

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI
CIVIL APPEAL NO. 0054 OF 2022
(Arising out of Masindi Chief Magistrate’s Court Civil Suit No. 0033 of 2018)

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1. GLADYS BAGADA KYOMYA
2. KUSEMERERWA WILSON
3. TINKASIIMIRE FRIDA APPELLANTS

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VERSUS

TINKAMANYIRE HOSEA RESPONDENT

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BEFORE: Hon Justice Isah Serunkuma

JUDGEMENT

Introduction

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In the year 2018, the Respondent filed Civil Suit No. 0033 of 2018 against Gladys Bagada Kyomya (1st Appellant), Musinguzi Wilson, Busobozi Patrick, Kusemererwa Wilson (2nd Appellant) and Tinkasiimire Frida (3rd Appellant) seeking an order that the defendants jointly and severally trespassed on his land located at Kitamba Village, Kitamba Parish, Bwijanga Sub County in Masindi District measuring approximately 1
25 acre. The respondent further sued for recovery of the above land, general damages and costs of the suit.

At the trial, the appellant produced 5 witnesses to prove his case and the Defence 5 witnesses as well.

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The trial Magistrate Grade One in her judgement found the appellants’ evidence in relation to the respondents herein was not credible and therefore dismissed the suit as against the respondents with costs. The trial magistrate however ruled in favour of the Respondent as against Gladys Bagada, Kusemererwa Wilson and Tinkamanyire Frida the appellants herein.

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Being dissatisfied with the decision to dismiss the case against the respondents herein, the appellants filed this instant appeal on grounds that;

1. *The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision in Civil Suit No. 0033 of 2018 that the suit land forms part of the land the respondent bought from the 1st appellant's husband a one Kyomya Reuben in 1998 when the Respondents neither at any point utilised nor possessed the suit land.*
2. *The learned trial Magistrate erred in law and fact when she cancelled the agreements of purchase of the suit land by the 2nd and 3rd appellants from the 1st appellant.*
3. *The learned trial Magistrate erred in law and in fact when she failed to find that the 2nd and 3rd appellants were not bonafide purchasers for value without notice protected by law.*
4. *The learned trial Magistrate erred in law and fact when she failed to find that the suit land formed part of the 1st appellant's land which her husband (Kyomya Reuben) did not sell to the Respondent in 1998.*
5. *The learned trial Magistrate erred in law and fact when she awarded the respondent general damages of UGX 5,000,000/= (five million Uganda Shillings only) which is excessive and unjustified in the circumstances.*

The Appellants in their written submissions discussed grounds 1 - 4 jointly and ground 5 separately.

Representation

The appellants were represented by Counsel Simon Kasangaki of M/S Kasangaki and Co. Advocates and the respondent was represented by Counsel Atyang Christine of M/S Atyang Christine & Co. Advocates.

Both parties were directed to file Written Submissions.

Appellants Submissions

The Appellant discussed ground 1 - 4 jointly as follows;

The 1st Appellant submitted that the suit land belongs to her having inherited it from her late husband, Kyomya Reuben and that being her land, she rightfully sold it to the 2nd and 3rd appellants who claim that they own the suit land as bonafide purchasers.

They further submitted that the respondent did not produce the sale agreement of 1998 by which he brought land from the 1st appellant's husband, Kyomya and that the said agreement was not exhibited in court and that the seller's husband died and did not testify in court to confirm if he had sold the land to the respondent.

- 5 On the 5th ground they submitted that the respondent was awarded excessive general damages yet he did not merit general damages and had no evidence had been led to prove any.

Respondents Submissions

10 The respondents submitted that they own the suit land that forms part of the 6.5 acres which he brought from the 1st appellant's husband in 1998 and in April 2018, the 1st appellant illegally sold the suit land to a one Talemwa Jacob and when this was brought to the respondent's attention it led to a family meeting and resolved to refund Talemwa's money. However, later the 1st Appellant went ahead and sold the suit land to the 2nd and 3rd appellants.

15 ***Analysis of Court***

It is the duty of the first Appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account that the Appellant court did not have the opportunity to hear and see the witnesses testify. In **Peters v Sunday Post Limited [1958] 1 EA**, at page 429 the Court of Appeal for East Africa held
20 that;

*“An appellant court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellant court might itself have come to a different
25 conclusion”.*

The supreme Court of Uganda reaffirmed this principle in **Kifamunte Henry v Uganda; S.C.C.A. No. 010 of 1997**. For purposes of consistency I will handle the grounds of appeal in the order they are presented when they stated that the duty of the first appellant is;

“To review the evidence of the case and reconsider the materials before the trial judge. The appellant court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it”

I have extensively reviewed the entire record of the lower court, the Memorandum of Appeal and the appellant and respondents written submissions. For purposes of consistency, I will handle the grounds of appeal in the order they are presented.

Appellants argued that the lower court wrongly analysed the evidence on record. The respondent invited court to peruse the reasoning of the learned trial Magistrate on page 9 and 10 of her judgment while resolving the issue of who owned the suit land before its sale. The respondent claims he purchased 6.5 acres from the husband of the 1st appellant and the said agreement got lost. However, the witnesses who were present during the land transaction testified in court that they knew the size of the said land and its boundaries.

The 1st appellant testified that the suit land is outside the 6.5 acres which the respondent bought from the husband of the 1st appellant but she did not call any witness to confirm the boundaries of the land and did not produce the agreement of land sale to the respondent to ascertain the truth since the respondent had lost his copy.

Absence of the said agreement under the law of evidence is done by secondary evidence through oral accounts by persons who either attested to it or seen it or seen the document (Section 62 (e) and 64 (1)(c) of the Evidence Act).

In addition, the case of **Oryema Mark v. Ojok Robert; H.C.C.A. No. 0013 of 1998**, where MUBIRU STEPHEN J held that;

“Unlike oral testimony, physical evidence does not lie, does not forget, does not pursue self-interest”.

In line with the above law, the persons who were present during the transaction between the respondent and the 1st appellant’s husband testified on the side of the respondent and corroborated his evidence.

Basing on this same law, the 1st appellant presented Mr Kyaligonza as a witness but did not testify in regards to this effect. Therefore, on the issue of ownership of the suit land,

I find myself in agreement with the trial magistrate where she found that the respondent's witnesses who were present when he purchased the suit land gave her a true account of the case.

5 Another ground of the appellants' submission is that the 1st appellant's evidence was not rebutted that she had earlier sold the suit land to a one Talemwa and that the respondent expressed interest in buying the suit land and committed to refund Talemwa's money but failed. However, the respondents submitted that they properly rebutted the said evidence and even tendered proof.

10 On the issue of material contradictions; the appellants stated that the trial magistrate ignored material contradictions. When dealing with this issue, the court must ask itself two questions, whether there were contradictions and whether the contradictions were minor or material. In the case of *Bintubizibu Sam V Juma Sekibamu; HCCA No. 009 of 2019*) court held 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
15 being rejected and minor ones unless they point to deliberate untruthfulness will be ignored.

Basing on the appellants' submissions despite the fact that some inconsistencies have been identified, these have not been satisfactorily explained and therefore will be ignored by court.

20 On the ground that the trial magistrate erred in law and fact when she failed to find that the 2nd and 3rd appellants were bonafide purchasers for value without notice, the 2nd appellant submitted that the respondent told him that the suit land belonged to the 1st appellant and that the respondent reached out to him and told him about his commitment to refund Talemwa's money.

25 In the locus case of **David Sajjaaka Nalima V Rebecca Musoke; (Civil Appeal No. 012 of 1986)** it was held that a bonafide purchaser is one that had no notice, actual or constructive about the fraud and where a bonafide purchaser is guilty of fraud, that person ceases to be innocent and therefore loses protection.

Furthermore, to prove that the appellants are bonafide purchasers for value without notice have to prove certain elements as was laid out in the case of *Hajji Nasser Katende V Vithalides Halidas & Co. Ltd; C.A.C.A, No. 084 of 2003* as follows;

- a) *That he/she holds a certificate of title.*
- 5 b) *That he/she purchased the property in good faith.*
- c) *Had no knowledge of the fraud.*
- d) *Purchased the property for a valuable consideration.*
- e) *The vendor had an apparent valid title.*
- f) *Purchased without notice of the fraud.*
- 10 g) *And was not party to the fraud.*

The 2nd and 3rd appellants plead that they are bonafide purchasers hence implying that they didn't know of the respondents claims over the suit land prior to their purchase and they submit that they carried out due diligence and didn't hear about any conflict about the suit.

- 15 The respondent submits that the 2nd and 3rd appellants being residents in the same area and neighbours with the plaintiff they had knowledge of the circumstances surrounding the suit land.

It is my considered view that there are so many things that put the 2nd and 3rd appellants on notice because having carried out due diligence the people should have informed them as fellow neighbours and furthermore, they knew about the complaints of the respondent which should have stopped them from proceeding to buy the suit land. I therefore, believe that the 2nd and 3rd appellants are not bonafide purchasers of the suit land thus this ground fails.

On the 5th ground which states that the learned trial magistrate erred in law and in fact when she awarded the respondent general damages of UGX 5,000,000/= which is excessive and unjustified in the circumstances.

The appellants submitted that the learned trial magistrate awarded excessive general damages of 5 million reason being that the 2nd appellant bought his land at 2.5m and the 3rd appellant at 1.35m totalling up to 3.85m which is a less value than the amount of the general damages or the value of the subject matter in dispute.

The respondents submitted in reply that the approach by the appellants in quantifying general damages is wrong, misleading and has no legal basis since in law and as regards principles of law, an award of general damages is a discretion of court

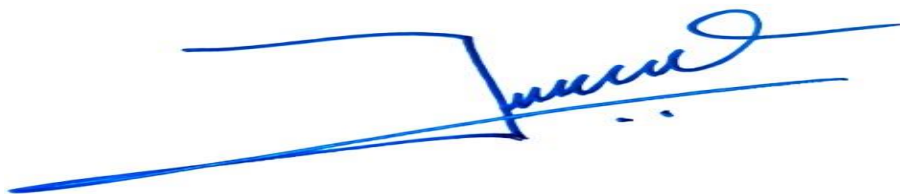
5 I now turn to the trial court's discretion on matters of damages. The law is now well settled that an appellate Court will not interfere with an award of damages by a trial court unless the trial court has acted upon a wrong principle of law or that the amount is so high or so low as to make it an entirely wrong principles of law or that the amount is so high or so low as to make it an entirely an erroneous estimate of the damages to which the plaintiff is entitled. The earliest authority on this point I have been able to
10 find is **Phillips vs. London South Western Point CA 1879.**

In my view, the principle that an appellate court will not interfere with the award of damages by a trial court unless the trial court acted upon wrong principle of law or the amount awarded is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled equally applies to the instant case.

15 In the final analysis, I find that this appeal lacks merit and it is consequently dismissed with costs to the respondent.

I so order.

20 Dated and delivered on this 22nd Day of December 2023.

A handwritten signature in blue ink, appearing to be 'Isah Serunkuma', written over a horizontal line.

Isah Serunkuma
JUDGE

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