

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

**HCT-04-CV-CA-112-2008  
(Arising from Pallisa Civil Suit No. 02/2005)**

- 1. LUKALE RASHID**
- 2. KALUNA NYUMBA**
- 3. MULUPUNE.....APPELLANTS**

**VERSUS**

**ASASANSI LOGOSE.....RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

This is an appeal against the Judgment and Orders of **His Worship Ismail Zinsanze** Principal Magistrate Grade I, Pallisa dated 5.12.2008.

The memorandum of appeal listed 4 grounds of appeal formulated as here below.

1. That the Learned Trial Magistrate did not evaluate the evidence properly or at all as a result of which he arrived at an erroneous decision.
2. That the decision of the learned trial Magistrate is against the weight of evidence.
3. That the decision of the learned Trial Magistrate is tainted by fundamental misdirections in law and on the facts.
4. That the decision of the learned Trial Magistrate has occasioned a miscarriage of justice.

On 11<sup>th</sup> September 2013 when parties were summoned for hearing, **Mr. Wabwire** for appellants applied to court that parties desired to file written submission. Court granted the prayer and pronounced a schedule to be followed.

By the 30<sup>th</sup> September 2013 when matter came back to court for mention, only appellant had filed the submissions. The respondent has not filed any submissions to date.

Court will therefore consider appellant's submissions in absence of respondent's submissions.

The duty of a first appellate court was laid down in the case of **BAGUMA FRED V. UGANDA SCC Appeal 7/2004**. This duty is to review the evidence and subject it to a fresh scrutiny then, come up with its own conclusions thereon.

A review of the lower court proceedings indicates that, applicant claimed in the Pallisa District Land Tribunal that she is mother of a deceased **Mbogo Peter** who bought the land in dispute at shs. 230,000/= in 1993 from **Sulaiman Kasolo**. That when her son died in 2002, she became the heir and stayed on the land without problems till 2004 when respondents claimed the land and began constructing thereon. She therefore brought the suit for an immediate injunction against the respondents, which was granted.

In defence statement the defendants stated that first Respondent **Lukale Rashid** is brother of Respondents 2 and 3. That the land belonged to one **Zaida Nyamba**

who inherited it from their late father **Jabeli Luka**. When his brother died in 1997, Respondent was made heir and he inherited the land in dispute.

During the hearing, the claimant/plaintiff told court she sued the respondents for encroaching on her plot which her son bought from the brother of 1<sup>st</sup> Respondent **Sulaiman Kasolo**. She offered evidence to that effect.

In cross-examination she revealed that her son died, she was the mother and the would be heir was still a minor.

**CW.2 Alaisa Kasolo** wife of the late **Kasolo** told court the plot was for the deceased who sold it off to the late son of claimant.

In defence DW.1-Lukale Rashid told court that the land in dispute belonged to **Haruna Nyamba** (D.2 as share from the late **Jaberi Lukale** and **Kasolo** (his brother) fraudulently sold it to the plaintiff.

**DW.2- Haruna Nyamba** stated that the land in dispute was given to him as a share of his late father's estate. He also sold it to **Samson Mubale** in 2004. When **Kasolo** sold the land to **Mbogo** he took the matters to LC Court who handled the matter and the land was handed to him. He handed over the file containing the LC documents for identification, which I have seen on record.

**DW.3 Mukonge** Chairman LC.I Bunyerero who confirmed that the land was given to D.2 as a share from his late father.

**DW.4 Abdu Mumamu** confirmed that land belonged to D.2 as a share of his inheritance. The trial Chief Magistrate for reasons stated in his judgment gave judgment in favour of the plaintiff, hence this appeal.

The issues for determination are;

- 1) Whether the trial Magistrate did not evaluate the evidence properly or at all as a result of which he arrived at an erroneous decision.
- 2) Whether the decision of the learned Trial Magistrate is against the weight of evidence.
- 3) Whether the decision of the learned Trial Magistrate is tainted with fundamental misdirections in law and on the facts.
- 4) Whether the decision of the learned Trial Magistrate has occasioned a miscarriage of justice.

I will resolve the issues in their order of presentation.

**Issue 1: Whether the decision is against the weight of evidence.**

The Judgment of the Learned Trial Magistrate is based on the evidence in court. It bases its conclusions on the testimony of the plaintiff and her witness CW.2. The Magistrate was taken away by the evidence of CW.2 simply because she alleged that she was around when the late husband (**Kasolo**) sold the land to the son of the plaintiff. However he did not go at length to examine the fact that DW.2 told court that this sale even if it occurred it was unlawful. He did not bother to examine evidence from D.2, DW.3, D.4 to the effect that the land in issue was land belonging to the deceased father of appellants, and given to (D.2). The Judgment, shows that the Trial Magistrate dismissed the evidence by D.2 that the LCs tried

the matter and he called it a creation of his imagination. He offered no reasons for this finding. Contrary to the Trial Magistrate's myopic evaluation of the evidence on record, there is a glaring wealth of other evidence on record, from both parties which if he had correctly weighed he would not have made the conclusions he did.

I am satisfied therefore, that the appellants have satisfactorily proved that the Learned Trial Magistrate did not evaluate the evidence properly and as a result he reached an erroneous decision. This issue is therefore terminated in the positive.

**Issue 2: Whether the decision is against the weight of evidence.**

The findings in Issue 1 above duly dispose of this issue and I find that the decision is against the weight of evidence.

**Issue 3: Whether the decision is tainted with fundamental misdirections in law and on the facts.**

There are two fundamental problems of law in this matter which the Learned Trial Magistrate overlooked, and which if he had considered would have led him to a different result.

The first, as pointed out by Counsel for appellants is that the plaintiff/claimant in this matter had no *locus standi* to sue. If she was to sue as next of friend, then she either needed Letters of Administration, or Powers of Attorney (see O.3 r.1 & 2) and (Administrator Generals Act). She sued for a deceased's property without Letters of Administration. She also sued on behalf of the heir without Powers of Attorney. If so, none of the above are on record. It is therefore erroneous and

irregular for the Learned Trial Magistrate to proceed to give Judgment in favour of a non entity. The above ground alone renders the trial a nullity.

Secondly the trial Magistrate did not visit the locus. It is trite law that whenever court hears a land matter, court must visit the locus. It has been held in various cases by this court and others that where court fails or does not visit locus that trial is a nullity in law. This trial was accordingly also a nullity on account of the court's failure to visit locus. (See the following cases of **JAMES NSIBAMBI V. LOVISA NANKYA (1980) HCB 81**, followed in **MUKODHA TWAHA V. WENDO CHRISTOPHER MBALE HCT-04-CV-CA-42/12** (unreported).

For those reasons, this issue is found in the positive and I hold that the decision is tainted with fundamental misdirections in law and on facts.

Issue 4: Whether the decision of the Learned Trial Magistrate occasioned a miscarriage of justice.

By virtue of the findings on grounds 1, 2, and 3 above, the Learned Trial Magistrate reached an erroneous decision. The orders and directives that emanated out of that decision have affected the parties, yet it's a decision tainted with fundamental misdirections. Such a decision is said to have caused a miscarriage of Justice. Hon. J. Odoki (as he then was) held in **MATAYO OKUMU VS. FRANSISKO AMUDHE & 2 ORS [1979] HCB 229**, that a decision appears to have caused a miscarriage of justice where there is a prima facie case that an error has been made.

From the findings in issues 1, 2, and 3 it is clear that errors have been made. I therefore find that the decision by the Learned Trial Magistrate caused a miscarriage of justice. The issue is therefore proved.

In the final result, this appeal succeeds on all grounds raised. The appeal is allowed. The judgment and orders of **His Worship Zinsanze** Principal Magistrate Grade I Pallisa are hereby set aside and quashed. A retrial is hereby ordered to be immediately done by another competent court of the Chief Magistrate, Pallisa, before another Magistrate. Appellants are granted costs of this appeal here and in the court below. I so order.

**Henry I. Kawesa**

**JUDGE**

**07.05.2014**