THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 21 OF 2005

(Arising from Kayunga Court Civil Suit No. 8 of 2003)

1. ADAM BALE
2. PASKALI MUKAMA } :::::::::::::::::::::::::: APPELLANTS
3. DAVID SSALI

VERSUS

WILLY OKUMU :: RESPONDENT

BEFORE: HON.MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT.

This is an appeal against the decision/orders of His Worship S.M. Obbo Londo, Magistrate Grade 1 at Kayunga *(herein after referred to as the "trial Court")* dated 7/04/2005.

Background.

The facts are briefly that Willy Okumu *(hereinafter referred to as the "Respondent")* sued the Adam Baale, Paskali Mukama and David Ssali *(hereafter referred to as "1st" "2nd" and "3rd" Appellants respectively)*, claiming ownership or land situate at Bulongo village, Namuganga sub-county in Mukono (now Kayunga District) (*hereinafter referred to as the "suit land").* The Respondent claimed that he purchased the suit land in 1970 from one late Kamada Jagenda, and that the Appellants encroached on the said land, and parceled it between the 1st and 2nd Appellants.

The Appellants denied the Respondent's claim, but the trial court decided in favour of the Respondent hence this appeal. The Appellants advanced three grounds of appeal in their amended memorandum of appeal as follows:

1. ***That the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record and this arrived at wrong decision.***
2. ***That the learned trial magistrate erred in law and fact when he made a finding that the suit land belongs to the Respondent without any credible evidence on record thus causing a miscarriage of justice.***
3. ***That the learned trial magistrate erred in law and fact when he failed to visit the locus in-quo and thus resulting in a wrong decision.***

The Appellants prayed that the appeal be allowed and the orders of the trial court be set aside, with costs to the Appellants here on appeal and in the court below.

Resolution.

Ground 1 and 2 were argued together, and will be resolved in the same manner. The main complaint by Appellants is that the trial court failed in its duty to evaluate the evidence when it ruled that the Respondent is the rightful owner of the suit land, when the Respondent's evidence was riddled with inconsistencies and contradictions.

Counsel for the Appellants pointed that PW1 (Respondent) testified (at page 3 of proceedings last paragraph) that he bought the suit land from 1st Appellant's father at Shs 4000/- in 1970s, but that no written sale agreement was executed. That this was contradicted by evidence of PW4, Edward Lutaaaya, who testified (at page 20 (supra) that a sale agreement for the suit land, was made in his presence relating to the suit land. Further, that even though PW4 testified that some two other people; namely one Samail and Kamada (the latter the vendor) witnessed the sale, their evidence was not taken by court. Counsel went on to submit that PW4 confirmed the fact that the vendor was sick and suffering from mental illness; a fact the trial court should have considered to vitiate the transaction, if any.

The Respondent was unrepresented on appeal, and also did not put in any response to the Appellants' submissions. After revisiting the record of the lower court, it emerged

that the alleged contractions are largely non-existent, and where they tend to exist, they are minor and do not go to the root of the matter.

For instance, the alleged contradictions between PW1 and PW2 regarding witnessing of the sale agreement in issue do not hold any substance. As a matter of fact, the record does not reflect the Appellants' claim that PW2 testified to witnessing the sale transaction in writing at all or otherwise. Secondly, the Appellants' view of the sale transaction is that it was; or ought to have been documentary in nature. This was, however, not the case as the transaction was practically and purely oral, and was duly witnessed. There is no law against oral agreements, provided they can be proved, as it was in the instant case. In my view, the trial court addressed this issue of oral agreements quite properly and exhaustively.

The other instance of alleged contradictions pointed out in the testimony of the Respondent by the Appellants' Counsel appears at page 5 of the proceedings. When cross-examined by the 1st Appellant, the Respondent stated that the sale was between himself and the 1st Appellant's father and that there were no other people. That this contradicted PW3 Yowana Bidale, and PW4 Edward Lutaaya, who testified that (at page 8 and 20 of proceeding respectively) that they actually witnessed the sale transaction.

In my view, the above alleged contradiction is very minor, especially when it is viewed against the main issue at trial, which related to ownership of the suit land. It would also seem clear that the Appellants' Counsel only read the record selectively. For instance, at the same page 5 which he quoted, the next sentence states:

> ***"The judgment of the court before L.C.III court proves that the kibanja is mine."***

This was in response to the question as to who was adjudged the owner of the suit land by the LC11 Court. In my view the contradiction pointed out pales in comparison to the issue of ownership of the suit land, which was resolved; not only by the trial court, but also by the L.C.III court in favour of the Respondent.

The law relating to contradictions and inconsistencies is well settled that when they are major and intended to mislead or tell deliberate untruthfulness, the evidence may be rejected. If, however, they are minor and capable of innocent explanation, they will normally not have that effect. See ***Makau Nairuba Mabel v. Crane Bank Ltd., HCCS No. 380 of 2009 per Obura J.; Okecho Alfred v.Uganda, S.C.Crim.Appeal No24 of 2001; Alfred Tarjar v. Uganda Crim. Appeal No 167 of 1969(EACA).*** Ground 1 and 2 have no merit and they are disallowed.

Ground 3.

In the third ground of appeal, the Appellants complain of the trial court's failure to visit the *locus in- quo*, and that as a result it arrived at a wrong decision. There is only need to restate the position of the law and procedure as they relate to visits to the *locus in- quo*. It was aptly held by Sir Udo Udoma CJ. (R.I.P) ***in Mukasa v. Uganda (1964) EA 698 at page 700*** that:

> ***"A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence."***

From the above extract of an authoritative case, it is clear that the view of a *locus in - quo* is in addition to; and cannot be a substitute for evidence already given in court. It would follow that visiting *locus in-quo* by court is not mandatory and court reserves the right to visit *locus in-quo* in deserving cases - which is its discretion to exercise.

This court as an appellate court cannot interfere in the exercise of discretion by a lower court merely because the appellate court could have exercised it differently unless, of course, in exercising its discretion the lower court applied the wrong principles or was manifestly erroneous in its exercise of the discretion - which is not

the case in the instant case. Ground 3 lacks merits and it fails. The net effect is that the appeal fails and is dismissed with costs.

BASHAIJA .K.ANDREW
JUDGE
06/12/12