THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT HOIMA

CIVIL APPEAL NO. 46 OF 2023

(Formerly Masindi Civil Appeal No. 047 of 2021)

(Arising from Hoima M.A. No. 24 of 2021 and M.A. No. 05 of 2014 both arising from Hoima C.S. No. 035 of 2012)

MASIKO BENON :: APPELLANT

VERSUS

1. MAGARA FRED
2. SSEMPIJA TADEO
3. SSENKAYI GODFREY **:::::::::::::::::::::::::::::: RESPONDENTS**
4. SSEKYANZI ZAKARIA
5. MUSISI JIMMY

Before: Hon. Justice Byaruhanga Jesse Rugyema

Judgment

[1] This Appeal is arising from a Ruling of H/Worship Opio James of the Chief Magistrate's Court of Hoima dated 12th October, 2021 dismissing **Miscellaneous Application No. 24 of 2021** arising from **Miscellaneous Application No. 05 of 2014**, all arising from **Civil Suit No. 35 of 2012**.

[2] The brief facts of the Application are that the Applicant filed **Miscellaneous Application No. 24 of 2021** seeking for an order for enlargement of time to file an Application for Review and

setting aside of the Ruling of **His Worship Jamson Karemani Karemera** (as he then was) in **Miscellaneous Application No. 05 of 2019** (arising from Civil Suit No. 035 of 2021) and costs of the Application. The trial Chief Magistrate dismissed the said Application with costs to the Respondents. The Applicant in the said Application, now the Appellant was dissatisfied with the said Ruling hence this Appeal.

[3] The Appellant formulated 8 (eight) grounds of appeal namely:

1. ***The learned Magistrate erred in law and fact when he failed to properly re-evaluate the evidence on record thus arriving at a wrong decision.***

2. ***The learned Magistrate erred in law and fact when he relied on the Ruling in Miscellaneous Application No. 21 of 2020 which the Respondent had not applied for its review and had not been delivered thus arriving at a wrong decision.***

3. ***The learned Magistrate erred in law and fact when he said that the Court rejected Miscellaneous Application No. 21 of 2020 and directed that execution be done whereas not thus arriving at a wrong decision.***

4. ***The learned Magistrate erred in law and fact when he relied on the arguments of Counsel for the Respondents which were filed on 29th September, 2021 yet the Ruling was made on 9th September, 2021 thus arriving at a wrong decision.***

5. ***The learned Magistrate erred in law and fact when he disallowed the Application.***

6. ***The learned trail Magistrate erred in law and fact when he awarded costs to the Respondent.***

7. ***The learned Magistrate erred in law and fact when he held that the Application was an abuse of Court process.***

8. ***The learned Magistrate erred in law and fact when he ordered for execution of Civil Suit No. 035 of 2012 to issue.***

[4] In his submissions, **Mr. Mutalya**, Counsel for the Appellant proposed the following issues for determination of the grounds of Appeal.

1. ***Whether the learned Magistrate erred in law and fact when he failed to properly re-evaluate the evidence on record thus a arriving at a wrong decision.***

2. ***Whether the learned Magistrate erred in law and fact when he relied on the Ruling in Miscellaneous Application No. 21 of 2020 which the Respondent had not applied for its review and had not been delivered thus arriving at a wrong decision.***

3. ***Whether the learned Magistrate erred in law and fact when he relied on the arguments of Counsel for the Respondents which was filed on 29th September, 2021 yet the Ruling was made on 9th September, 2021 thus arriving at a wrong decision.***

4. ***Whether the learned Magistrate erred in law and fact when he disallowed the Application and awarded costs to the Respondents and ordered execution of Civil Suit No. 035 of 2012 to be issued***

5. ***Whether the Appellant is entitled to the remedies on the Appeal.***

[5] **Mr. Kisajja**, Counsel for the Respondents opted to respond to the issues as framed and in the same order as submitted by Counsel for the Appellant.

Duty of the 1st Appellate Court

[6] In agreement with both Counsel for the parties, the first Appellate Court has a duty to review the evidence of the case and to consider the materials before the trial Judge. The Appellate Court must then make up its own mind not disregarding the Judgment appealed from but carefully weighing and considering it. **Kifamunte Henry Vs. Uganda S.C.C.A. No. 10 of 2007 at p.5.**

Resolution of Issues

Issue No. 1: Whether the learned Magistrate erred in law and fact when he failed to properly re-evaluate the evidence on record thus arriving at a wrong decision.

[7] Counsel for the Respondent while relying on the authority of **Alita Luciro Vs. Obol Hannington, Gulu High Court Civil Appeal No. 012 of 2016** submitted that the 1st ground of appeal violated **0.43 rr (1)(2) CPR**. Indeed, in the **Alita Luciro case** above and other authorities to wit; **Katumba Byaruhanga Vs. Edward Kyewalabye**

Musoke (1999) KALR 261, the 1st ground of appeal as presently framed has been found to be too general that it offends the provision of **0.43 rr (1) and (2) CPR** which require a Memorandum of Appeal to set forth concisely the grounds of the objection to the decision appealed against without any argument or narrative. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. In this case Court is unable to ascertain from this ground of appeal the trial Magistrate's alleged error in law and fact or how he failed to properly evaluate the evidence.

[8] In **A.G. Vs. Florence Batiraine C.A.C.A. No. 79 of 2003,** on that account, Court struck out such grounds of appeal found to be general thus offending **0.43 rr (1) and (2) CPR**. In the premises, I accordingly strike out ground 1 of the Appeal.

Issue No. 2: Whether the learned Magistrate erred in law and fact when he relied on the Ruling in Miscellaneous Application No. 21 of 2020 which the Respondent had not applied for its review and had not been delivered thus arriving at a wrong decision.

[9] Counsel for the Appellant complained that the trial Magistrate in the impugned Ruling made a mention and or did rely on the ruling in **Miscellaneous Application No. 21 of 2020** that Court allegedly rejected yet the Applicant never filed such an application nor was any ruling ever delivered in respect of such.

[10] Upon perusal of the entire record in the lower Court, I do find that indeed, though the Applicant filed the application (**M.A. No. 21 of**

2020) seeking orders, inter alia, that the consent Judgment of 21st January, 2014 be reviewed and be set aside, no ruling was made or written disposing it off. This appears to had occurred so because apparently, on 14th March, 2021, the Applicant filed a Notice of Withdrawal of the said Application. A ruling could not be written for an Application that had been withdrawn. It is therefore not true as Counsel for the Appellant suggests, that the Application is unknown to the Appellant.

[11] However, a careful perusal and study of the impugned ruling, one is able to discern, as Counsel for the Respondent argued, that the trial Magistrate's refusal of **Miscellaneous Application No. 21 of 2021** was a mere accidental slip but intended to refer to **Miscellaneous Application No. 05 of 2014** since it was the Application on record that the then trial presiding Magistrate rejected and it was the application that was the subject of execution.

[12] In the premises, I find that the mistake or error by the trial Magistrate referring to **Miscellaneous Application No. 21 of 2020** (which was apparently withdrawn by the Appellant) was a mere accidental slip that can be corrected under **S.99 CPA** by the Court on either its own motion or on the application by the Respondent to give effect to what was the intention of the Court when the ruling in the impugned Application was given; **Orient Bank Vs. Zaabwe and Anor S.C.C.A No. 17 of 2007.**

[13] As a result of the foregoing, I find the 2nd and 3rd grounds of appeal devoid of any merit and they accordingly fail.

Issue 3: Whether the learned Magistrate erred in law and fact when he relied on the arguments of Counsel for the Respondents which were filed on 29th September, 2021 yet the ruling was made on 9th September, 2021 thus arriving at a wrong decision.

[14] Counsel for the Appellant submitted that the Respondents' Counsel filed their written submissions in reply on the 29th September, 2021. That the Ruling was made on 9th September, 2021 and therefore, before the Respondents filed their submissions in reply. He therefore wonders how the trial Magistrate could in paragraph 4 of his ruling state that the Respondents opposed the Application in their arguments which according to the record were filed after the ruling was made.

[15] I have carefully perused the impugned ruling. I have not been able to appreciate Counsel for the Appellant's argument because the impugned ruling is clearly dated 12th October, 2021 when it was delivered. This implies therefore, that before its delivery, Court was at liberty to consider whatever a raw material that were on record including the Respondents' submissions that were on record by 9th September, 2021. I find the 4th ground of appeal also devoid of any merit. It also accordingly fails.

Issue No 4: Whether the learned Magistrate erred in law and fact when he disallowed the Application and awarded costs to the Respondents and ordered execution of Civil Suit No. 035 of 2012 to be issued

[16] In the impugned ruling, the trial Magistrate disallowed the application with costs on grounds inter alia, that the consent

agreement was voluntarily made and that the Application was an abuse of Court process and therefore granting it would only serve the interest of injustice.

[17] Counsel for the Appellant submitted that the Appellant hoped he could execute the consent because his will was to settle the matter out of Court but that this has since failed as evidenced by the opinion of the surveyor, an expert who was sent by Court to visit locus and establish whether the consent could serve the order but found that the consent could not.

(a) **Whether the Consent Agreement was voluntarily made**

[18] Neither party alluded to any coercion or anything else related to fraud to the effect that the consent on record dated 22nd January, 2014 was either not voluntarily made or made under duress and or misrepresentation.

[19] The major term of the consent agreement was that the Respondents were to forfeit or relinquish the suit land/kibanja comprised in **Block 128 Plot 11 Buhonde-Kibaale District** (specifically the land along **Nalweyo Kisiita Nkooko Road** where the Appellant/Plaintiff had planted or grown cassava measuring **1.75 acres**) to the Applicant/Plaintiff in exchange of the Applicant/Plaintiff withdrawing the pending **Criminal Appeal No. 006 of 2014** in the High Court Uganda at Masindi.

[20] The Surveyor who was commissioned by Court under **Miscellaneous Application No. 05 of 2014** to measure off the land forfeited and or allocated to the Applicant/Plaintiff as per the terms of the consent judgment observed inter alia as follows:

(a) **The Applicant Mr. Matsiko Benon showed the surveyor where the cassava garden was as it had been destroyed and where the said 1.75 acres was to be measured.**

(b) **All the neighbours including the Chairperson L.C. III Kisiita confirmed where the destroyed cassava garden existed.**

(c) **The land from which the measurement of the 1.75 acres was to be done belonged to the Appellant, Mr. Matsiko Benon as per his claim and all the neighbours present but the 1st Respondent/Defendant (the 1st Respondent who claimed an interest thereon) disagreed with everyone yet he had no land to show for execution of the consent.**

[21] The surveyor concluded that the survey of the **1.75 acres** of land could not be done as the parties in suit disagreed with the terms in the consent Judgment.

[22] Whereas in **Miscellaneous Application No. 05 of 2014,** by Court Order dated 4th September, 2018 execution was to issue by way of the District Surveyor measuring off the 1**.75 acres** land for the Applicant as per the terms of the Agreement, the trial Magistrate in the present impugned Application which was for enlargement of time to file an application for review and setting aside the Ruling vide **Miscellaneous Application No. 05 of 2014**, he disallowed it on the grounds the consent agreement having been voluntarily made, the Applicant was seeking unjustifiable orders.

[23] Counsel for the Appellant on the other argued that the Respondent having offered no land to measure off the **1.75 acres**, then the

consent order is inexecutable and therefore, there is still a pending dispute warranting the granting of the order sought in the impugned **Miscellaneous Application No. 24 of 2020.**

[24] I am unable to agree with Counsel for the Appellant. The Consent Judgment dated 22nd January, 2014 is executable. The suit land from which the **1.75 acres** are to be measured off was ascertained by the Appellant/Plaintiff and was confirmed by the Chairperson LC III Kisiita and all the neighbours to the land. As rightly concluded by the trial Magistrate in the impugned Ruling, in the event of default by any parties to the suit, paragraph 7 of the consent clearly provided that the other party would have not the option of recourse to execution proceedings.

(b) **Abuse of Court process**

[25] Under the law, abuse of the Court process involves use of the process for an improper purpose; **Uganda Land Commission Vs. James Kamoga & Anor, S.C.C. No. 08 of 2004**. The common feature of abuse of Court process is the improper use of judicial process by a party in litigation, the most common one being multiplicity of actions on the same issues between the same parties and instituting different actions between the same parties in different Courts; **Ajaokuta Steel Co. Ltd Vs. Greenbay Investment & Securities Ltd & Ors (2019) legalpedia (SC) 11661.**

[26] In the instant case, as correctly submitted by Counsel for the Respondents, the Appellant filed **Miscellaneous Application No. 05 of 2014** against the Respondents seeking for order inter alia, that the consent Judgment entered by the parties in **C.S. No. 035**

of 2012 be set aside. The said Application was dismissed by His Worship Karemani Jamson (as he then was).

[27] The Appellant then filed a fresh Application vide **Miscellaneous Application No. 021 of 2020** against the Respondents again seeking for order inter alia, that the consent Judgment of 21st January, 2019 be reviewed and set aside of which he later filed a Notice of Withdraw but had filed it together with written submissions.

[28] Before Court withdrew or granted the withdraw of **Miscellaneous Application No. 021 of 2020**, the Appellant/Applicant filed the impugned **Miscellaneous Application 24 of 2021** which was accordingly disallowed by the trial Magistrate.

[29] It is apparent therefore that from when the consent Judgment was entered on 22nd January, 2014, the Appellant has filed one Application after the other over the same subject matter. In my view, the Appellant's conduct amount to an abuse of Court process intended to irritate and oppress the Respondents with Court actions, especially filing **Miscellaneous Application No. 024 of 2021** before **Miscellaneous Application No. 21 of 2020** was formally withdrawn. It is this Court's view that surely there must be an end to litigation.

[30] As a result of the foregoing, I find that the trial Magistrate was justified to disallow the impugned application with costs. Grounds 5, 6, 7 and 8 are also in the premises found devoid of any merit and they accordingly fail.

Issue 5: Whether the Appellant is entitled to remedies sought in the appeal.

[31] In the premises that all the grounds of appeal have been found devoid of any merit, it follows that the Appeal is dismissed. Costs follow the event **(S.27 CPA),** the Respondents are the successful litigants, but since it is the 1st Respondent who resisted or hindered the execution of the consent Judgment, the Respondents are not granted costs of the appeal.

[32] The Registrar of this Court is directed to urgently forward the file back to the lower Court for further appropriate action, that is, have the **Consent Agreement/Judgment in C.S. No. 35 of 2012** executed for the 1.75 acres in favour of the Appellant. The Respondents cannot be made to provide an alternative land to the Appellant because to do so, will be contrary to the consent Judgment vide C.S. No. 35 of 2012 between the parties which is still subsisting since it has never been set aside or reviewed and therefore is binding on the parties.

Dated at Hoima this **18th** day of **August, 2023**.

Byaruhanga Jesse Rugyema
JUDGE