THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT MBALE

HCT-04-CV-CA-101-2009

(Arising from Misc. Application No. 17/2008, Civil Appeal No. 63 of 2004 and Bulucheke Civil Suit No. 68/2002)

NABILELE ROBERT……..……..…….APPELLANT

VERSUS

PATRICK WAKWEMA.. ……..……RESPONDENT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is a second appeal.

The background to this appeal is that the parties hereto litigated before the Magistrate Grade II Court of Bulucheke for recovery of land. The appellant herein **Nabilele Robert** was the plaintiff and the respondent **Patrick Wakwema** was the defendant.

In the court of first instance the appellant was trying to recover land he allegedly mortgaged to the respondent for shs.27,000/= in 1993. He claimed that three years later he wanted to pay the respondent money to redeem the land but the respondent refused and claimed ownership. The appellant called 2 witnesses to support his case. However one of the appellant's witnesses (PW.3) **Matanda F.** testified

against him and supported the respondent that indeed the appellant had sold and not mortgaged the suit land to the respondent.

On the other hand the respondent's case in the court of first instance was that the appellant sold to him a piece of land on 21.7.193 for which he paid shs.10,000/= then shs. 18,000/= and 135 Kgms of posho each 200/= translating into 27,000/= making a grand purchase price of shs.55,000/=. That the appellant showed him the land and he took possession thereof todate. The respondent called 2 witnesses in support of his case. These witnesses were present and gave consistent evidence in support of the respondent. Despite this, the Magistrate in Bulucheke Court held that this transaction was a mortgage and not a sale. He gave judgment for the appellant herein. The respondent herein successfully appealed against the said decision in the Chief Magistrate's Court Mbale vide Civil Appeal No.62/2004. The appellant herein was dissatisfied with the learned Chief Magistrate's decision hence this second appeal.

The appellant raised two grounds of appeal that:

(1) The learned Chief Magistrate failed or did not properly evaluate the evidence on record thereby reaching a wrong decision.
(2) The learned Chief Magistrate's decision occasioned a miscarriage of justice.

As I have stated above, this is a second appeal. The law governing second appeals to the High Court is provided for under S.220 of the (MCA) Magistrates Courts Act.

It is enacted under S.220 (1) (c) that:

> "*Subject to any written law and except as provided in this section, an appeal shall lie……..*
> *(c) from Decrees and orders passed or made in appeal by a Chief Magistrate with the leave of the Chief Magistrate or of the High Court to the High Court under S.220 (3) MCA.*
> *Leave to appeal for the purposes of subsection (1) (c) shall not be granted except where the intending appellant satisfies the Chief Magistrate or the High Court that the decision against which an appeal is intended involves a substantial question of law or is a decision appearing to have caused a substantial miscarriage of justice*."

When I read the ruling of the learned Chief Magistrate granting leave to the present appellant to appeal to this court, I was not convinced that he took into account the requirements of the law which was intended to regulate the type of cases which should come to the High Court on second appeal. His brief ruling goes as follows:

> "*RULING*
> *I had the opportunity of reading the affidavit of the applicant in support of the Notice of Motion and Respondent's affidavit in reply.*
> *I have also addressed my mind about the law on leave to appeal to the High Court. It is fit and just to grant the application leave to appeal to the High Court (sic).*
> *Order: leave to appeal granted*."

Clearly all indications are that the learned Chief Magistrate granted leave to appeal as a routine matter. The basis for the grant remained in his mind. There is no question of law cited which necessitated this appeal. There are no reasons to show that any miscarriage of justice was occasioned to the appellant at all.
The intention of the legislature was to prevent unnecessary second appeals from coming to the High Court and to put an end to litigation. This intention was not served by the learned Chief Magistrate.

The above notwithstanding, I will go ahead and deal with the unrepresented appellant's appeal since it appears someone drew for him the grounds of appeal which seem to be based on questions of law. The law is that failure of the appellate court to evaluate the evidence as a whole is a matter of law and may be a ground of appeal as such. ***MILLY MASEMBE V. SUGAR CORPORATION & ANOR. SCCA 1/2000*** per **Mulega JSC** (RIP)

After carefully studying the lower court's records and comparing the same with the submissions by both sides, I have come to the conclusion that the appellant has not shown that there are special circumstances necessitating this court to re-evaluate the evidence adduced. A second appellate court cannot and is not required to re-evaluate the evidence as a first appellant court is under duty to do except where it is clearly necessary. No instances of failure on the part of the learned Chief Magistrate have been pointed out by the appellant to my satisfaction to necessitate a review of the evidence. This court's exercise of power to review the evidence depends on whether the trial Magistrate failed to take into account any particular circumstances or probabilities or whether the demeanour of the witnesses whose evidence was accepted was inconsistent with the evidence generally. It is the duty of the appellant to point out these failures clearly but he has not done so. The

learned Chief Magistrate rightly concluded that the respondent's witnesses were more believable than those of the appellant. It was positively proved that the respondent paid money and posho as consideration for the land. He paid in installments which mode of payment could not have been for a mortgage. The appellant called witnesses who were hostile to him and gave hearsay evidence. One supported the respondent herein. No error apparent has been pointed out by the appellant for one to conclude that there was a miscarriage of justice. The appellant's complaints do not hold water.

I will consequently dismiss this appeal with costs.

Stephen Musota

JUDGE

14.03.2013