THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CA-0023-2003

(From Civil Case 0031-1994 of Chief Magistrate Court Mbarara)

DR. GAD MATSIKO ……APPELLANT

VS

LEVI KWIRIGIRA……. RESPONDENT

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

JUDGMENT

This is an appeal against the judgment of the Chief Magistrate, Mbarara delivered on 16th April 2003. The memorandum of appeal comprised eight grounds which I set out below:

1. The learned Chief magistrate erred in law and fact when she found that the appellant and respondent herein were party to the arrangement with the late Sebutale for sale of iron sheets.

2. The learned Chief Magistrate erred in law and fact when she found and declared that the respondent was the owner of the 1000 iron sheets the proceeds whereof were the subject matter of the suit.

3. The learned Chief Magistrate erred in law and fact when she held that the appellant's challenging the respondent's claim to the proceeds of the iron sheets in issue was founded on an 'unholy' motive.

4. The learned Chief Magistrate erred in law and fact when she found that rather than defend the suit, the appellant ought to have paid the proceeds of the iron sheets to the respondents, leaving the widow of the late Sebutale "to sort out her matter with the plaintiff" (respondent)

5. The learned trial Magistrate erred in law and fact when she found that the appellant owed the respondent Ushs.4,057,500/ and that the respondent was entitled thereto.

6. The learned Chief Magistrate erred in law and fact when she held that the appellant admitted the respondent's claim.

7. The learned Chief Magistrate erred in law and fact when she pronounced judgment only against the appellant without pronouncing herself on the liability of the deceased 2nd plaintiff, Mrs. Gad Matsiko and/or on the consequences of her demise.

8. The learned Chief Magistrate erred in law and fact when she condemned the appellant in costs of the suit.

Learned counsel for the appellant argued grounds 1 and 2 together. Therein lies the core of this appeal. Indeed in the lower court the first issue was whether the plaintiff was the lawful owner of the 1000 iron sheets entrusted to the defendant — the appellant in the matter. The first appellate court must treat the available evidence as a whole to a fresh and exhaustive scrutiny. See *Dinkerrai Ramkrishan Pandya vs R* [1957] EA 336. It was the finding of the learned Chief Magistrate that on the balance of probabilities the respondent herein was the owner of the suit iron sheets. In her judgment she said she had reached that conclusion on the basis of the receipt tendered in evidence as exhibit P.1 and that the respondent had been able to get 386 iron sheets released from the shop without question. It was the conclusion of the learned Chief Magistrate that there was sufficient proof of ownership of the iron sheets by the plaintiff. On the other hand this is disputed by the appellant who testified that the iron sheets had been taken to his wife's shop by no other than the owner, late Sebutale. The appellant denied knowledge of any transaction between the respondent and Sebutale, let alone respondent's ownership of the iron sheets in issue. The burden of proof is on the respondent to prove he is the owner of the disputed iron sheets. See Sections 101 and 102 of the Evidence Act, Cap 6. Exhibit P.1 shows it was a receipt drawn in favour of the Manager of the defunct Co-op. Bank. While it is not denied the respondent was at one time Branch Manager of the defunct Cooperative Bank in Mbarara his personal particulars are nowhere apparent on that key exhibit. There is nothing to show either that the iron sheets related to on the receipt are the very same ones late Sebutale delivered to the shop which the appellant's wife ran. There is no evidence to support that of the respondent that there were any iron sheets he had delivered to the shop of the appellant's wife. Next I should consider the 386 iron sheets apparently released from the shop following orders by the

respondent. Exhibit P.1 shows the iron sheets involved were of gauge 28 only. The letter from All Saints Church refers to iron sheets of gauge 28 and is addressed to the respondent whose address was Uganda Co-operative Bank. The letter expressed gratitude to the respondent for his support in supplying them the specified iron sheets which were 260 in number. That letter is Exhibit P.2 and is dated 2nd March 1993. Exhibit Dl is a delivery acknowledgment for the 260 iron sheets. They are however of gauge 26 and not gauge 28 as alleged by both the letter exhibit P.2 and the respondent and the respondent. While the stamp of the defunct Co-operative Bank Ltd is apparent in the delivery there is nothing to suggest that the respondent owned the iron sheets in issue. The rest of the iron sheets taken to roof a building at the behest of the Co-operative Bank Ltd were taken by DW2 who admitted they had been of gauge 26. He had been told by the respondent to go and collect the iron sheets from the shop owned by the appellant's wife. DW2 had signed for the iron sheets and was not aware of what arrangement there had been between the respondent and the owner of the shop. From the foregoing experiences under which iron sheets were collected from the shop of the wife of the appellant I elicit nothing to make respondent's ownership of the iron sheets any more certain. 1 do not agree with the learned Chief Magistrate that the respondent proved he was the owner of the iron sheets just as I find no basis for the assertion that there had been a tripartite arrangement between the parties to this appeal and late Sebutale. The two grounds succeed.

Concerning the third ground and the fourth ground I find the remarks of the learned trial magistrate idle given available evidence. I find no unholy motive on the part of the appellant, I find no reason why the respondent should expect any payment from the appellant and I don't see why the widow of Sebutale should be dragged into this matter. These grounds succeed.

Regarding ground five, without prejudice to my finding in the course of this judgment, I find the sum of Shs. 4,057,500/= was arbitrarily awarded to the respondent. The sum was neither pleaded nor proved as should be the case regarding special damages. See Ssali vs Bwesigye [1978] HCB 188. This ground also succeeds.

Given my findings so far I find it unnecessary to discuss grounds 6. 7 and 8 since the appeal has succeeded.

Consequently this appeal is allowed and the judgment of the trial court is set aside. Appellant is entitled to costs here and below.

P. K. Mugamba

Judge

18th August 2005