

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA TORORO
CIVIL APPEAL NO. 0081 OF 2022
[ARISING FROM CIVIL SUIT NO. 32 OF 2019]**

**1. DINNA WABWIRE
2. AJAMBO AGNES
3. JUSTINE WABWIRE:.....APPELLANTS**

VERSUS

**1. NANGIRA MONICA
2. WAFULA DOROTHY:.....RESPONDENTS**

JUDGMENT

BEOFRE: HON. DR. JUSTICE HENRY I. KAWESA

Background

This is a consolidated appeal arising as herebelow:

In HCT-04-CA-146-2019, the parties were **Dinna Wabwire** and **Ajambo Agnes** as Appellants and **Nangira Monica** and **Wafula Dorothy** as Respondents.

In Civil Appeal No. 078 of 2019, the Appellant is Justine Wabwire and the Respondent s are Nangira Monica and Wafula Dorothy.

On the 8th day of May 2013, by consent, parties agreed to consolidate both appeals, wherefore the Court granted the prayers and endorsed the consent, hence this consolidated appeal with [parties interchanged as above.

The facts that led to the appeals are that:

In the lower Court, the pleadings show that the 1st and 2nd Appellants that is; Dinna Wabwire and Ajambo Agnes sued the 3rd Appellant; Justine Wabwire and the two Respondents; Nangira Monica and Wafula Dorothy vide civil Suit No.032 of 2009.

In the plaint, the Plaintiff's cause of action against the Defendants was for;

1. Recovery of land,
2. A declaration that the suit property was not available for sale being family land and;
3. That the purported sale of the same by the Plaintiffs to the Defendants was *null* and *void*.

They prayed for;

- i) Permanent injunction against the Defendant and their agents and;
- ii) General damages for the inconveniences;
- iii) Eviction of the Defendants from the suit land and;
- iv) Costs.

The record and evidence on file reveals that the first Plaintiff was a wife to the first Defendant and the second Plaintiff was a sister to the 1st Defendant.

The evidence and facts showed that the first Defendant sold this land to the 2nd Defendant, who in turn sold to the 3rd Defendant.

All the Defendants denied the claims above. The 1st Defendant claimed that he did not sale the land to the 2nd Defendant, but had only allowed him to utilize the land on that basis of a temporary agreement. The 2nd and 3rd Defendants alleged that they are bonafide occupants of the land in question.

After conducting a full trial, the learned trial Magistrate found in favour of the Defendants and made orders, hence this appeal.

Grounds of appeal:

In Civil Appeal No.078/2019, the Appellant raised three grounds of appeal that;

1. The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence on record thereby reaching a wrong decision.
2. That the decision of the learned trial magistrate has occasioned a miscarriage of justice.
3. The learned trial Magistrate misdirected herself both in law and in fact when she believed the evidence of the 2nd and 3rd Defendants.

In Civil Appeal No.146 of 2019, the grounds were as follows:

1. The learned trial Magistrate erred in law and in fact when she made declarations in favour of the Defendant in the absence of a counterclaim.

2. The learned trial Magistrate erred in law and in fact when she held that the suitland was not land that required any spousal consent before the same could be dealt with by the 1st and 2nd Respondents.
3. The learned trial Magistrate erred in law and in fact when she held that the 3rd Defendant was a bonafide purchaser for value.
4. The learned trial Magistrate erred in law and in fact when she granted the Respondent's general damages of shs. 4,000,000/- (*four million shillings*) in the absence of a counter claim.
5. The learned trial Magistrate erred in law and in fact when she failed to evaluate the evidence as a whole and thus reaching a wrong conclusion that occasioned a miscarriage of justice.

These grounds have been argued relatedly and I will follow the order adopted by Counsel for the parties, but will group them subjectively as herebelow:

1. Evaluation of Evidence as covered by grounds 2,3,5 (Appeal 146) and grounds 1,2,3 (Appeal 078/2019).
2. Wrong declarations (GI; CA No.146/2019).
3. Grant of general damages (G4) Appeal No. 146/2019).

The duty of the first Appellate Court

This Court being a first appellate Court is required to make a fresh appraisal of all evidence on record and re-assess it to reach its own conclusions, bearing in mind the fact that it did not have the chance

to hear and observe the witnesses. See *Lovinsa Nankya versus Nsibambi (1880) HCB 81 and Father Venansio Begumisa and 3 Ors versus Eric Tiberaga; SCCACA No. 17 of 2000 (2004).*

In this case, this duty is served best if an appraisal of the evidence on record is first done before attempting to answer any of the grounds or preliminary objections raised in regard to either appeal.

Evidence on record

The case for the Plaintiff was led through PW1; Dinna Wabwire, who told Court that DW1: Justine Wabwire is her husband. She said that she is suing for her family land on which she was staying. The land is 60ft x 200ft which land was bought by her husband and his sister Ajambo Agnes (PW2), Joyce Nafula and Lucy Takali in August 1987. The land was purchased from Livingstone Bwire. She was later informed by her husband that Josephat Barasa (a friend) had been lent the land to use temporarily; to which she objected, but her husband ignored and brought in Barasa. Barasa and his wife; Nangira Monica constructed a house thereon by 2003, and occupied it. Later, her husband informed her that these people had bought off the land. In December 2009, her sons brought to her attention an agreement by DW2; having sold the land to DW3; Wafula Dorothy, measuring 80ft by 140 ft. that was all the Plaintiff's evidence on record.

In defence, the evidence was through DW1; Wafula Dorothy who said that the 2nd Defendant) (Nangira Monica) who sold her a plot of land in issue, measuring approximately 140 x 80 ft. she exhibited the

original sale agreement in proof marked DEX1. She also told Court that Nangira Monica gave her an agreement on which she bought the land. She also inquired from the LC1: Wabwire Michael and produced an agreement dated 8th October 2006, between DW1: Wabwire Justine selling to Nangira Monica at shs. 200,000/- (*two hundred thousand shillings*), measuring 100 ft x 60 ft.

Monica had informed her that since the plot she bought from the 1st Defendant was 60ft x 100ft, she had no access road and she talked to her neighbour; Omala Patrick who added her a portion which was not measured, but was approximated. The agreement between Nangira Monica and Wabwire Justine was shown to Court as DIDI.

The DW1 (1st Defendant; Wabwire Justine) began laying a claim on the land that he demands a balance from DW2; which ended in Court and DW1; Wabwire Justine was convicted and sentence to serve community service at Busia Health Centre IV, under *CCOO1/2010; Uganda Versus Wabwire J.* the complainant in that case was Nangira Monica.

DW2; Nangira Monica confirmed that she bought the land from the 1st Defendant, who (1st Defendant) called his family members and told them of the sale and that he had sold in the presence of the 1st and the 2nd Plaintiffs and their children; Peter and Wanyama. The land was 60ft x 100ft, she then bought a portion for an access road from Omala Patrick, in the year 2007 for shs. 400,000/- (*four hundred thousands*) and Omala Patrick made her an agreement. The agreement was made and she built a house thereon, and lived there

without disturbance from the Plaintiffs and sold to DW3 in 2009. She sold the piece of land of 80ft x 140ft to Dorothy, and the 1st Defendant began laying claims on the land. The witness sued DW1 and the case was heard in Court where DW1 was convicted and sentenced.

DW3: Wabwire Justine said that the 1st Plaintiff is his wife. The 2nd Defendant is a wife of his friend; Barasa Joseph. He said he agreed with the 2nd Defendant to sell to her land without consulting his wife. The sale was a temporary agreement. The land had been bought together with his sister, but later he learnt that the 2nd Defendant had sold off the land. He also learnt that the 2nd Defendant had exceeded the 100ft x 60ft and sold 140ft x 80ft.

DW4; Barasa Patrick confirmed knowledge of the agreement of sale between DW1 and DW2 in 2006 of October 8th 2006.

DW5; Wabwire Michael Sunday chairman LC1 said that he had made the agreement of 2009 and tendered it as DE4; and knows that Monica acquired the land through a valid sale and purchase transaction. He also confirmed that he was informed by Omala Patrick that he sold the land for an access road to Monica.

DW6: Barnaba John Wabwire said he was present when he received shs. 40,000/- (*forty thousand shillings*) for land sold to Monica by Maria.

At *locus*, Court was able to be taken around the disputed land by the parties.

After analyzing the evidence, the trial Magistrate returned a judgement in favour of the defence having found that DW3 is the rightful owner of a portion of land, only measuring 60ft x 100ft, genuinely purchased from DW2 and that DW2 had passed on good title to DW3 in respect of the 100ft x 60ft. the learned trial Magistrate went ahead to enter judgement and made orders to that effect.

Resolution of the preliminary objections.

The Respondent's Counsel raised two preliminary objections which I resolve as hereunder:

The 1st preliminary objection regarding failure to serve the memorandum of appeal within 21 days provided for **under O.5r1(2) of the Civil Procedure Rules**, Appellant's Counsel in rejoinder has provided sufficient rejoinder in proof that contrary to what Counsel alleges, the record of appeal was requested for by the Registration on 26th November 2016 and the memo was served on 2nd December 2019; and he claims that the same is attached.

I have perused both the record and the alleged annexure to his submissions which, in any case is not acceptable practice. No such evidence is available. There is no affidavit of service of summons (memorandum) what he annexed are notices of hearing.

This lends credence to arguments by Counsel for the Respondent that the memorandum was not served. This contravenes the requirements

O.5(r)(1)(2) of the Civil Procedure Rules as held in the cases cited of *Katsigazi Bensons versus Lorna Musanyisa; MCA No. 21 of 2021*, quoted in *Lubega Robert Smith & Ors versus Walonze Maliki; HCCA No. 036 of 2016*. This objection is therefore upheld.

The second objection related to the prolix nature of ground 1,2, and 3 under Civil Appeal No.78 of 2019. I do not find these grounds prolix since they point out that the learned trial Magistrate failed to properly evaluate the evidence. This limb of the preliminary objection fails.

Given the fact that these are consolidated appeals and Counsel, though not served, was able to defend the appeals. I will move under **Article 126(2)(e) of the Constitution** and excuse the first limb of the preliminary objection and suspend its effect up to the full end of the assessment of this appeal on merit and will therefore move on to determine the grounds of appeal on merit as herebelow:

Grounds 1,2,3

(CA NO. 78/2019 and 2,3,5 (CA No.146/2019) on failure to properly evaluate the evidence.

The law requires that every Plaintiff bears a burden to prove their case on a balance of probability. **Sections 101, 102 and 103 of the Evidence Act** also requires that whoever asserts a fact, must bring evidence to prove it.

The Plaintiffs who moved Court under a claim that the suitland was '*family land*', had a burden to lay evidence before Court proving this fact. The evidence brought by the Plaintiffs to the effect. was only the oral testimony of PW1; Dinna Wabwire. Her evidence was challenged by the defence who called a total of six witnesses including DW3, who was a husband to PW1, PW2 never testified.

The evidence of each and every one of DW1 - DW6 does not in any way deny that DW2 sold the land in issue to DW3. Neither does it contradict the fact that DW1 sold to DW2.

The question is; was it '*family land*'. It is only PW1 who assents so. DW3 tried to claim that he sold the family land, but both, apart from alleging so, led no evidence in Court in proof of this fact.

I find that the trial Magistrate in his judgment considered the pleadings and evidence before him and reach a conclusion that the Plaintiffs failed to prove that the suit land is the one where they stayed and derived sustenance and occupation; and provided nothing in proof of the property as matrimonial.

I do not find any evidence in proof of this and I hold that, the Plaintiff failed to produce evidence that the land in dispute is a matrimonial land.

Secondly, on the issue of whether there was a valid sale, between DW1 and DW2, I find ample evidence on record in proof of this transaction. The learned trial Magistrate in his judgement found likewise and

discusses the available evidence at length on page 5,6 and 7 of his judgment and I do not fault his findings.

As to the issue whether DW3 was a bonafide purchaser for value, again the evidence on record, through PW1 and DW1 - DW6, all is clear proof of this fact. It shows that DW1 sold to DW2. DW2 sold to DW3. DW3 was unaware of any of the encumbrances alluded to by the Plaintiff. The Plaintiffs, moreover, brought no evidence of such claims.

I do find that the learned trial Magistrate rightly assessed all this evidence from pages 5-11 of the judgement.

In the result, I find no merit in grounds 1,2,3 of the Civil Appeal No.146 of 2019. They all fail.

Ground I/CA No.146/2019 Declarations

This ground faults the learned trial magistrate for making declarations in favour of the Defendant in the absence of a counterclaim.

This ground is not justifiable in view of **Section 98 of the Civil Procedure Act**, which mandates Courts to grant reliefs to parties to help in meeting the ends of justice.

There is therefore no need for a counterclaim to warrant the passing of any order, save that orders made must be lawful, just and made according to the law. This ground therefore fails.

Ground 4:

Award of general damages to the tune of shs. 4,000,000/- (*four million shillings*).

The principles that govern the assessment of damages are in the discretion of Court. In the decided cases like; *Uganda Revenue Authority versus Wanume David Kitamirike; CCA No. 3 of 1993* and *Oboga versus Municipal Council of Kisumu (1971) EA 91* and *Kampala District Land Board* and *George Mitala versus Venansio Bamweyana; Civil App. No. 02 of 2007*, the principal is emphasized that;

'in the award of general damages by a trial Court, its trite law that damages are the direct probable consequences loss of use, loss of profit etc., due to the probable consequence of the act complained of'

In the case before me, the learned trial Magistrate awarded shs. 4,000,000/- as general damages, but he did not explain the reasons or formula used to reach the same as a compensatory measure.

In view of this failure, and the fact that Counsel for the 2nd Respondent conceded to the ground, the same succeeds.

I do find that shs. 4,000.000/- (*four million shillings*) grant of general damages was not done following the right procedure and this ground therefore succeeds.

Save for this finding, this consolidated appeal has failed on all grounds raised and both appeals are dismissed with costs; with an

order that the lower Court's order for a grant of damages to the 2nd and 3rd Defendant is duly set aside.

I so order.

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Hon. Dr. Henry I Kawesa

JUDGE

18/01/2024

18/01/2024:

Counsel Wabwire Dennis for the 2nd Respondent in Court.

Respondent absent.

Counsel Lebu William for the 3rd Appellant in Court.

Counsel Lebu also holding brief for Counsel Ojambo David. Counsel for the 1st and 2nd Appellants.

Appellants absent.

Oketch – clerk.

Counsel for the Respondent:

The matter is for judgement and we are ready to receive the same.

Court:

Judgment is ready. It is read in the presence of both Counsel

Sgd:

Edimu Hellen

AG. ASST. REGISTRAR

18/01/2024