

5 THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CIVIL APPEAL NO. 004 OF 2025
(ARISING FROM LAND CLAIM NO.05 OF 2023)

10 MUVUNYI EPHRAIM :::::::::::::::::::::::::::::::::::APPELLANT
VERSUS
KABAMI JERURINA ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE SSEMOGERERE, KAROLI LWANGA
15 JUDGEMENT

Brief Facts:

Appellant brought a suit in the Chief Magistrate's Court at Kisoro for the following declarations to the effect that (a) he was the rightful owner of the
20 suit land; (b) the defendant had trespassed on his land; (c)an order for a permanent injunction restraining the defendant and her agents from further trespass on his land; (d) an order of compensation for damages, (e) general damages, (f)exemplary damages, (g) costs of the suit. The suit and is situated in Kiburara village, Gisorora Parish, Nyakabande sub-county, Kisoro district.

25 The cause of action allegedly arose when the appellant bought the suit land from 3 individuals on November 21st, 2021, and a cash and sale agreement was made to that effect. Consideration was UGX 17,000,000/=. The sellers, Mirembe Epafra, Hilda Kandezi and Nyirakwizera Kellen allegedly acquired
30 the suit land by gift deed in 1976 from Simon Nzibarinda. Mirembe Epafra and Kabami Jerurina, the respondent, are husband and wife in a polygamous marriage, in which Kabami Jerurina is the senior of two wives. Subsequently, the respondent allegedly trespassed on the land, destroying the appellant's 100 planted cabbages, and destroyed the fence erected by the appellant.

The respondent in her written statement of defence stated that she received the suit land as a marriage gift from her father-in-law, Nasenayire Semavegete and mother-in-law, Karuhije Merabu in 1982. That she subsequently took control and possession of the land and has been using it to-date. In 2021, Mirembe Epafra, Hilda Kanadenzi and Kellen Nyirakwizera brought a case before the Magistrate Grade I in Kisoro, claiming the suit land, which suit was dismissed for want of prosecution. Mirembe Epafra, Hilda Kanadenzi and Kellen Nyirakwizera are brother, sisters respectively. The respondent alleged that after the case was dismissed, they connived with the appellant to bring a fresh claim alleging a sale. Respondent also stated there was another concurrent pending suit over the same land in the LC II court at Gisosora Parish, Nyakabande Sub-county.

The suit was tried before the Learned Chief Magistrate, His Worship Kenneth Komakec. At trial, the following additional facts were established. The suit land had been once been rented out to a third party by the respondent and her husband, Mirembe Epafura to the appellant. Later her husband connived with his sisters and authored a forged gift deed, that the land had been gifted to them by their cousin in 1976.

The issues of determination at trial were:

1. Whether the appellant was the rightful owner of the suit land;
2. Whether the respondent was a trespasser of the suit land;
3. What remedies were available to the parties.

At the trial after hearing the evidence from all the parties, the learned Trial Magistrate, made the following findings of fact. At page 11, of his judgment, he found that after locus, there was no dispute over the particulars of the land, which is unregistered land. Second, the locus visit found the land uncultivated. Third, that the marriage gift was to both the husband, the vendor, and his wife the respondent. Fourth, was that the respondent had been using the land jointly for cultivation of seasonal crops, until her husband sold the land to the appellant.

5 At page 12 of his judgment, the learned Chief Magistrate made an additional finding based on his evaluation of the evidence, to the effect, that the appellant had not investigated any third-party rights to the land which could interfere with his intended use of land. He found that the land was “family land”.

10 “Thus, in the instant case the plaintiff fell short of these requirements, since as a prospective buyer, his failure to undertake such inquiries and make such inspection of land that would satisfy a reasonable prudent person of business including a thorough physical investigation of the land and questioning any occupants as to their rights.”

“That’s my conclusion, the suit is family land.”

15 Upon this finding, the learned Chief Magistrate made a finding that the sale of the suit land to the appellant by the husband of the respondent lacked spousal consent, required under **Section 40(1)(c) of the Land Act, Cap 227**, which provides:

20 “no person may sell or enter into any other transaction in respect of land, on which, the person ordinarily resides with his or her spouse, and from which they derive their sustenance except with the prior consent of his or her spouse.”

The absence of spousal consent vitiated the transaction. He found that the claims for trespass could not be sustained for lack of ownership. The suit was
25 dismissed with costs hence this appeal.

Representation:

This appeal was argued by M/S A. Marvin for the Appellant and M/S Bikangiso and Co. for the Respondents. Both parties filed written submissions to dispose
30 of this appeal.

5 **Memorandum of Appeal:**

Appellant framed three grounds of appeal. These are:

- 10 1. The learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on court record and establish who formerly owned the suit land, and who gifted the suit land, hence omitting to make a decision on the same thereby occasioning a miscarriage of justice;
- 15 2. The learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record hence arriving at an erroneous decision that the appellant fell short of carrying out due diligence before purchasing the suit land thereby occasioning a miscarriage of justice.
- 20 3. The learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record, hence arriving at an erroneous decision or conclusion that the land is family land and was sold without the consent of the respondent and yet this issue was not framed during scheduling for determination thereby occasioning a miscarriage of justice.

Appellant prayed that the judgment of the lower court be set aside, declaration issue that he is the lawful owner of the land, costs of the appeal and in the lower
25 courts and any other orders and reliefs.

Discussion and Analysis:

This appeal turns on points of law and fact. First, the appellant attacked the findings and conclusions of fact on who owned the land. Appellant attacked the findings of the trial court to the effect that the land was a “marriage gift”, hence
30 jointly owned by the respondent and her husband. Second, the Appellant attacked the findings of the trial court, to the effect, that he had failed to carry out the necessary due diligence before purchasing the suit land. Third, that court made a finding that the land was family land, yet this issue was not framed for during scheduling for determination.

5 At the onset, this is an appeal whose central issue of determination is ownership of unregistered land, and the “practical limitations of determining ownership of land by the courts”, See, **Kemitare v Kanyaraju, 2025 UGHC 316**, a decision of this court. The rationale in Kemitare is also supported by the supremacy of constitutional protections, the fundamental rights like the right to property
10 which are enshrined in the constitution. I wish to add, that in framing grounds of appeal, dispositive grounds, such as those founded in constitutional rights and protections or Acts of Parliament take precedence over procedural grounds based on procedural issues or subsidiary legislation.

In the same decision, the Court considered the duty of an appellate court to re-
15 evaluate evidence, and make inferences of fact.

“It is the duty of the first appellate court to re-evaluate the evidence before it, and make its own inferences of fact. This duty is summarized in the Supreme Court decision of *Kifamunte v Uganda, Criminal Appeal No. 10 of 1997*.

20 The guiding principle of establishing ownership of the suit land before anything else, is important in determining this appeal, I propose to dispose of the third issue first; as it touches on ownership of the land,

**The learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record, hence arriving at an erroneous
25 decision or conclusion that the land is family land and was sold without the consent of the respondent and yet this issue was not framed during scheduling for determination thereby occasioning a miscarriage of justice.**

In support of this ground, appellant stated, there was no specific issue to address, the declaration of the suit land, “family land”. In support of this
30 contention, appellant cited, **Order 12 Rule 1** of the **Civil Procedure Rules, S-1-71-1** (the “Civil Procedure Rules”) as a mandatory requirement in a scheduling conference. Appellant also cited, **Order 15 Rule 5** of the **Civil Procedure Rules**, that provide that it is the duty of court to frame issues for court’s determination.

Respondent in reply restated the findings of the learned Chief Magistrate that
35 the land was given to the respondent as a marriage gift and therefore was

5 family land. Respondent associated herself with the law, applied by the learned Chief Magistrate to arrive at the conclusions he made. Respondent also stated that court can amend or strike out issues under **Order 5 Rules 1 and 2** of the **Civil Procedure Rules**. Lastly, Respondent stated, the first issue was whether the plaintiff was the rightful owner of the suit land.”

10 Appellant stated that his case was harmed, as he was not able to adduce evidence in support or contravention of this issue. He referred to the defendant’s written statement of defence of which I reproduce the impugned paragraph 4 which is to the effect, that:

15 **4. The Defendant in reply to the rest of the paragraphs contends that she is the rightful owner of the suit land which she purchased from Karuhije Merabu w/o Nasanayire Semavegete.**

- (a) That the Defendant was given this suit land as a marriage gift in the presence of many people;
- 20 (b) That the suit land was given to the plaintiff in year 1982.
- (c) That after purchasing the suit land, the defendant took control and possession of the same and she has been using it up to date.

I will make the following preliminary observations after perusing the record of
25 proceedings. First, the written statement of defence was prepared by the Magistrate. Infact, the respondent only appended her right thumbprint on account of understanding the document prepared for her. It appears the words “purchased from” are stricken out in the document on court record. The power of court to deal with such matters, is provided for in **Order 6 Rules 17 of the**
30 **Civil Procedure Rules S.1. 71-1 (the “Civil Procedure Rules”)**. **Order 6 Rule 17 of the Civil Procedure Rules** provides as follows:

“No technical objection shall be raised to any pleading on the ground of any alleged want of form.”

35 The action to strike out the phrase, “purchase” is protected by **Order 6 Rule 18 of the Civil Procedure Rules** which gives court the power to strike any matter in a pleading which may be unnecessary.

5 I reproduce the impugned first issue below:

“Whether the plaintiff is the rightful owner of the land.”

I have already stated, on the authority of the **Kemitare** decision (op cit.), how important it is in land matters, to determine the issue of ownership first. The framed issue, turned on whether the plaintiff, could acquire a legal title to the
10 land. This transfer of title was subject to all adverse interests. Whereas the learned Chief Magistrate upheld the purchase of the land by the Appellant, at page 9 of his judgment, he found that the respondent did not sign the sale agreement. The relevant passage is reproduced below:

“However, PW3 testified upon cross examination that from the year 1986
15 up to the time the suit was land was sold (2021), he used to cultivate seasonal crops on the same and the defendant who is his senior wife cultivated the suit land together with him, and this was since 1986, and even after marrying his second wife in 1992 but when he was selling the same, the defendant did not sign.” Emphasis mine.

20 In the absence of a matrimonial cause, the issue of declaration of ownership is secondary. Matrimonial causes as between spouses confer ownership rights to specific property acquired during marriage to one or the other spouse or both. The finding is that the respondent was a senior wife, based on PW3’s evidence, and the fact that the respondent did not sign the sale agreement were findings
25 of fact which inevitably had legal implications under **Section 38A(4)(c) of the Land Act, Cap 227**, (the “**Land Act**”) that defines family land, the relevant provision is:

“on which is situated the ordinary residence of the family and from which the family derives sustenance.”

30 The fact of the respondent’s cultivation of seasonal crops was in the Appellant’s own witness, PW3. This admission brought into play, **Section 38(2) and 38A(4)(c) of the Land Act. Section 38(2) of the Land Act**, defines security of occupancy as:

“a right to have access and to live on family land.”

5 This right is protected by the right to give spousal consent under **Section 39** of the **Land Act**, which requires the prior consent of the spouse prior to any of the specified dealings in land in **Section 39(1) of the Land Act**. These are:

(a) sell, exchange, transfer, pledge, mortgage or lease any family land;

10 (b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land;

 or (c) give away any family land, inter vivos, or enter into any other transaction in respect of family land; except with the prior consent of his or her spouse

15 Once legal rights provided by statute were established, that had an effect on whether the appellant could get title, the learned Trial Chief Magistrate had no option but to investigate to a logical conclusion. The above provisions created a statutory restriction on transfer of land.

At page 10 of his judgment, the learned Trial Chief Magistrate observed:

20 “It is imperative to note that a spouse may file a suit opposing a transfer of family land made by the other in violation of statutory restrictions on his or her power of disposition.”

 “This provision thus creates a general incapacity of one spouse to contract in his or her own family land and their failure to agree, can nullify any proposed transaction.”

25 “This necessarily requires a husband and wife to jointly make the decision concerning family land and their failure to agree can nullify any proposed transaction.”

30 The defect in the Appellant’s title, therefore, arose from failure to meet a condition precedent prescribed by statute. The provisions of the Land Act are clear:

Section 40(1)(c) of the Land Act, Cap 227, which provides:

 “no person may sell or enter into any other transaction in respect of land, on which, the person ordinarily resides with his or her spouse, and from

5 which they derive their sustenance except with the prior consent of his or her spouse.” [Emphasis mine].

This derogation is a constitutionally permissible one, from the right to property under Article 26(1) and (2) of the Constitution. In **Jerurina Kamanzi v Federico Biana and others, Civil Appeal No. 16 of 2023, 2025 UGHC 457**, this court
10 held:

“.....in a suit of for declaration of family land, the right to property in enshrined in Article 26(1) of the Constitution must be given effect, subject to the statutory considerations in the Land Act which don’t undermine it.”

The right to land has permissible derogations, as long as they don’t cancel it.

15 I find there was no miscarriage of justice from considering and determining ownership of land. The first issue framed, covered the finding on the third issue, it dealt with the Appellant’s not the husband of the Respondent’s title.

This ground must fail.

I now turn to the first and second issues:

- 20 **1. The learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on court record and establish who formerly owned the suit land, and who gifted the suit land hence omitting to make a decision on the same thereby occasioning a miscarriage of justice;**
- 25 **2. The learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record hence arriving at an erroneous decision that the appellant fell short of carrying out due diligence before purchasing the suit land thereby occasioning a miscarriage of justice.**

30 This ground cannot succeed for the following reasons. The first issue clearly investigated the nature of the appellant’s title, and not the title held by PW3 or any other person. A decision on this issue does not resolve this appeal, as trespass as a cause of action can only be brought by an owner of the land.

5 Second, the learned Chief Magistrate found at page 12 of the judgment found the Appellant at fault for failure to conduct due diligence.

“Thus, due diligence is a requirement of the law that applies to any prospective buyers of unregistered land.”

10 “Thus, the standard of due diligence imposed on the purchaser of unregistered land is much higher than that expected of registered land.”

He found the Appellant at fault for failing to take recognizance of the fact that the suit land was “family land”. The defence of bona-fide purchaser could not apply in this case. The fact of marriage was easily discernible, it was not controverted by the Appellant’s own testimony, that of PW3, the husband of the
15 respondent. Bamugemereire, J.A., as she then was in **Mohammed Abdallah Garelnabi v Diana Irene Nayiga, Civil Appeal No. 231 of 2019, at page 10**, stated.

“in determining ownership of land, the court must satisfy itself that the Respondent is a bona-fide purchaser for value without notice.”

20 Notice may be actual or constructive. Statutory bars, or permissible derogations from the right to property protected by the Constitution form both actual and constructive notice. The right to property is a fundamental right enshrined in the Constitution in **Article 26(1) and (2) of the Constitution**. It is a determination of fact and law, that marriage, also creates matrimonial rights.
25 It creates both matrimonial rights to property, a specific fact pleaded in the respondent’s written statement of defence, and its implication under Article 31 of the Constitution.

The findings of the learned Trial Chief Magistrate cannot be faulted, for pointing out the obvious, that due diligence would have established interests
30 adverse to those of PW3, the seller. This high standard is also imputed by transactions prohibited by statute, specifically, the sale of family land without consent of the spouse. I find no reason to disturb the findings of the learned Trial Chief Magistrate.

Absent establishing ownership, the entire suit failed for the correct
35 reasons, **Grounds 1 and 2 must accordingly fail.**

Comment:

Appellant's case failed for legal reasons. It failed as a matter of law, the absence of spousal consent vitiated any sale, gift or other disposal by PW3 to any third party as a matter of law under **Section 39(1)(a), (b) and (c) of the Land Act**. The only way for the Appellant to discharge this burden was to show the defendant gave consent. On the contrary, the respondent refused to sign her consent. No title could pass to the Appellant as a matter of law.

I fault the Respondent for citing wrong provisions of the law in their submissions. **Order 5, Rules 1 and 2 of the Civil Procedure Rules** provide for issue of summons when a suit is instituted and items to accompany summons respectively. Accordingly, I will make an adjustment to the award of costs.

The Appellant is not without remedy, absent specific performance, he has a right to action to a refund of the 17,000,000/= consideration paid to the sellers of the land. If the Appellant had joined the seller of the suit land to this suit, these orders could have issued in this action.

Findings and Conclusion:

Grounds 1, 2 and 3 fail.

The entire appeal is dismissed.

I award half the taxed costs to the respondent.

5 I SO ORDER.

DATED AT KABALE THIS 30TH day of JUNE, 2025.

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A handwritten signature in blue ink, appearing to read 'Karoli Lwanga', is centered on the page.

SSEMOGERERE, KAROLI LWANGA
JUDGE.