THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-143-2012

(FROM BUBULO CIVIL SUIT NO. 211/2011)

KHALAYI AIDAH.....APPELLANT

VERSUS

MUHAMAD MAKALAMA.....RESPONDENT

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

JUDGMENT

The Appellant raised 6 grounds of appeal. She prayed that court allows the appeal, the decision of the lower court be set aside, and costs be provided for.

This is a first appellate court. It has a duty to re-evaluate the evidence freshly, scrutinize it and make its own conclusions thereon. (See *PANDYA VERSUS R (1957) E.A. 336*).

The lower court record shows that plaintiff sued the defendant for vacant possession, that defendant is a trespasser on the suit land, a permanent injunction to issue against the defendant, general damages and costs of the suit.

The defendant's written statement of defence shows that defendant claims he bought the land from **Laurent Kimuna** on 20.6.2011.

From evidence, **PW.1 Aida Khalayi** stated that defendant bought the disputed land without her husband's consent. She had used the land since 1992. She has two children. She only heard that he bought it from her sick husband. That he was given 20 x 70 leaving 12 x 70 for her and the children. She wished to recover the whole land.

PW.2 Tsebeni George said before death of his brother-in-law he showed him a piece of land that he gave measuring 32 x 72 strides. He was later told defendant bought 20 x 70; which was not true, because he had allocated it to his children.

In defence **DW.1 Makalama M.** said he bought the land at shs. 1,500,000/= and had an agreement and was in occupation. He testified that plaintiff and her children had been shown the piece left to them during the funeral rites of his late brother.

DW.2 Khatami Joseph said he witnessed the purchase agreement on 07.June.2011. He conceded in cross-examination that they went to the Probation Officer and demarcated her land. The land was 32 x 70.

DW.3 Nabutalo Joseph stated that she witnessed the sale on 07.June.2011. The sale was of 20 x 70 strides leaving 12 x 70 strides. She confirmed in cross-examination that the land was one piece and a piece curved off and the remaining was left to her and her children but **Margret Lubango** was in occupation.

DW.4 Magret Lubango also witnessed the sale of 70 strides by 20 to defendant her late husband.

In her assessment of the above evidence the learned trial Magistrate found that plaintiff has no cause of action against the defendant. On issue 2 she found that defendant wasn't a trespasser and dismissed the suit with costs.

The above being the evidence before me, having gone through the lower court record, and having listened to arguments by both the appellant (**Khalayi**) unrepresented and Respondent **Mohamed Makalama** (unrepresented) I summarize the grounds as follows:

That the decision of the learned trial Magistrate was against the weight of evidence, in that the learned trial Magistrate did not evaluate the evidence properly as a result of which he reached a decision which is unsupportable in the circumstances.

I have examined the evidence and found that:

1. The court did not visit the locus.
2. The date for giving judgment was not indicated.
3. The record is silent as to when the judgment was delivered.
4. The parties had ever gone before an informal tribunal at the Sub-county for settlement of the claim.

With the above in mind the appellant complained orally in court that whereas she was informed that the judgment was fixed on 15.November. 2012 it was read on 6. November. 2012. Secondly that the agreement relied on by defendant was a forgery and she had raised this in the lower court but court ignored her. The appellant raised issue with the size of the plot. That court ruled it was 30 by 70 feet yet the defendant had said he bought 20 feet and 12 feet left to plaintiff and her children. She testified that as per the date, she totally had nowhere to cultivate.
Defendant on the other hand responded that true the judgment was delivered in absence of appellant. He argued that his agreement was proved in court. He argued that appellant had never used the land.

This matter in my view revolves around properties of a deceased person. The plaint shows that the appellant sued defendant as one of the widows of the deceased who had been in occupation of her piece of land since 1992. She led evidence to show that this is the same piece of land which defendant/Respondent purportedly bought. She raised evidence through herself and her witness to show that though she was using the land neither her or her children was consulted while the sale happened. This is confirmed by the defendant/respondent and his evidence.

Indeed in his written statement of defence, he acknowledges so. He even attached a document showing that the Probation Officer went and intervened and even demarcated the land in dispute.

I find it for a fact that contrary to the finding by the learned trial Magistrate that she had no cause of action against the defendant, the evidence shows that she was in adverse possession as a widow and hence had a right or interest in the land. She could sue for trespass.

Secondly, I find it as a fact that in assessing the evidence the learned trial Magistrate failed to accord the evidence a proper weight. She ignored the fact that there were grave contradictions in the descriptions of this land regarding the acreages allegedly sold to defendant and those left for use by plaintiff and her children. As rightly argued by appellant there is a problem. Did the Defendant/Respondent buy 20 x 70, leaving 12 x 70, or 32 x 72, leaving 20 x 70 as PW.2? Or was it 32 x 70 as per DW.2 or 70 by 20 as per DW.4?

This could have been resolved if she had visited the locus. Unfortunately she did not, and she never went into an investigation of the said matter. This was erroneous and irregular. This is made worse by the fact that some evidence points at the fact that some land was left for plaintiff/appellant's use while Respondent claims there is nothing left for her. Moreover the Probation Officer's report shows that there was land demarcated off for plaintiff to start using immediately. This supports her claim in the plaint that defendant had refused her to access the said land todate (see paragraph 6 of the plaint).

With all the above observations, I find justification in the appellant's appeal. There was gross misapprehension of the evidence by the learned trial Magistrate. The failure to visit locus occasioned a miscarriage of justice. In *Okoth Okwale v. R (1965) E.A. 555*- the Court must consider all evidence before making conclusions.

Also In Practice Direction 1/2007 the practice to visit locus in quo was emphasized. Court must as a matter of practice visit locus in a land matter. The purpose of the visit among other reasons enables court to ascertain what each party is talking about. See *J.W. Oriange v. Okaling (1986) HCB 63*.

This omission was therefore fatal in this particular case where parties needed to show court exactly what they were talking about.

For all reasons above I find that the appeal succeeds, and all grounds upheld, as redrafted by court.

The lower court judgment and orders are set aside. It is ordered that the matter should be retried before another Magistrate Grade I at Bubulo. Costs to appellant here and below. I so order.

Henry I. Kawesa

JUDGE

28.05.2015