

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

CIVIL APPEAL No. 037/2012

(Arising from Kisoro Land Claim No. 1 of 2008)

UWERA ESTHER APPELLANT
(Administratrix of the Estate
Of Karuhanga Onesmus)

VERSUS

TURINAWE BENON RESPONDENT

BEFORE HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant, UWERA ESTHER, filed this Appeal against the Judgment of HW Kabale Grade I Magistrate WINIFRED KYOBICA.

The background to is that the parties have a running dispute between them over a piece of land located at Nyakitare in Kanoni cell, Birambo parish, Maziba Sub County in Kabale District.

It is the case for respondent, TURINAWE BENON, that he bought the suit land from one John Betubiza and his wife Manjeri Kabaziguruka on the 4th of November 2004. A sale agreement to that effect was executed by the parties and a copy tendered at trial. John Betubiza passed away in 2005. Between the 23rd and 25th of May 2005, shortly after the death of John Betubiza, three of his sons Karuhanga Onesmus, Akampurira Johnson and Baryantuma Isaiah entered upon the land and harvested eucalyptus trees and planted maize. The three who entered upon the land were sons of John Betubiza and his first wife Ngasheki Justine.

The appellant UWERA ESTHER is the wife of one Onesmus Karuhanga who was originally a defendant in the lower court but passed away during the pendency of this suit. UWERA is a party as she is the administrator of his Karuhanga's estate. The

appellant challenges the respondents ownership of the land and states that the land was given to the Karuhanga by his father the late Betubiza and mother Ngasheki Justine on the 14th of May 2000 as a gift in appreciation of the good things he had done for the them as a son. The gift deed on which this was done was tendered as an exhibit.

The learned trial magistrate believed the plaintiff's/respondent's case and entered judgement in his favour on the 4th of December 2013. The defendant/appellant being dissatisfied with that judgment filed this appeal with 5 grounds namely,

1. The learned trial magistrate erred in law and fact when she wrongly evaluated the evidence and as a result made wrong findings on issue 1 and 2.
2. The learned trial magistrate erred in law and fact when she failed to resolve the issue of whether the plaintiff obtained the suit land lawfully.
3. The learned trial magistrate erred in law and fact when she misdirected herself by turning herself into a handwriting expert by holding that the exhibits PEX 1 and DEX 1 were written by the same person.
4. The learned trial magistrate erred in law and fact by bringing into her judgement an issue of whether the Suitland was family land yet it was not canvassed by Counsel at the scheduling or addressed by counsel during submissions and therefore misdirected herself thus occasioning a miscarriage of justice.
5. The learned trial magistrate erred in law and fact to value the trees and order compensation when it was not proved that the appellant took the trees.

This is a first appeal. The Court is therefore under obligation to subject all the evidence to a fresh scrutiny and arrive at its own conclusions but will be guided by the lower court on matters regarding demeanour of witnesses considering that the lower court had the opportunity to see those witnesses testify.

I will deal with the first three grounds of appeal collectively.

The Grounds are:

1. The learned trial magistrate erred in law and fact when she wrongly evaluated the evidence and as a result made wrong findings on issue 1 and 2.
2. The learned trial magistrate erred in law and fact when she failed to resolve the issue of whether the plaintiff obtained the suit land lawfully.

3. The learned trial magistrate erred in law and fact when she misdirected herself by turning herself into a handwriting expert by holding that the exhibits PEX 1 and DEX 1 were written by the same person.

All three grounds here are centred on ownership of the Suitland. Counsel for the appellant submitted that since all parties claimed ownership based on documentary evidence of acquisition of the land, then only a handwriting expert could have helped the court to arrive at a fair and just decision.

Counsel for the respondent argues that there was no need for a handwriting expert. In the case of the agreement allegedly giving land to the appellant's late husband (Karuhanga), the photocopy tendered was different from the original. One had Karuhanga's name and the other did not. Counsel contends that was an alteration that did not need an expert to identify.

It was also argued that a Court of law under S. 72 of **The Evidence Act** may compare questioned signatures with proved ones for the purpose of satisfying itself as to the authenticity of a signature.

I have addressed my mind to the evidence and the submissions of Counsel.

Karuhanga Onesmus was said to have acquired this land from his parents. In Paragraph 2 of his written statement of defence Karuhanga stated that in the year 2000 he bought the land from his biological father with full consent of all the family members and an agreement to that effect was executed.

During the hearing, DW 1 Akampurira Johnson stated that Karuhanga was given the land by his parents on 14th of May 2000 for the good things he had done for them. DW 2 Justina Ngasheki who is a mother of both Karuhanga and DW1 repeated DW 1s claims. That it was only immediate family members who had witnessed the giving of the gift. She added that her husband and herself bought the land jointly in 1989. The vendor was one Kururagire while the author of the Sale agreement was one Tibihika. The deed of sale was not formally exhibited and remained an identified document by the time the defence closed its case.

PW 1, the respondent, Turinawe Benon, testified that he bought the land from John Betubiza and his wife Manjeri Kabaziguruka on the 4th of November 2005. There were several persons present and 8 people witnessed the sale deed which was tendered as an exhibit.

I have closely examined the evidence regarding these transactions. Firstly I am not persuaded that Karuhanga was given the land as a gift. In his own pleadings it is stated that he had purchased the land from his father. It is a tenet of our law that a

party must be bound by his pleadings and will not be allowed at trial to set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings. The system of pleadings operates to define and deliver with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them (*Interfreight Forwarders vs EADB [1994 - 95] HCB 54*).

Therefore to say that the land was a gift and adduce an agreement to that effect is a fundamental departure.

Furthermore, this Court is persuaded that the land was in the possession of Betubiza and his wife. Betubiza had purchased the land at a time he was separated from his first wife Justina Ngasheki. The author of the deed of purchase by Betubiza from Kururagire was one Tibihika Vereriyano, who testified as PW 5. He stated that DW 2 was not present or party to the sale. PW IV, Manjeri, Betubiza's second wife stated that when she married Betubiza he was on his own and had this piece of land which the couple then sold to the respondent.

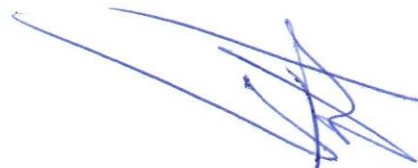
PW 2, Karugaba Living drafted the agreement of sale while PW 3 was an 80 year old Uncle of the late Betubiza who also witnessed the sale to the respondent. He stated that for a while, Betubiza was on his own on the land. The signatures of Betubiza on the 1989 purchase agreement and the 2004 sale are similar and tally with the rest of the documentary evidence.

Looking at the evidence it would appear that, on a balance of probability, the respondent bought this land. It also unlikely, on the evidence, that DW 2 was ever in possession of the land. The land was in the possession of Manjeri and Betubiza. Consequently the alleged gifting of the land to Karuhanga is a fallacy.

Additionally this DW 2 had no connection to the Suitland. There is no evidence that she either farmed or had a home on it. It was the second wife Manjeri who appeared to have derived sustenance from the land. In the result the appellant has no basis on which to claim that the Suitland was family land within the meaning of S. 39 of the **Land Act**.

For the above reasons there was no lawful challenge to the purchase of the land by the respondent.

In the result, it is the finding of this court that the first 3 grounds of appeal fail.



Ground 4

The learned trial magistrate erred in law and fact by bringing into her judgement an issue of whether the Suitland was family land yet it was not canvassed by Counsel at the scheduling or addressed by counsel during submissions and therefore misdirected herself thus occasioning a miscarriage of justice.

The submissions of Counsel on appeal are that the land was family land which is in direct conflict with the wording of this ground of appeal.

Because of my finding in Grounds 1 - 3 this ground is dismissed. Secondly, it would have no bearing ownership of the land.

Ground 5

The learned trial magistrate erred in law and fact to value the trees and order compensation when it was not proved that the appellant took the trees.

Akampulira in cross examination at Pg. 33 admitted that it was true they cut down the trees but they were harvested by the plaintiff. DW 2 also states that the cut trees were taken by the plaintiff. The respondent and his witness though they admit the trees were cut down do not state that they were taken by Karuhanga and his brothers. The trial magistrate however gave cogent reasons for her finding. The trees were cut down without the respondent's permission. She accordingly gave a value which I shall not interfere with.

In the result this ground of appeal fails.

This appeal is accordingly dismissed with costs.

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Michael Elubu

Judge

16.3.17

