The Hon. Justice Tsekoko

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT JINJA

CIVIL APPEAL NO. 9/1993

(ORIGINAL CIVIL SUIT NO. 14/90)

IGULU & 2 OTHERS :::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

IRENE MBALYOHERE :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C. M. KATO

J U D G M E N T

This is an appeal against the Judgment of the Chief Magistrate Jinja. The appellants are: Amisi Igulu, Amuza Bikina and Amudani Waiswa and the respondent is one Irene Mbalyohere (or Mbalyoyere the name is spelt differently in the same case).

The facts of this case as they may be gathered from the record of the lower court are briefly that the respondent bought a piece of land from one Kagongongo in 1980 and she paid 10,000/- for it in 3 instalments as follows: 5,000/-, 3,000/- and then 2,000/-. Later on she discovered that her land was being encroached upon by the defendants. She filed this case against the appellants/defendants for damages in trespass.

On their part the appellants/defendants maintain that the land belongs to the Muslim Community of the area to whom it was given by one Yokana Luba Mukajjanga in 1950 but later the land had to be abandoned due to the flood. They further say that the land has never belonged to the respondent.

The learned trial magistrate found as a fact that the land belonged to the respondent and she accordingly entered judgment in her favour. The appellants being dissatisfied with that judgment filed the present appeal. Mr. Mutyabule who represented the appellants in the lower court and in this present appeal formulated 10 grounds of appeal which are as follows:-

...../2

1. That the trial Chief Magistrate erred when she over looked overwhelming evidence in favour of the appellants and decided the case in favour of the respondent.

2. That the trial Chief Magistrate erred when she refused to appreciate that the doctrine of Resjudicata was applicable to this case since the respondent had filed the same suit over the same subject matter concerning the same parties in the Imanyiro RCI court.

3. That the trial Chief Magistrate erred in that she acted on the unexecuted document which was adduced to prove a sale of the said land between the respondent and one Kagongongo.

4. That the trial Chief Magistrate exhibited bias in the case by issuing an injunction without proper application and putting the appellants in prisons before determination of the suit and without justifiable excuse.

5. That the trial Chief Magistrate upon receipt of a letter from the RCIII Imanyiro immediately misled the respondent to file a suit in court instead of pursuing the case on appeal the case she had lost in RCI Imanyiro. A photo-copy of the said letter is hereto attached and marked annexture "A".

6. That the trial Chief Magistrate erred when she failed to appreciate that the appellants were lawfully holding the land for and on behalf of the Muslim Community of the area who had already erected a school and made other developments on the land for and on behalf of the Muslim Community of the area.

7. That it was inequitable to dispossess the appellants of the land which they had held for and on behalf of a muslim community for over 30 years.

8. That the trial Chief Magistrate having been conversant with the facts of this case right from the time she got a letter from RCIII Imanyiro she ought to have disqualified herself from presiding over this case and should have handed it over to the Grade II Magistrate of the area or some other magistrate to ensure impartiality and a fair trial.

...../3

9. That the trial Chief Magistrate erred when she ordered the appellants to pay shs. 200,000/- as damages which was not pleaded for and upon which she was never addressed and there was no basis for such assessment.
10. That the proceeding at the locus in quo were irregularly conducted in that one Kinawa was allowed to show the court the boundaries without being sworn.

I propose to deal with the 10 grounds of appeal in the order in which they are given above. Dealing with the 1st ground of appeal first. Mr. Mutyabule argued that the learned trial magistrate over looked the overwhelming evidence which had been given in favour of the appellants. On his part Mr. Kania who represented the respondent both in the lower and this court contended that the evidence on record was overwhelmingly in favour of the respondent.

This being a court of the 1st appellate jurisdication has the powers to look at the evidence on record and evaluate it then come to its own conclusion bearing in mind that the trial court had the benefit of seeing the witnesses in the dock, a benefit which the appellate court does not have: Dinkerrai Remkrishan Pandya V. R. (1957)EACA 336 and Williamson Diamonds Ltd V. Brown (1970)EA 1.

I have looked at the evidence as adduced by both sides in the lower court and on the balance of probabilities the evidence clearly establishes that the appellants have never owned the land in question but it was bought by the respondent from Kagongongo. That being the position I must find that the learned trial magistrate was in order when she found that the respondent was the owner of the land in dispute. The appellants had no right to be on her land or to use it without her consent. The appellants' acts obviously amounted to trespass. With due respect I do agree with the argument of Mr. Kania to the effect that the evidence on record was overwhelmingly in favour of the respondent; that disposes of the 1st ground of appeal.

..../4

The 2nd ground of appeal deals with the issue of Resjudicata. In that ground the learned counsel for the appellants argued that the suit was res judicata because the same suit was still pending in the court of RCII at Imanyiro village. On the other hand Mr. Kania argued that the case was not res judicata because the case which was filed in the RC court was between different parties. The plaintiff in that particular case had filed the suit against the chairman of Imanyiro mosque one Ali Musamali. I have had the opportunity of looking at the record on the file and it is clear that the suit which was before the RC courts was in fact between the present respondent and the chairman of Imanyiro mosque. There is nothing in the present proceedings to connect the chairman of Imanyiro mosque and the present appellants. The evidence does not suggest that the appellants are appearing in this case as agents or representatives of the chairman of Imanyiro mosque. In order for the provision of section 7 of the Civil Procedure Act and section 222 of the M.C.A to operate the parties in the previous proceedings must be the same: Hilario Ochenya V. Petero Ogwang (1976)HCB 331. In the present case the parties are definitely different although the subject matter may be the same. I find that the 2nd ground of this appeal cannot succeed.

The 3rd ground of appeal concerns the agreement of sale which the learned counsel for the appellants attacked seriously both in the lower court and when he was arguing this appeal. His argument was that the agreement of sale was never executed in that the respondent did not sign it and therefore it would not be accepted in evidence. The learned counsel for the respondent conceded that the agreement was never executed. I have looked at the agreement and it is true when it was written the respondent did not sign it although the seller of the land Mr. Kagongongo signed it. I agree with the learned counsel for the appellants when he says that this document which was not executed ought not to have been received in evidence, it must be pointed out however, that the case for the respondent did not entirely depend on the existence or non-existence of this agreement. The agreement was only part of the chain of evidence brought to prove the respondent's case. My finding on this point is that although the agreement was improperly admitted in evidence there was some other evidence to

...../5

prove that the respondent had actually bought the land. I find this to be a proper case which falls under section 165 of the Evidence Act. With that finding the 3rd ground of this appeal is disposed of.

In the 4th ground of appeal the appellants through their counsel are complaining that the learned trial magistrate was biased against them because she first had them arrested and thrown into prison after having issued an injunction without any proper application for such an injunction having been made. Mr. Kania the learned counsel for the respondent conceded that the trial magistrate had improperly granted an injunction against the appellants without such injunction having been applied for. It is the law that bias should be proved as a fact. In the present case there is evidence that the learned trial magistrate exercised her jurisdiction improperly when she ordered for the appellants to be arrested but that itself does not necessarily mean she was biased against them. There has been no evidence to show that she ever had any problem with any of the appellants, so it cannot be said conclusively that she was biased against any of them. This ground of appeal cannot be sustained. (see: Halbsbury's Laws of England 3rd Edition volume 25 page 150 paragraph 273 and the cases of: R. V. Camborne Justices Ex parte Pearce (1955)IQ B41 and R. V. Lower Munslow Justice Ex parte Pudge (1950 2ALLER 756).

The 5th ground is not so different from the second and the fourth grounds of appeal. In this ground of appeal the appellants' counsel is bitterly complaining that the learned trial magistrate misled the respondent by telling her to file a new suit instead of telling her to appeal against the decision of RCII court. With due respect I do agree with Mr. Kania's contention that there was no evidence to suggest that the learned trial magistrate ever advised the respondent to file this suit against the appellants. I find no merit in ground no. 5 of this appeal.

As regards to the 6th ground of appeal Mr. Mutyabule the learned counsel for the appellants opined that the learned Chief Magistrate was wrong when she failed to appreciate that the land had been given to the local muslem community and that the appellants were holding that land on behalf of the community.

...../6

Although this matter was pleaded in paragraph 5 of the written statement of defence none of the appellants testified that he had been sued in his resentative capacity as a member or an official of the moslem community so the provisions of Order 1 rule 8 of the Civil Procedure Rules do not apply here and as such the argument that the appellants were holding the land for the other moslems does not arise. The 6th ground of appeal accordingly fails.

That leads me to the 7th ground of this appeal. Mr. Mutyabule's argument on this ground of appeal was that it was inequitable for the learned trial magistrate to have ordered the appellants to quit the land which they had held on behalf of the moslems for over 30 years, he based his argument on the case of: Mutesi V. Oitimong. I have already stated elsewhere in this judgment that the appellants did not appear in this case as agents or lawful representatives of the moslem community so the argument that they had held the land on behalf of the community for so long does not arise. That puts the 7th ground of this appeal to an end.

I now turn to the 8th ground of this appeal. This ground of appeal is simply that the learned trial magistrate should have disqualified herself from presiding over this case because she had been already conversant with the facts of the case when the Chairman RCIII wrote to her about the matter. Mr. Mutyabule the learned counsel for the appellants seriously argued that this being a case which was triable by magistrate grade II it should have been started in the Magistrate Grade II's court under the provisions of section 220 of the M.C.A. With due respect I do agree with learned counsel's argument that since the Chairman RCIII had written to the Chief Magistrate therefore that made her conversant with the facts of the case. As a Chief Magistrate she was entitled to receive such a correspondence and that in itself did not render her incompetent to try the case. As regards to the provision of section 220 of the M.C.A that section does not prohibit a magistrate of higher jurisdiction to try a suit where the parties anticipate damages to be much higher than that which a lower court may award. I do not find any merit in this ground of appeal.

..../7.

Ground 9 of the appeal was that the trial magistrate awarded damages when they had not pleaded for. This ground cannot be said to be entirely true because in paragraph 7 of the Plaint and in the prayer the respondent pleaded for damages for trespass. It is however, true to say that the learned counsel for the plaintiff/respondent did not address the court on the issue of damages in his submission but the learned Chief Magistrate in her judgment did give reasons as to why she came to that figure of 200,000/-. The reasons were that the plaintiff/respondent had been using the land for cultivation of food to feed her children and she is a widow and she had been deprived use of that land. So it is not true to say that the 200,000/- damages were not prayed for or that there was no reason given for awarding such damages.

The 10th and last ground of this appeal was that the proceedings at the locus in quo were irregularily conducted because one Kinawa was allowed to show court the boundary of the land without being sworn. Mr. Kania conceded that this man's evidence had been given without being sworn but I have gone through the record of the locus in quo and I found nowhere this man having testified even if he testified as it has been said still I believe that the Judgment of the lower court was not based entirely on what he said. This ground of appeal fails.

In all these circumstances I find that this appeal cannot succeed it is accordingly dismissed with costs of this appeal and that in the court below to the respondent/plaintiff.

C. M. KATO
JUDGE
7/10/1994