THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HODERN AT ARUA

CIVIL APPEAL NO. 0026 0F 2011

1. **WALTER CHARLES DRACHIRI)**
2. **VUNI S/o DRANDRU)**
3. **LAGHU DRAEYIA) ---------- APPELLANTS**

=VERSUS=

ASIENZO LUCY ---------- RESPONDENT

BEFORE HON. JUSTICE VINCENT OKWANGA

JUDGMENT

The respondent had sued the three appellants along with another defendant (in the lower court) in Moyo Chief Magistrate's Court in 2007 for ownership of land comprised in temporary plot Nos. 234, 236 and 237 situate along Apiliga close in Moyo Town Council, in Elendra village, Moyo District.

Notes and clarification:

When I was perusing this case file with a view to writing this judgment I came across the proceedings of my predecessor at the circuit, my brother His Lordship Justice Nyanzi Yasin dated 20/05/2013, as follows:-

> ***"Court: This file is drawn to my attention to write the Judgment but since court never permitted the parties to file written submissions, I consider the appeal to have not been heard by court. The case was adjourned to be heard on 19/02/2013 by the Deputy Registrar of the court for hearing. Instead of causing the matter to be heard, on that day the appellant filed written submission without appearing before court. Such conduct is not***

accommodated by either the rules of procedure or practice of court. I cannot write judgment where the appeal is not heard".

Signed

Nyanzi Yasin

Judge

20/05/2013

I noted from the above records that my predecessor at the circuit His Lordship Justice Yasin Nyanzi did not agree with the procedure adopted by the counsels before court in filing written submissions without the permission of court.

Nevertheless when this matter appeared before me several times for judgment and I noted that written submissions had been filed, I decided to write the judgment and deliver the same as the other alternative of sending the file to Kampala to my predecessor in the station would just add to the delay already occasioned. I shall now deliver my judgment nevertheless.

According to the records of the lower court, the respondent claims on the plaint in the lower court is that, on 25/09/2009, Moyo Town Council allocated to her plots 234, 236, 237 all to be merged into one plot to be known as plot No. 234 and thereafter Moyo District Land Board granted to her a lease thereon.

A communication was made to the land officer at Arua requesting him to prepare a lease offer in her favour in respect of the said plots. Prior to the lease offer to her, she had entered into a compensation agreement with one Drandru Lucio (deceased) father of the 2nd appellant, who occupied plot No. 234 to resettle him and his family to another place by giving him an alternative plot and building two grass thatched huts thereon but the Lucio Drandru died before the respondent could resettle him and his family.

In the end the 2nd appellant who appeared to have been the heir to the deceased Lucio Drandru rejected the alternative plot offered by the respondent as well as the resettlement agreement entered into between his late father Drandru and the respondent. The 3rd defendant who had occupied plot No.236 also sold his portion to the 1st appellant as well while one Obumai Anjelo who was the fourth defendant had obtained possession of part of the suit land through the 1st respondent.

At the trial court, the Chief Magistrate held that the respondent (plaintiff at the trial) had lawful interest in the portion of land occupied by the 2nd appellant, Vuni S/o Drandru whom the court found as having succeeded his late father Lucio Drandru who had made an agreement with the respondent to resettle him (deceased and father of 2nd respondent) on a different piece of land by way of compensation.

The court further found in its judgment that as the rest of the defendants appellants No. 1 and 3, were not compensated by the respondent, her case against them and the 1st appellant were dismissed.

The court awarded no costs to the 1st and the 3rd defendants while the second defendant was condemned to pay 1/3 of the taxed bill of costs to the respondent.

The trial Magistrate went ahead to hold that ***"it has been established that the agreement between the plaintiff and Laghua (Drandru Lucio) as succeeded by Vuni is still enforceable by the plaintiff, the plaintiff has proved her case on the balance of probabilities on this, and I do agree that she can go ahead and perform her part of the contract between her and Drandru as succeeded by Vuni. Judgment is therefore entered in her favour in respect of the piece of land occupied by the second defendant, and I do order a specific performance of the relocation agreement between the parties. The plaintiff having failed to prove the rest of the issues with regard to the remaining defendants, I dismiss her case against those defendants, and award no costs between her (plaintiff) and them (1st and 3rd defendants). The 2nd defendant shall pay 1/3 of the taxed bill of costs to the plaintiff in respect of his case".***

It appears that during the trial the name of the 4th defendant Obumai Anjelo, was actually struck off from suit and the suit proceed against defendants No. 1, 2 and 3 only.

This was done during the scheduling of the case on 14/01/2007.

The three appellants then appealed such decision and judgment of the trial court and filed three grounds of appeal as follows:-

1. **The learned (trial) Chief Magistrate erred in law and fact when he failed/refused to award costs to the 1st and 3rd appellants upon the respondent's case being dismissed against them**

2. **The learned Chief Magistrate erred in law and fact when he ordered specific performance of the agreement between the late Drandru and the respondent on the 2nd appellant who has no Letters of Administration to the estates of Drandru Lucio.**
3. **The learned Chief Magistrate erred in law and fact when he failed to properly evaluate the evidence on record and thereby came to a wrong conclusion regarding the 2nd appellant.**

In their 1st ground of appeal the 3 appellants attacked the findings of the trial Chief Magistrate where he held thus on page 7 of the judgment, 2nd paragraph from the top of the trial court:-

> ***"It has herein above [been] sic established that the agreement between the plaintiff and Laghu(sic) Drandru as succeeded by Vuni is still enforceable by the plaintiff, the plaintiff has proved her case on the balance of probabilities on this, and I do agree that she can go ahead and perform her part of the contract between her and Laghu (sic) Drandru as succeeded by Vuni.***
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> ***Judgment is therefore entered in her favour in respect of the piece of land occupied by the 2nd defendant, and I do order a specific performance of the relocation agreement between the parties. The plaintiff having failed to prove the rest of the issues with regards to the remaining defendants, I dismiss her case against those defendants, and award no costs between her (plaintiff) and them (1st and 3rd defendants). The 2nd defendant shall pay 1/3 of the taxed bill of costs to the plaintiff in respect of his case."***

It is indeed true as submitted by counsel for the appellant that under section 27 (i) of the CPA that costs should follow the event unless the court orders otherwise. However, the trial court has discretion whether to award costs or not and such discretion should be exercised judicially.

Section 27 CPA (ii) reads:-

> ***"A successful party can only be denied costs if it is proved that but for his conduct the action would not have been brought. The costs should follow the event even where the party succeeds in the main purpose of the suit".***

It was argued for the appellants that the learned trial Chief Magistrate did not exercise his discretion judicially as he never assigned any reason for denying the 1st and 3rd appellants their costs when they were successful against the respondent as there is no evidence at all to show that their conduct caused the respondent to file the suit against them.

Counsel for the appellants cited a number of authorities to support his contention.
The duty of the first appellate court is to subject the entire evidence before the trial court to an exhaustive scrutiny in order to arrive at its own conclusion. While doing this, it has of course to give due allowance to the fact that it didn't have the opportunity to see and hear the witnesses at the trial.

In the case of **Uganda Development Bank Ltd =Vs= Muganga Contruction Company; Civil H.C. suit No. 1691 of 1977;** Manyindo, J (as he then was) held that;

> ***"Under section 27 (i) of the Civil Procedure Act (Cap.65) costs should follow the event unless the court orders otherwise. This provision gave the judge discretion but that discretion had to be exercised judicially. A successful party can only be denied costs if it is proved that but for his conduct the action would not follow the event even where the party succeeds only in the main purpose of the suit"***

In **National Pharmacy Ltd =Vs= Kampala City Council, Civil Appeal No. 0002 of 1979, Court of Appeal for Uganda, [1979] HCB 256;** it was emphasized that the inability on the part of claimant party to prove the whole of the claim couldn't constitute a good reason for denying that party it costs if it was successful. A successful defendant could only be deprived of his costs when it was shown that his conduct, either prior to or during the course of the suit, had led to litigation which, but for his own conduct, night

have been averted. A charge of fraud was very serious and could not be proven as in ordinary civil cases on a balance of probability.
In this case it was not proved. And since other malpractices alleged on the appellant were not also proved, the trial Judge had no material before him to justify awarding the appellant only half of its taxed costs. He had not therefore exercised his discretion judicially.

I am in total agreement with the principles of costs as expounded in all the judicial authorities referred to above.
The clear position of the Law is that a trial Judge or a Magistrate has the discretion to either award costs or not to a successful party, or even award costs in part depending on the reasons the trial Judge or Magistrate has for not awarding or for awarding costs only in part in a particular case, as in the instant case regarding the award of 1/3 of the taxed bill of costs the trial Chief Magistrate awarded to the respondent against the 2nd appellant, Vuni S/o Drandru and his decision not to award any costs to the 1st and the 3rd appellants, respectively.

In my view whatever reasons the trial Chief Magistrate had for not awarding costs to the 1st and the 3rd appellants as successful parties and for awarding the respondent only third of the costs against the 2nd appellant, I feel that in doing so the trial Chief Magistrate acted judicially.

Similarly, although the trial Magistrate didn't specifically say so in his judgment, it can be clearly gathered from his judgment that the trial Chief Magistrate awarded a 1/3 of the taxed bill of costs against the second appellant in favour of the respondent. In doing so, I am very certain in my mind as can be gathered from the facts of this case and the evidence on record that the trial Magistrate did this because respondent was only successful in her suit against the second appellant only out of the three defendants she (the respondent) had sued, so it would have been more prudent and fair to apportion the costs retably as against each defendant in the suit. This follows that in not awarding any costs in favour of the two appellants (1st and 3rd defendants in the original suit) the trial Magistrate must have had at the back of his mind when taking such a decision, the

enormous expenses the respondent had incurred in having this suit land surveyed, getting the town planners' lay out from Kampala and forwarding it to Moyo Town Council and later on paying all the necessary premium, ground rent and survey fee all by herself, the trial Magistrate must have considered those expenses the respondent had incurred in all those process to decline from awarding costs to these two appellants (1st and 3rd appellants). This assertion is supported by the evidence on record. Accordingly I find that the trial Chief Magistrate had reasons for not awarding costs to the two appellants against whom the suit was dismissed. Accordingly I find that the trial Magistrate was justified in doing so. This Hon. Court cannot fault the findings of the trial Magistrate on that point.

Ground 1 of the appeal therefore fails and is hereby dismissed.

Finally, before I take leave of this ground of appeal, I must add that as can be gathered from the brief facts of the case as summarized herein above, the respondent had originally sued four defendants who all filed written statements of defence. At the scheduling hearing on 14/01/2007, the name of the fourth defendant, one Obumai Anjelo was struck off from the plaint on the application of the counsel for the Plaintiff Mr. Barigo on the ground that this particular defendant had no interest in the suit land at the time.

When the defendant's name was struck off by the trial court he the (4th defendant) prayed for costs which the trial Chief Magistrate actually awarded to him but which the trial Magistrate appeared to have forgotten to refer to in his final judgment.

The trial court's records for 14/01/2007 reads in part; at page 3 of the records of proceedings, last paragraph of that page:-

> ***"Court: Since both the plaintiff and 4th defendant are in agreement that the 4th defendant be struck off the record for reasons that he has no interest in the suit land or any part thereof, the prayer to strike him off is granted and the 4th defendant is hereby struck off the record.***
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> ***However, since the fourth defendant filed his written statement of defence (WSD), and incurred some costs, and bearing in mind that costs follow the***

event, the 1st sic (4th defendant is awarded costs so for incurred in defending this suit. (Correction is mine)

I find that having awarded costs for the 4th defendant as above, giving reasons to justify so, the trial Magistrate erred in not reflecting the same in his final judgment even if the final judgment didn't include the name of the 4th defendant.
This court being the first appellate which is fully seized with the powers of the trial court as it were, I shall direct here and so order that the costs incurred by the 4th defendant Mr. Obumai Anjelo as ordered by the trial Magistrate on 14/01/2007 for defending that suit at the trial up to that date (14/01/2007) be part and parcel of the trial court's judgment and orders as costs against the respondent in the original Civil Suit No. 0012 of 2007, even if the 4th defendant didn't appeal to this Hon. Court.

Failure to reflect such costs in the final judgment would amount to an error in law unless there is proof before this Hon. Court that such costs to the 4th defendant at the trial court has been fully paid and settled.
However, as I see no evidence on record to show that such costs have been settled as I write this judgment, I feel that my order to that effect would not be superfluous.
However, such error by the trial Chief Magistrate as I have pointed out herein did not occasion any miscarriage of justice to any of the appellants.

I shall now consider grounds 2 and 3 of the appeal together.
On ground 2 of the appeal the appellants contend that the learned trial Magistrate erred in law and fact when he ordered for specific performance of the agreement between the late Drandru and the respondent and the second appellant who has no letters of administration to the estate of Drandru.

On ground 3, the appellants contend that the learned chief magistrate erred in law and fact when he failed to properly evaluate the evidence on record and there by came to a wrong conclusion regarding the second appellant.
I am entirely in agreement by the submission of learned counsel for the appellants that there is no evidence on record to show that the second appellant, Vuni S/o Drandru could

competently and legally assume the rights and legal obligations of his late father Drandru with whom the respondent made an agreement for relocation so as to warrant the trial Magistrate order for specific performance against him (2nd appellant).

Under section 191 of the Succession Act no rights to any part of the property of a person who has died instestate shall be established in any court of justice, unless Letters of Administration have first been granted by a court of competent jurisdiction.
In the absence of clear evidence that the 2nd appellant holds any Letters of Administration to the estates of the late Drandru Lucio, there is no legal basis for the trial Magistrate for ordering specific performance of the agreement between the late Drandru Lucio and the respondent, as against the second appellant who was not privy to that agreement.

From the evidence before court, the agreement between the late Drandru Lucio and the respondent, in which the respondent was to secure an alternative piece of land on which to relocate the family of the said Drandru Lucio after building two grass thatched huts thereon to compensate the latter with was never implemented or carried into effect as the late Drandru died before it could be implemented or carried into effect as the late Drandru died before it could be implemented and his son, the 2nd appellant to whom the deceased (Drandru Lucio) had delegated the responsibility of verify the alternative land for such relocation, rejected the alternative piece of land the respondent had offered on the grounds that the alternative land offered was in a swamp. Accordingly the trial Magistrate erred to order for specific performance against the 2nd appellant as the respondent herself did not execute her part of the agreement of getting a suitable land and erecting thereon two grass thatched huts for the relocation of the family of Drandru as agreed.

In the case of **Bweya Steel Works Ltd =Vs= National Insurance Corporation, H.C. Civil Suit No. 0063 of 1985;** (Odoki .J. as he then was) held that;

> **"Where a plaintiff has wholly or in part executed his part of an oral agreement in the confidence that the defendant would do the same, the court often orders specific performance on the ground that it would be a fraud on**

the defendant's part not to carry out the contract. However, for any acts to suffice as part performance they must be unequivocally and in their own nature referable to some such agreement as that alleged. The acts must be such as to prove the existence of some contract and consistent with the contract alleged.

The respondent not having made the necessary compensation in respect of the 2nd and the 3rd appellants, she could not properly and legally sue these two for the vacant possession of the plots (portion of land) they occupy as the law doesn't permit any local or controlling authority to deprive them of their land without any adequate compensation.

In the end I find that the 2nd appellant's case succeeds in part on the 2nd and the 3rd grounds which are hereby allowed with costs to all the three appellants;- Walter Charles Drachiri, Vuni S/o Drandru and Laghu Draeyia in this court only.
Cost is also re-affirmed for Obumai Anjello – fourth defendant at the trial court in that court up to 14/01/2007, as ordered by the trial court.

It is hereby ordered!

VINCENT OKWANGA
JUDGE
12/05/2015