

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF JINJA AT JINJA  
CIVIL APPEAL NO.0043 OF 2014**

**KUMBE KUSAIN**

=====

**APPELLANT**

*Versus*

**1. MALINGHA SILVE  
2. BAFIRAWALA NATHAN**

=====

**RESPONDENTS**

**BEFORE HON. JUSTICE MICHAEL ELUBU**

**JUDGMENT**

This is an appeal against the Judgment and decision of H/W Matenga Dawa Francis, Magistrate GI, Mayuge Court which was delivered on 10<sup>th</sup> April 2014.

The background is that the Appellant, **KUMBE KUSAINI** sued the Respondents **MALINGA SIRIVE** and **BAFIRAWALA NATHAN** in the Grade I Magistrate's Court of Mayuge.

The Appellant, (Plaintiff) sought orders for a declaration of the (Respondents) defendants as trespassers; for a permanent Injunction; and for eviction orders. The 1<sup>st</sup> Defendants denied the claim stating that he had legitimately bought the land from the father of the Plaintiff and in the case of the 2<sup>nd</sup> defendant from our Wamulongo Milton who had in turn purchased from the Plaintiff's father.

The Plaintiff's evidence is that the land had originally belonged to his grandfather **SALIM KUMBE** and it was from him that **ADAM KUMBE**, the Plaintiff's father, inherited the land. In 1998 Adam Kumbe sold the land to the 1<sup>st</sup> defendant. The second defendant made his purchase from one Wamulongo Milton.

It is said that **SALIM KUMBE** had made a will in which he stated that the land should never be sold. Adam Kumbe went against this wish and sold the land.

The Plaintiff sued his father in the clan Court for going against the clan wish. The clan gave a decision in his favour and directed that the defendants be compensated or evicted. They refused to leave. It was then that the clan authorised the Plaintiff to sue the Defendants on its behalf for the prayers stated before.

The defendants were left on the land in the life time of the Plaintiff's father and sued when he died.

The 1<sup>st</sup> defendant is said to have a home with coffee and banana plantations and said he would leave if he was given compensation.

The Defendants case (Respondent) was in the case of the 1<sup>st</sup> Respondent he bought the land from Adam Kumbe in 1990. That he paid for the land in one go and it was Adam Kumbe who settled him on the land. He built a home where he lives with his wife and children. The 1<sup>st</sup> Respondent also planted trees, matooke and a coffee plantation. The seller's children were minors at the time he made his purchase. The 1<sup>st</sup> Respondent produced 3 witnesses including the person who drafted the sale agreement. It is said that some clan members and neighbours witnessed the purchase of the land and appended their signatures to the agreement.

D1 was surprised to be sued by the seller's son. He denies any knowledge of the suit land belonging to the clan. It is also said that the seller had problems at the time of sale as his wife was sick and he needed the money.

The second Respondent is BAFIRAWALA NATHAN. He purchased the land on the 12/1/1997 from one Milton Wamango who is Adam Kumbe's in law.

It was said that both Adam Kumbe and Wamango were witnesses at the sale to Bafirawala. That there were several other witnesses present at the sale. Two of them, including the person who drafted the agreement, testified.

Both defendants tendered their purchase agreements in court.

At the conclusion of the hearing the learned trial Magistrate found that the Defendants were bona fide purchasers who obtained good title from the sellers. That their stay on the land was only disturbed after the death of the Plaintiff's father. That as owners they cannot be found in trespass to the land. The Plaintiffs claims were accordingly dismissed.

The Plaintiff being dissatisfied with the funding of the trial Magistrate filed this appeal with the following grounds:

1. That the learned trial Magistrate erred in law and in fact when he failed to evaluate the evidence adduced on record hence coming to an erroneous decision.
2. That the Learned Trial Magistrate erred in law and in fact when he failed to realize that the suit/land is a clan land which is not supposed to be sold.
3. That the Learned Trial Magistrate erred in law and in fact when he gave his decision basing on evidence of the Respondent which was full of contradictions.
4. That the decision of the Trial Magistrate occasioned a miscarriage of justice.
5. That the appellant deserves a right to amend the memorandum of appealing on receipt of a copy of proceedings and Judgment being appealed about.

At the hearing, the appellant argued the appeal himself while Ms. Esther Adikin of The Justice Centres represented the Respondents.

The four grounds were argued jointly by both parties, this court will resolve them in the same manner.

As a first appeal, the parties are entitled to a fresh scrutiny of the evidence from this court which should then arrive at its own conclusions giving allowance for the fact that it has not seen the witnesses testify and can make no conclusions on evidence based on demeanour or manner of testimony.

It however remains that the Appellant's claims must be proved on a balance of probabilities.

The Appellant argued that his brothers and himself were never consulted when the suit land was sold although in the same submission he challenged the very existence of a genuine sale. He added that the suit land was clan land.

The Appellant's father according to the first Respondent, Malingha Silvester, sold the first portion of land to him on the 26<sup>th</sup> of August 1990. He produced witnesses

who were present at the sale. It is said that there were clan members present at the sale. The purchase agreement was tendered as DEX 1.

For the second Respondent the evidence adduced was that on the 12<sup>th</sup> of January 1997 he bought the land from Milton Wamango. That the Appellant's father Kumbe Adam was present at the sale.

The Plaintiff was 30 years old on the 23<sup>rd</sup> of October 2013. It would mean he was 10 years old at the sale of the first piece of land in 1990. It is therefore unlikely that a child of that age would in a rural setting be called sign a land sale agreement as a witness.

For the second piece owned by the 2<sup>nd</sup> Respondent, the land was purchased before 1997 when the Appellant was less than 14 years.

What is even more pertinent the Appellant's brothers and sisters were not the owners of the suit land. Since they had no right of ownership over the land, their consent was not required for the sale.

The Appellant argued that his mother's consent, as the spouse of the seller was not sought before the sale was concluded.

There was no requirement for the wife's or children of majority age consent, in 1990 and 1997 when the sales were made. The legal requirement for spousal consent was introduced by Section 39 of **Land Act** which was passed in 1998.

The lack of consent does not therefore vitiate the sale here.

It must be added that the said spouse testified as PW2 Zaituna Namukasa and does not state anywhere that she challenged the sale. In fact DW5 Seforoza Nangobi, the wife of the 1<sup>st</sup> Respondent, stated in her evidence that the reason Adam Kumbe sold the land was because he had a wife who was sick.

It should be noted that the clan did not challenge the sale in Adam Kumbe's life time. Several clan members are said to have been present at the sale. The Respondents enjoyed quiet possession of the land for several years before the Appellant rose to challenge their occupation.

This court has found no evidence on record that the suitland was clan land or that the appellant's grandfather had stated in his will that the land should never be sold.

No evidence was adduced to show the clan position or what the grandfathers will was.

Therefore the submission that this was clan land not to be sold is not backed by evidence.

The argument that Adam Kumbe had no authority to sale is also not backed by evidence.

Infact he appears to have had full authority as owner, considering that the challenge has only arisen after his demise.

The evidence therefore shows that the suit land was properly purchased by the Respondents who have evidence of purchase and there is no basis to challenge their title.

The Appellant has not proved any of the grounds of appeal.

In the result this appeal shall be dismissed.

The Respondents shall have the costs here and in the lower Court.



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**MICHAEL ELUBU**

**JUDGE**

**15/8/2018**