

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASINDI
LAND APPEAL NO. 0036 OF 2015
ARISING FROM CIVIL SUIT NUMBER 052 OF 2011 IN THE CHIEF MAGISTRATES
COURT, HOIMA**

MUHUMUZA VINCENT ...

APPELLANT

VERSUS

KIPARU DAUDI

RESPONDENT

JUDGMENT BY JUSTICE GADENYA PAUL WOLIMBWA

This appeal is against the decision of Mr. Yeteise Charles, Senior Magistrate Grade I, at the Chief Magistrates Court at Hoima dated 13th May 2015.

Background

The brief facts of this case are as follows: Daudi Kiparu (the Respondent) sued Muhumuza Vincent for trespassing on his land located at Ndaragi II LCI village in Kisukuma Parish, Kigorobya, Hoima. The Respondent alleged in the lower court that he bought land measuring about 50 acres from Tipo in 1975. He took possession of the land and used it. That he was surprised when the Appellant, came from nowhere and started cultivating cassava, cotton and maize on part of the land, measuring approximately five acres.

The Appellant on his part accused the Respondent of grabbing his land. He told court that he got the suit land from Angella Sabiti, his mother who inherited the same from Bukanga Nyamuhanga, her late father.

Both parties called witnesses save to mention that the plaintiff who never testified in person but chose to do the same through an appointed attorney.

The court gave judgment for the Respondent based on the following reasons:

- That the Appellant's mother, has never had land in the area and so there was no land she could have passed on to the Appellant.
- There was no agreement to show how the Appellant acquired the land from his mother;
- That the witnesses of the Appellant failed to show the boundaries between the parties;

- That there was no evidence that the Appellant's mother had ever settled or used the suit land;
- That the witnesses of the Respondent supported his claim that he bought the land from Tipo;
- That William Kato, who settled on the neighboring land to that of the Respondent in 1996, only knew the Respondent as his neighbor;
- Lastly, that William Kato, as a neighbor, was not called to witness the handover of the land by Sabiti to the Appellant

The Appellant being aggrieved by the decision of the Senior Magistrate Grade I, filed the present appeal.

Grounds of Appeal

The grounds of appeal are:

- That the senior Magistrate Grade I erred in law and fact when he failed to properly evaluate the evidence on the record thus reaching a wrong decision;
- That the learned senior magistrate Grade I erred in law and fact when he entered judgment in disfavor of the Defendant / Appellant when the Appellant had a claim of right on the same piece of land.

Representation

The Appellant was represented by Mr. Ian Musinguzi, while the Respondent was represented by Mr. Kasangaki

Arguments of the Appeal

At the beginning of the appeal, counsel agreed to reduce the grounds of appeal to just one: that is whether the learned Senior Magistrate Grade I properly evaluated the evidence on the record. This was a wise decision because all the grounds of appeal rotate around the issues of evaluation of evidence.

Counsel raised several issues around the evaluation of evidence by the Learned Senior Magistrate, but key among them was the issue of whether the plaintiff (respondent) legitimately appointed an attorney to represent him in the lower court. It is my considered view that a consideration of this point will determine whether I look at the other components of the lone ground of appeal.

Mr. Musinguzi counsel for the Appellant submitted that the learned Senior Magistrate erred in law when he relied on a power of attorney which contravened section 2 and 3 of the Illiterate Protection Act. He said that the power of attorney on which the Respondent appointed Ezra Kanyamwenge, to represent his interests in court was not certified and that there was no certificate of translation to show that the advocate read over the power attorney before the Respondent thumb printed it. He submitted that based on this irregularity the evidence adduced by Ezra Kanyamwenge, was a nullity.

Mr. Simon Kasangaki, counsel for the Respondent submitted that he was surprised that the Appellant did not object to the power of attorney in the lower court. He submitted that the Illiterate Protection Act accords protection to the illiterate and that he was surprised that the Appellant was now using the same act to take away protection from the Respondent who had gone to the Act for protection. However, in the alternative, counsel submitted that the Appellant had not adduced evidence to show that the Respondent was illiterate.

In rejoinder, Mr. Musinguzi responded that the power of attorney was an illegality and that allegations of illegalities have to be taken by the court seriously.

Consideration of the Arguments

I have considered the arguments of the parties and most importantly, the power of attorney under which the Respondent appointed Ezra Kanyamwenge to represent him and even testify on his behalf in the lower court. From the evidence on record, the Respondent was prevented by illness from appearing in court right from the time he filed the suit up to the time when the case was handled. He seems to have appeared once in court when was listed by the court as having been present. Presumably, it was against this background of illness that the Respondent appointed Ezra Kanyamwenge as his attorney to stand in for him in all litigations and other legal matters concerning his interests.

A copy of the said power of attorney appears on the next page.

UGANDA
THE STAMPS ACT
CAP 230

I hereby certify that the full duty with which the within written document is determined by me and that such duty has been paid

Already paid shs.....	
New Paid shs.....	1,500
Total.....	1,500

REVENUE AUTHORITY

POWER OF ATTORNEY

I DAUDI KIPARU of C/o Kigorobyia Ndaragi, Hoima do hereby appoint/nominate and name **EZRA KANYAMWENGE** of C/o Kigorobyia Ndaragi, Hoima to be my true and Lawful attorney to perform and execute the following acts and deeds.

1. To institute, defend and prosecute or participate in any legal proceedings affecting my property including but not limited to land in any or before courts of law or tribunal in Uganda and outside Uganda.
2. To sign and execute all documents that may be necessary or incidental to the purpose of performing any of the duties and benefits conferred on them therein.
3. To do any other act or thing that may be necessary or incidental to the exercise of the Power of Attorney.
4. **AND** for me and in my name to sign all such transfers and other instruments and do all such acts, matters and things as may be necessary for carrying out the powers hereby given and for recovering all sums of money that are now or may become due or owing to me in respect of properties and for enforcing or varying any contracts, covenants or conditions binding upon any lessee, tenant or occupier of the lands or upon any other person in respect of the same and for recovering and maintaining possession of the lands and for protecting the lands from wastage, damage or trespass
5. I have given this power of Attorney conscientiously and the same shall remain in force until the same shall be revoked by me in writing .

Dated at Hoima this 06th day of March 2014

SIGNED by the said
DAUDI KIPARU

 RHT
DONOR

SIGNED by the said
EZRA KANYAMWENGE

Ezra Kanyamwenge Esq
ATTORNEY

Witnessed by
Name Robert Hatega

Address P.O. Box 14, Hoima

Occupation Advocate

Date: 06/31/2014

**ROBERT HATEGA ADVOCATE
& LEGAL CONSULTANT**
 * 06 MAR 2014 *
 LLB(HONS) MUK. DIP LP (MCI)

From the power of attorney above, the donor, who is the Respondent, is an illiterate person given that he thumb-printed the power of attorney. I am aware that the Respondent's counsel said that the Respondent was literate but no evidence was offered to back up this claim. If the Respondent was indeed literate, then he should have either written his name or signed the power of attorney. However, the respondent could not do any of the above, because he was illiterate. Therefore, given that the Respondent was illiterate, the advocate who prepared the power of attorney should have complied with section 3 of the Illiterate Protection Act. This section provides as follows:

Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his or her instructions and was read over and explained to him or her.

The import of this section is that an advocate, who prepares a document for an illiterate person must read it over to him or her in a language that the person understands and after doing so he must witness the signature or thumb print of the literate and attach a certificate in the jurat that he complied with these provisions of the law. This position is based on the decision of the Supreme Court in **Kasaala Growers Cooperative Society vs. Kakooza and Another SCCA19 of 2010**, where Justice Karokora (JSC), observed that:

Section 3 of the illiterate Protection Act ... enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document his or her true and full address. that this shall imply that he or she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his or her instructions and to state that it was read over and explained to him or her who appeared to have understood it.

The Supreme Court added that section 3 of the Illiterate Protection Act is couched in mandatory terms and that failure to comply with the section makes the document inadmissible. Similarly, Justice Bashajja in **Nakiwala and 2 Others vs. Kwekibira and Another Civil Suit Number 280 of 2006 [2006] UGHCLD 07 (25th February 2014)**, when faced with a similar power of attorney, like in the instant case, declared it void following the decision in the Kasaala case (supra). In light of the above therefore, the power of attorney made by the Respondent appointing Ezra Kanyemwenge, as his attorney was not done in accordance with **section 3 of the Illiterate Protection Act** and is therefore irregular and of no legal consequence (void).

It follows therefore, that any actions including the testimony that Ezra Kanyemwenge (PW1) did on behalf of the Respondent in the lower court are void.

Before I take leave of this matter, I was asked by the Respondent's counsel, not to use the default in the preparing the power of attorney to the detriment of his client, whom the Illiterate Protection Act was made for. On the face of it, the arguments raised by Mr. Kasangaki, are persuasive and convincing but these arguments however overlook the mandatory provisions of the law and legal implications both negative and positive that could follow from letting an irregular power of attorney take root in the legal system. In fact, even the Respondent, himself, is not precluded from pleading that the power of attorney is irregular for not complying with the law. Well, for these reasons, therefore, I am not persuaded by the Respondent's counsel to overlook the omission.

What is the effect of the irregularity in the power of attorney to the trial in the court below?


The decision of the lower case rested on the Respondent presenting his case in accordance with the law. Unfortunately, the Respondent, was not able to appoint Ezra Kanyemwenge, as his attorney in accordance with the law and this default, has therefore robbed the trial of the vital participation of the Respondent in the case. The default, has also made the decision of the learned Senior Magistrate Grade 1, in the lower court incapable of either being supported or rejected based on the evidence that was presented before him in the absence of the Respondent's evidence. That being the case, I am convinced that a miscarriage of justice was occasioned by the admission by court of a void power of attorney appointing Ezra Kanyemwenge, as the lawful representative of the Respondent. For this reason, I accordingly set aside the decision of the lower court and order that the case be tried *de novo* so that it can be determined on its merits.

By way of orbiter, I was intrigued by the evidence of Ezra Kanyemwenge, who despite having been appointed the attorney of the plaintiff, could not take the evidence stand and imagine himself to be the respondent. He did try to tell court what the respondent had possibly told him to say in court or what he knew about the case but this too, fell short of the law as the law does not envisage a witness delegating to another person giving of evidence of matters which they have perceived by their eyes, ears and feelings. The only exception to this salutary rule are cases of experts, who for some reason cannot be procured to come to court. Here, other experts who are familiar with their handwriting and signatures are allowed to take the witness stand on their part. I would have expected, the Respondent's counsel to have obtained a commission to take evidence of the Respondent in accordance with Order 28 of the Civil Procedure Rules.


Decision

The judgment of the lower court in **Civil Suit Number 052 of 2011 Daudi Kiparu vs. Muhumuza Vicent** is set aside with orders that the case be tried *de novo*. The Appellant is awarded costs both in this court and below.

It is so ordered.


Gadenya Paul Wolimbwa
JUDGE

28/4/2020
All the parties are advised
Mr. Robert Kamukhanda - Ct Clerk
Judgment read in open
court.


28/4/2020.