

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

HCT-04-CV-CA-0050-2007

(FROM CIVIL SUIT NO. 91 OF 2005)

SANYU GRACE.....APPELLANT

VERSUS

1. SIMON MANIAKU WOGOLO

2. FRANCIS GAGULA.....RESPONDENTS

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

This is an appeal from the judgment and orders of the Magistrate Grade I Mbale dated 6th September 2007 in Mbale Civil suit No. 91 of 2005 dismissing the plaintiff's claim with costs. The appellant Sanyu Grace is represented by M/s Owori & Co. Advocates. The respondents to wit Simon Maniaku Wogole and Francis Gagula appear in person.

Through her lawyers, the appellant complains in her memorandum of appeal that:

1. The learned trial Magistrate erred in law and on the facts when he held that the appellant's suit lacked adequate proof.
2. The learned trial Magistrate erred in law and on the facts when he rejected the appellant's sale agreement Exhibit P.I on erroneous ground.
3. The learned trial Magistrate formed an unbalanced view of the evidence by preferring the case by the respondents first and was in the result obliged to reject the case for the appellant.
4. The learned trial Magistrate erred in law when he failed to subject the whole of the evidence of the parties to that exhaustive judicial scrutiny and appraisal which the appellant was entitled to expect.
5. The decision complained of appears to have occasioned a miscarriage of justice.

The appellant prays for orders from this court that:-

- a) This appeal may be allowed.
- b) The decision of the lower court may be set aside.
- c) Judgment may be entered for the appellant here and below upholding her customary ownership of the suit land.
- d) The appellant may be granted costs here and below.

In support of their respective cases, the parties hereto filed written submissions.

In the appellant's written submissions, after reviewing the lower court's evidence contends that her evidence contained on pages 2 and 3 of the typed proceedings establish that she purchased the suit land from Gizamba Mukamba who had earlier

bought the land from PW.1 Jane Namakoye. That this evidence stands unchallenged. That, the learned trial Magistrate briefly considered this evidence and did not, in his judgment, test that evidence against the evidence of the respondents. That this is illustrated in the issues framed by the trial Magistrate which were irrelevant to the main issue before the court which was encroachment. The appellant further contends that the trial Magistrate rejected the Sale Agreement, Exhibit P.I which was never challenged by the defence. That the respondents' case was accepted because wrong and misleading issues had been framed. That the learned trial Magistrate failed in his primary judicial duty of testing and balancing the evidence adduced by the appellant and the evidence by the respondents. That the exhibits for the respondents were accepted yet they were not from a reliable sources.

Finally the appellant emphasizes that PW.1' evidence was very reliable because he sold land to Gizamba Mukamba who in turn sold to the appellant. That no reasons were given for rejecting that evidence.

In their respective reply to the appellant's submissions which are in similar wording they each contend that the learned trial Magistrate tested all the evidence and was right to find that the appellant miserably failed to prove her case on a balance of probabilities when she failed to call her vital witness one Gizamba Mukamba and the chairman LC.I Kayole Abdu who allegedly witnessed the transaction but refused to testify at the *locus-in-quo*. That PW.2 one Jane Namakoye an aunt to the appellant is not a reliable witness and did not produce

any document in court to prove that she sold the suit land to Gizamba Mukamba. They prayed that the appeal be dismissed.

This being the first appellate court its duty is to consider and evaluate the evidence and the entire proceedings of the lower court and come to its own conclusion after subjecting the evidence adduced in the lower court to fresh and exhaustive scrutiny.

Ephraim Ongom and Anor. v. Francis Benega SCCA 10 of 1987- unreported

Whilst the appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial court should stand, this jurisdiction is exercised with caution if there is no evidence to a particular conclusion or if it is shown that the trial Judge (magistrate in this case) has failed to appreciate the weight or bearing of the circumstances admitted or proved or has plainly gone wrong, the appellant court will not hastate so to decide.

It is wrong for the appellate court to differ from the finding on a question of fact of the Magistrate who tried the case and who has had the advantage of seeing and hearing the witness. An appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this jurisdiction should be exercised with caution. It is not enough that the appellate court might have come to a different conclusion.

Peters v. Sunday Post Ltd [1958] EA 424

Watt v. Thomas [1947] A.C. 484.

I am alive to these instructive pronouncements and will go ahead and deal with the grounds of appeal separately.

Ground I

As rightly submitted by learned counsel for the appellant, the duty to prove her case on a balance of probabilities lay on the appellant herself. She had to adduce evidence to do this. According to the evidence on record, the appellant stated that she bought land from Gizamba Mukamba in the presence of the LC.I Chairman Kikyafu zone, one Kayole Abdu. These two people were vital witnesses if her assertion was to be proved in accordance with the law. However the appellant did not produce these people who are still available to prove her claim. The record shows that the appellant was given ample time to produce her witnesses from 7.9.2006 to 20.6.2007 but did not. She decided to close her case without calling these vital eye witnesses and no reasons were assigned for their absence. It is the duty of the one who alleges to prove that such allegation happened. This requirement was rightly alluded by the trial Magistrate in his judgment at P.7 while referring to the case of ***Sheikh Ali Senyonga and 7 Others v. Sheik Hussein Rajab Kakooza & Others CA 9 of 1990.***

According to the record, the other person who allegedly witnessed the transaction, was Kayole Abdu. He was at the *locus-in-quo* but declined to say anything about the transaction. On P.9 of the proceedings at the *locus-in-quo*, the claimant said,

“Apart from the Chairman LC.I Kikyafu cell, I do not know any other person. I am calling the chairman Mr. Kayola Abdu.”

When Abdu Kayola came forward, he merely said,

“I have been here for a long time i.e. I am born of this place.”

He offered no other information. According to court, he refused to divulge more because “he was sick.” I doubt whether this was true. He was hiding something. In the circumstances I agree with the finding of the trial Magistrate that the absence of supporting evidence from those who witnessed the transaction tremendously weakened the appellant’s claim and cast doubt whether it ever took place. This finding was based on a correctly framed issue number 1 whether the claimant bought the suit land from one Gizamba or whether the sale agreement was valid between the claimant and Gizamba. Learned counsel for the appellant challenged the validity of this issue but did not indicate what the correct issue should have been.

Ground 2:

I agree with the respondents on this issue that the trial Magistrate was right to reject the appellant’s agreement because the purported transaction between the appellant and Gizamba Mukamba took place on 8 November 1999 when the later had already sold the land to Frances Gagula, the second respondent. This earlier transaction was on 5th July 1996 as per Exh.D. IV.

Ground 3:-

I had opportunity to peruse the judgment by the learned Magistrate Grade I. In my view it was professionally written and whatever is required in a judgment is

contained therein. He properly evaluated the evidence and related the same to the law and facts of the case. The decision reached was based on the evidence as a whole. The agreement between the respondents impacted directly on the right of the appellant in the disputed land.

Ground 4:

I have nothing to base on to fault the trial Magistrate on the way he handled the trial and reached his verdict. As I have held in ground 3, the trial Magistrate subjected the whole evidence to exhaustive judicial scrutiny and appraisal before making his findings. The justice of this case dictated the findings.

Ground 5:

For the reasons I have given herein above, I am unable to hold that the lower court's trial and decision occasioned any miscarriage of justice.

In conclusion I am unable to grant the prayers by the appellant.

I will dismiss this appeal with costs.

Musota Stephen

JUDGE

28.4.2010

28.4.2010

Appellant in court.

Respondent absent.

Obedo for the appellant.

Wanale Interpreter.

Obedo: Appeal for judgment.

Court: Judgment delivered.

Musota Stephen

JUDGE