Ug.shs. \$300,000/=.

The trial magistrate thus ordered the defendants to give vacant possession of the suit kibanja to the plaintiff, awarded general and special damages plus a permanent injunction restraining them from further trespassing on the suit kibanja.

h) GROUNDS OF APPEAL

- a) the trial magistrate erred in law and in fact when she visited the locus in quo and conducted a hearing in the absence of the defendants and their counsel despite having been duly notified of their absence.
- b) the trial magistrate erred in law and in fact when she relied on the plaintiff's evidence gathered during the locus in quo visit without the defendants and their advocate to hold that the suit kibanja was bought by the plaintiff.

- c) The trial magistrate erred in law and fact when she held that the sale agreement dated 3rd January 2013 was valid yet the same agreement was thumb printed by the defendant without any translation as required by law.
- d) The trial magistrate erred in law and fact when she considered evidence of PW3 (Ssekibengo Jackson) who the plaintiff's counsel asked court to declare hostile for being too contradictory in his evidence thereby arriving at a wrong decision.
- e) The trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby awarding excessive damages based on court's finding at the locus which was in the absence of the defendants and their counsel.
- f) The trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record to hold that the plaintiff bought the suit bibanja and that the boundary marks and demarcation as shown to court by the plaintiff at the locus was true and authentic.

g) ISSUES ON APPEAL

- a) Whether the trial magistrate erred in law and in fact when she visited the locus in quo and conducted a hearing in the absence of the defendants and their counsel despite having been duly notified of their absence.
 - b) Whether the trial magistrate erred in law and in fact when she relied on the plaintiffs evidence gathered during the locus in quo visit without the defendants and their advocate to hold that the suit kibanja was bought by the plaintiff.
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- c) Whether the trial magistrate erred in law and fact when she held that the sale agreement dated 3rd January 2013 was valid yet the same agreement was thumb printed by the defendant without any translation as required by law.
 - d) Whether the trial magistrate erred in law and fact when she considered evidence of PW3 (Ssekibengo Jackson) who the plaintiffs counsel asked court to declare hostile for being too contradictory in his evidence thereby arriving at a wrong decision.
 - e) Whether the trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby awarding excessive damages based on court's finding at the locus which was in the absence of the defendants and their counsel.
 - f) Whether the trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record to hold that the plaintiff bought the suit bibanja and that the boundary marks and demarcation as shown to court by the plaintiff at the locus was true and authentic.

g) DUTY OF A FIRST APPELLATE COURT.

- h) The duty of this court as a first appellate court is 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 conclusion. And in case of any conflicting evidence the appeal court has to make

1 Father Nanensio Begumisa & 3 others vs. Eric Tiberaga sccA 17 of 2000 (2004) KALR ²³⁶/_{sup}

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 conclusions². As rightly stated in the case of Ocen Rona-Ido³, in exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court.

il LAW APPLICABLE

- . The Constitution of the Republic of Uganda ¹⁹⁹⁵/_{sup}
- . The Civil Procedure Act Cap 71
- . The Civil Procedure Rules
- . The Contracts Act
- . The Illiterates Protection Act Cap 78
- . The Evidence Act Cap ⁶/_{sup}
- . The Magistrates' Courts Act Cap ¹⁶/_{sup}
- . Common law and decided cases.

j) LEGAL REPRESENTATION.

The appellant was represented by Ms. Lunar Advocates while the respondent was represented by Ms. Nshemerirwe, Arigye & Co. Advocates.

²/_{sup} Lovinsa Nankya vs. Nsibambi 1980 HCB 15 cited with approval in Ocen Renaldo vs. Justin Orunya Gulu Civil Appeal No. 006 of 2013.

³/_{sup} Ocen Renaldo vs. Justin Orunya Gulu Civil Appeal No. 006 of 2013.

K. SUBMISSIONS:

Both parties filed written submissions which I carefully studied together with the record of proceedings and the relevant law. I need not reproduce the submissions here.

L. DECISION OF COURT

Issues 1 and 6

- Whether the trial magistrate erred in law and in fact when she visited the locus in quo and conducted a hearing in the absence of the defendants and their counsel despite having been duly notified of their absence.
- Whether the trial magistrate erred in law and in fact when she failed to properly evaluate the evidence on record to hold that the plaintiff bought the suit bibanja and that the boundary marks and demarcation as shown to court by the plaintiff at the locus was true and authentic.
- a) Counsel for the appellants submitted that whereas court fixed date for locus visit as 21/2/2022, their advocate wrote to court and notified it that he would not be able to attend the locus because he had another matter that had been fixed earlier on in Masaka Chief magistrate's court and consequently requested for another date. The letter was received at court 2 days before the locus visit. Nonetheless the court did not consider his request and the locus visit was conducted in his absence, which occasioned a miscarriage of justice to the appellants and the court arrived at a wrong decision. He clearly elaborated the procedure that court

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should follow at locus and cited several authorities in support of his case which I carefully studied and entirely agree with.

- b) Counsel for the respondent on the other hand submitted that the case had been fixed for locus on several occasions and on all of them the appellants and their advocate had failed to turn up. Further that the advocate for the appellants invoked a wrong procedure for applying for adjournments because under the law and practice direction governing adjournments, adjournments are supposed to be sought orally and are not automatically granted by court.
- c) Perusal of the record of proceedings shows that the defendants were duly notified of the date for locus visit through their advocate. The advocate responded to this notice by writing to court that he would not be in position to attend because he had another matter in Masaka court. The letter did not explain why the defendants would not attend and indeed no reason was given for their non-attendance. There is nothing on record to show whether the court responded to the advocate's request for another date.

- d) In my view, the defendants and their advocate having failed to turn up after being duly notified the case proceeded under O.9r.20 of the Civil Procedure Rules. The locus proceedings were conducted on 21/12/2022 as scheduled and schedules for submissions were set. The defendants had the option of applying to court to set aside the *ex parte* locus proceedings and be allowed to participate. This they did not do but instead

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they went ahead and filed submissions on 4/15/2022 and judgment was delivered in November 2022.

- e) It was therefore grossly erroneous for the advocate for defendants to apply for adjournment by way of letter and assuming that simply because the court had received the letter, then the adjournment had been granted. It was equally wrong for the defendants not to attend in person even though their advocate was absent. This was their case and they should have exercised due diligence to attend in person. As already stated no reason was advanced as to why the defendants /appellants did not attend.
- f) The court therefore rightly proceeded under O.9 r.20 of the Civil Procedure rules and the defendants ought to have applied to set aside the *ex parte* proceedings. The same cannot be set aside on appeal. Perusal of locus proceedings (Page 30- 32 of the record of proceedings) shows that the locus was properly conducted.
- g) I therefore find that the trial magistrate rightly proceeded under O.9 r.20 of the Civil Procedure rules since the defendants/appellants who had been duly notified failed to turn up and no reason was given for their non attendance and that the locus proceedings were properly conducted.

Issue 2

Whether the trial magistrate erred in law and in fact when she relied on the plaintiffs evidence gathered during the locus in

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quo visit without the defendants and their advocate to hold that the suit kibanja was bought by the plaintiff.

- a) As already found above the trial magistrate rightly conducted the locus proceedings in absence of the defendants who had been duly notified but opted not to attend and that the locus proceedings were properly conducted. From the record and judgment it is not true that the trial magistrate based her decision entirely on the evidence that was gathered at locus. Witnesses had already testified in court that the appellants had sold suit kibanja to plaintiff. (PW1 on page 8 of the record of proceedings) testified that she bought the kibanja in 2000. Indeed even the 1st, appellant who testified as DW2 (Page 21 of the record of proceedings) admitted in her testimony that she had sold kibanja to plaintiff in 2000 at

Ug.shs. 300,000 but that she had only paid Ug. Shs. 100,000. The court merely went for locus to see the said kibanja. Since the defendants opted not to attend locus proceedings on that day the court had no option but to be guided by the plaintiff.

- b) I therefore find that the finding by the trial magistrate that the suit kibanja was bought by the plaintiff was based on evidence adduced by witnesses both at court and during locus. I thus resolve the 2nd issue in the negative.

Issue 3

Whether the trial magistrate erred in law and fact when she held that the sale agreement dated 3rd January 2013 was valid

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yet the same agreement was thumb printed by the defendant without any translation as required by law.

- a) Counsel for appellants submitted that the trial magistrate made an erroneous finding that the agreement that was made on 11/3/2013 was valid yet the same offended the provisions of S.3 of the Illiterates Protection Act. The said agreement was never read and explained to the 1st Appellant who was illiterate and for that reason it was void. He cited several authorities in support of his submissions which I have carefully studied.
- b) Counsel for the respondent on the other hand submitted that this issue did not arise during trial and for that reason it cannot be brought up on appeal.
- c) Under S.1 of the Illiterates Protection Act an illiterate in relation to a document is defined as a person who is unable to read and understand the script or language in which the document is written or printed.
- d) From the record, no evidence was led to show that the 1st appellant was an illiterate within the meaning of the Illiterates Protection Act. On the contrary on page 21 of the record of proceedings she clearly stated that she recorded a statement and signed the same. She was even able to identify her signature. The statement was read back to her simply because it was in English. The agreement of 31/1/2013 was drafted in Luganda and no evidence was led to show that she could not read Luganda. As rightly submitted by counsel for the respondent, this issue did arise during trial and cannot be addressed on appeal. Indeed, in her testimony, she kept to

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saying that she knew about the agreement of 1.6 million, (which is the agreement in contention) though she only received 1 million and was forced to sign the same.

- e) I therefore find that the trial magistrate rightly found that the agreement of 31/1/2013 was valid.

Issue No. 4

Whether the trial magistrate erred in law and fact when she considered evidence of PW3 (Ssekibengo Jackson) who the plaintiff's counsel asked court to declare hostile for being too contradictory in his evidence thereby arriving at a wrong decision.

I note that from the record, at page 17 whereas counsel for plaintiff applied to court to declare PW3 hostile, the court did not declare him so. Besides counsel for the appellants did not point out the exact contradictions that were made by PW3. This ground also hereby fails.

Issue 5

Whether the trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby awarding excessive damages based on court's finding at the locus which was in the absence of the defendants and their counsel.

- a) Counsel proceedings for appellants submitted that were conducted in the absence of the locus th

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defendants/appellants and their advocate, they were irregular and any findings of court based on the said locus were equally irregular. It was also submitted that since the court based its assessment of damages on the findings at locus, the same should be set aside.

- b) As already found above, the locus proceedings were properly conducted. Courts have overtime held that the appellate court would not interfere with the award of damages by a trial court unless the trial court acted on a wrong principle of law or the amount awarded is so high or so low as to make it an entirely erroneous estimate of damages to which the plaintiff is entitled. I have not found reason to interfere with the decision of the trial magistrate in relation to the damages that were awarded.

I have not found reason to set aside decision of trial magistrate. She properly evaluated the evidence on record and arrived at correct decision as discussed above.

M). FINAL ORDERS.

This appeal therefore hereby fails and is accordingly hereby dismissed. The decision of the trial magistrate is accordingly hereby upheld and the appellants shall pay costs of this appeal to the respondent.

DATED at Kampala this AG. JHDGE.

⁴ Masaka Municipal Council vs. Takaya Frank CACA N. 0173 of 2015.

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