THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0079-2009

(ORIGINAL PALLISA CIVIL SUIT NO. 39 OF 2008)

OSIRE MOSES.....APPELLANT

VERSUS

SYALUKA FLORENCE

ADMINISTRATOR OF THE

LATE TAKAAPA TOMASI.....RESPONDENT

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

JUDGMENT

Appellant raised five grounds of appeal. These grounds were as follows:-

1. Learned trial Magistrate did not evaluate the evidence properly or at all as a result of which he reached a decision not supportable in the circumstances.
2. The decision of the learned trial Magistrate is tainted by fundamental misdirections and non directions in law and on the facts.
3. The decision of the learned trial Magistrate's against the weight of evidence.
4. The learned trial Magistrate erred in law when he decided the case without visiting the locus in quo.
5. The decision of the learned trial Magistrate occasioned a miscarriage of justice.

He prayed that:

a) The appeal be allowed.

b) Judgment and orders below be set aside.

c) Judgment be entered for appellant here and in the court below.
d) Costs be awarded here and in the court below.

The brief facts were that the appellant sued the respondent in trespass under Civil Suit 39/2008 Pallisa. The plaintiff claimed that he inherited the suit land from his late father and that the respondent was a mere tenant thereon. The defendant claimed that his father bought the suit land from **John Tarukawo**, the appellant's uncle. The defendant claimed he was given the suit land by his late father. The trial Court dismissed the suit for reasons that it was not proved.

The duty of a first appellate court is to review the evidence afresh, make conclusions therefrom and reach its own conclusions thereon. The court must caution itself that it is progressing from a disadvantaged position since it did not have a chance to hear the witnesses; and observe them. See *Pandya v. R (1957) E.A. 336*.

I have dully gone through the lower court record. I have re-evaluated the evidence. I have also studied and considered the submissions below, and on appeal. I am making the following findings.

Grounds 1, 2 and 3 and 5:

Appellant argued the above grounds together. He pointed out that the errors on record were minor. He stated that PW.3 was man of 60 years and his mix up of the fact alluded to him as contradictions by the trial Magistrate was excusable, and minor since it did not even arise out of cross-examination. From the proceedings at page 5, paragraph 2 he had said. "*the land in dispute belongs to Osire (plaintiff) and it was inherited from his late grandfather Jono in 1985*"... then later "*Am changing it was John Tarukawo who gave land to plaintiff and Tarukawo was father to the plaintiff. Tarukawo had earlier inherited the said land from his late father Jono*."

The Respondent argued that learned trial Magistrate was right to disregard such evidence. My reading of the evidence from all witnesses in my view shows that the evidence of PW.3 on this issue was not discredited by cross-examination but appears to have been a slip of the tongue on lapse of memory since he corrected himself and never contradicted himself after that.

Regarding the fact that it was a lie for PW.4 to tell court that the land had been mortgaged away for 4 years at 30,000/= and hence his evidence be rejected. An examination of the record, shows that the plaint in paragraph 4, placed his cause of action on fact that in the year 2003 plaintiff further hired out the piece of land to defendant at shs. 30,000/= at a period of 4 years.

The fact that the Evidence Act requires a party who alleges a fact to prove it as per Section 103 of the Evidence Act; made it imperative for plaintiff to call evidence to prove paragraph 4 of his plaint. Evidence of PW.4, was led in court and he testified that he was present when the land was hired out by **Tarukawo** to defendant at 30,000/= for four years. (See page 6 of proceedings). There was cross-examination by defendant of PW.4 regarding defendant's purchase of land. The record contains no comment of record showing that PW.4 was telling lies to court. it is therefore not possible to adduce from the record where the learned trial Magistrate got this conclusion from.

The rejection of the clan minutes for being irrelevant (ID.I) is found on page 4 of the judgment paragraph 3 thus:

> "*The plaintiff tendered in court documentary evidence to wit minutes of Ikaarbwok Igwere clan meeting (ID.I) dated 2004, this document is irrelevant as it is just based on wishful thinking rather than facts and as such is inadmissible*."

Appellants argued that the learned trial Magistrate should have shown in his judgment how these documents/minutes were irrelevant. Respondent in submission argued that the minutes were irrelevant in that they were not related to the facts or issues in the case. It is to be noted that the court record shows that on 20.4.2009 the plaintiff informed court that he had come with his documents which court received and marked ID.A, ID.2, and ID.3. When defendant was asked to cross-examine on the documents he declined.

There is nothing else on record to show what these documents were, why court admitted them (for example for examination, for identification, as exhibit?). It is therefore surprising for court to refer to them as useless in its judgment yet it admitted them for the plaintiff. The documents are in English. When I examined ID.I, in its last paragraphs it states:

"*The sub-county clan leader still to call up the person who hired the land to remove his crops after his period of cultivating is over.....*"

ID.II for plaintiff, also contains a summons to "*TOMASI TOPAKA*" who is utilising the clan land illegally....."

The above contents of ID.I and ID.II refer specifically to a person "hired land" and utilising it "illegally." Can those references be called mere wishful thinking as per the learned trial Magistrate's comments in his judgment? Or irrelevant to the case (issues) as per Respondent's submissions- I do not think so.

I do not see any justification for the court's rejection or doubting of the Letters of Administration granted by the High Court on 16/March/2009, and agree with appellants that the learned trial Magistrate was in error so to do. The Letters of Administration were not in issue, were not challenged and by law court documents are relieved on their face value unless otherwise proved that they are forged.

The letters of Administration could have helped court to collaborate the contents of ID.I and ID.2, which it rejected as irrelevant, so as to infer that a holder of Letters of Administration bears responsibilities to protect the estate of the deceased from waste. The land in dispute having been alleged to be part of this estate by plaintiff, his reliance on his Letters of Administration was therefore proper and was of high evidential value.

I find that the learned trial Magistrate made a number of sweeping statements in his judgment which are not borne out by evidence on record. These were pointed out by appellants to include such statements like the fact that "*appellant is not a biological son of late* ***Tarukawo***," that "*parties were residing on same land*" and an "*attempt by appellant to come up with different stores to deprive bonafide purchasers of their properties*." (See page 5 of judgment).
However in rebuttal to the above submission, the respondents claimed that these observations arose from plaintiff's failure to prove his claims.

I disagree. The court is an independent arbiter and must not descend into the arena, save for giving guidance. A judgment must contain only a discussion of the evidence before court as

applied to the facts, and conclusions/findings thereon by the Court. See Section 136 of the MCA. A judgment must contain;

(a) The points for determination

(b) Decision on the points.

(c) The reason for the decision.

Also see *Livingstone v. Uganda (1972) E.A. 196*.

It is therefore my finding that there is reasonable justification in the appellant's complaints under grounds 1, 2, 3, and 5 as argued. It is my finding that the learned trial Magistrate failed to properly evaluate the evidence before him and thereby reached wrong conclusions thereon.
The grounds 1, 2, 3 and 5 are found proved as argued.

Ground 4:

The court did not visit the locus in quo.
The practise in Uganda today given the complexity of land matters is to visit the locus as a matter of necessity.
The Chief Justice issued Practise Direction No.1 of 2007 which as respondent point out lists guidelines as to how a visit to the locus in quo is done.

The Practise Direction is a guiding practise notification whose effect has been to reinstate the old practice in land law that a court ought to visit the locus. Each case ofcourse dictates its own procedure, though the majority of decided cases have guided that visiting the locus is not a formality but a necessity. This is because as pointed out in various cases like *Mukodha Twaha v. Wendo Christopher Mbale HCCS 0142/2012*, quoting *James Nsibambi vs. Lovinsa Nankya 1980 HCB 81*, Court visits locus to check out on the evidence adduced, so as to appreciate the issues and evidence in support more clearly.

The present case is one where court could have visited the locus to cross check what the witnesses were saying in court regarding size, boundaries, neighbours etc. This did not happen and hence was fatal as it led to misapprehension of the evidence by the court.

The failures above in the result occasioned a miscarriage of justice which court cannot overlook.
In *Matayo Okumu v. Fransiko Amudhe & 2 Ors (1979) HCB 229* **J. Odoki** held that:

> "*a decision appears to have caused a miscarriage of justice where there is a prima facie evidence that an error has been made*."

This was the case here.

Ground 4 accordingly succeeds.

In the result, I find that this appeal succeeds on all grounds. The lower court judgment and orders are hereby set aside. It is ordered that a retrial be conducted before another Magistrate. I so order. Costs to appellants.

Henry I. Kawesa
JUDGE
05.06.2015