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

HCT-04-CV-CA-106-2010
(Arising from Mbale Chief Magistrate's Court Civil Appeal No. 45 of 1999)
(From Kibuku Civil Suit No. 0007 of 1979)

MBOIZI DISON…….APPELLANT

VERSUS

1. **DAULI DAVID ROBERT**
2. **TAWONEKA LAWRENCE**
3. **MULA ENOCK**
4. **NABYAMA JAMADA**
5. **LINA G. GEMESI……..…RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is a second appeal. The Appellant Mboizi Dison is represented by M/s Mutembuli & Co. Advocates. The respondents to wit Dauli David Robert, Tawonekha Lawrence, Mula Enock, Nabyama Jamada and Lina G. Gemesi are represented by M/s Wagira & Co. Advocates.

The background to this appeal is that the appellant filed civil Suit No.MT.7 of 1979 in Kibuku Court against the respondents. The Magistrate Grade II who heard the case found for the plaintiff (appellant) against the defendants (Respondents). In his brief judgment which he reached after outlining the evidence before him, the trial Magistrate held that:

> "Now from the entire evidence I have got on record and basing my decision on the judgment in Appeal case No.50/74 and original case

> 201/70. I find that the plaintiff has proved his claim on the disputed land and I accordingly enter judgment for the plaintiff with costs."

The trial Magistrate Grade II then went ahead and made the following order:

> "The plaintiff (decree holder) may keep the defendants (Judgment debtors) as his tenants if he so wishes or if not then plaintiff to pay them reasonable compensation before they quit or are evicted from the land 'sic'."

When I read the record I found nowhere that the trial Magistrate evaluated the evidence before reaching his conclusions.

The defendants appealed to the Chief Magistrate Mbale vide Civil Appeal 45/1999. They were represented by M/s Majanga & Co. Advocates while the respondent (the appellant herein) was represented by M/s Owori & Co. Advocates.
According to the record, the 3rd and 4th appellants were by then deceased and the 1st, 2nd and 5th appellants prosecuted the appeal.

In his judgment, the learned Chief Magistrate overturned the judgment and orders of the trial Magistrate and decreed the disputed land to the appellants on 6th March 2006.
The then respondent sought leave to appeal to the High Court against the Chief Magistrate's decision but this leave was refused by the Chief Magistrate.

The appellant then applied for leave to appeal to the High Court in the High Court. This court granted permission to respective counsel to file written submissions in support of their respective cases. A schedule was given but it was not complied

with. Instead by consent dated 7th October 2010, leave to appeal was agreed upon by respective counsel.

In the appellant's memorandum of appeal five grounds of appeal were raised that:

1. The learned Chief Magistrate erred in law and his decision occasioned a miscarriage of justice when he failed to subject the whole evidence on record to exhaustive scrutiny, evaluation and appraisal expected of the 1st appellate court.
2. The learned Chief Magistrate erred in law and fact when he failed to re-evaluate the evidence on record and thereby reached an erroneous decision.
3. The learned Chief Magistrate erred in law and fact when he failed to appreciate that the suit land was part of the suit land the appellant litigated over in case No. MT.201 of 1970 to which the appeal of 1972 originated.
4. The learned Chief Magistrate erred in law and in fact when he failed to find that the suit land was property of the appellant.
5. The decision of the learned Chief Magistrate has occasioned a miscarriage of justice.

Court allowed respective counsel to file written submissions in support of their respective cases.

I have studied the same. I have thoroughly read this bulky record right from that of the Magistrate Grade II Kibuku. I have gone through the evidence adduced at the trial, the submissions on appeal to the Chief Magistrate, the judgment of both the Magistrate Grade 2 and the Chief Magistrate. I will go ahead and make my decision on this appeal.

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 Magistrates Courts Act (MCA).

It is enacted under S.220 (1) (c) (MCA) 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 leave of the Chief 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."

I am of the considered view that this provision is made in mandatory terms and is paged on the satisfaction of either the Chief Magistrate, the High Court that there is a substantial question of law to be determined or a substantial miscarriage of justice.

It was therefore irregular for counsel to have usurped this court's discretion and reached a consent to allow this appeal to be filed. They simply agreed to have the second appeal filed without alluding to any substantial question of law or any substantial miscarriage of justice to be decided upon by this court. Consents should apply to matters which do not call for mandatory decisions of the appellate court otherwise it would amount to usurping the Judge's discretion and decision.

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 consent to file this appeal.

The above notwithstanding and after a careful study of the lower court's record and comparing the same with the grounds of appeal and submissions by both learned counsel, 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 appellate court is under duty to do except where it is clearly necessary.

When I studied the record, I found that it was the Magistrate Grade II who did not do his job. He did not evaluate the evidence to support his summary decision. On the other hand the learned Chief Magistrate did a thorough job by re-evaluating the evidence adduced and reaching an informed decision.

I found no instances of failure on the part of the learned Chief Magistrate. I found no indication that the learned Chief Magistrate sitting as a first appellate court failed to take into account any particular circumstances or probabilities or the demeanour of witnesses was accepted but as inconsistent with the evidence generally.

None of these parameters were pointed out to my satisfaction.

The learned Chief Magistrate rightly believed the evidence by the respondents and their witnesses.

No error apparent has been pointed out to support the conclusion that a miscarriage of justice was occasioned.

Finally I wish to comment on the purported additional evidence filed by learned counsel for the respondents without leave of court. As rightly pointed out by learned counsel for the appellant, this was irregular. Additional evidence should not be adduced during submissions. This evidence has therefore not been considered.

Consequently I will order that this appeal be and is hereby dismissed with costs here and in the Chief Magistrate's Court.

Stephen Musota

JUDGE

08.05.2013