THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

H.C.C.A NO. 16 OF 1993

CIVIL APPEAL NO. 67 OF 1988

1. SAMWIRI SAJJABI)
2. KADIRI MUGWERI)
3. BA KALI WALUUBE) :::::::::::::::::::::::::::::::::: APPELLANTS
4. SIMON MUSAMBA)
5. WILLIAM MIRIMO)

VERSUS

SAMWIRI ISAZAKULYA) :::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C. M. KATO

JUDGMENT

This is an appeal against the judgment of the learned Chief Magistrate of Jinja delivered on 11/8/1993. There are 5 appellants namely: Samwiri Sajjabi, Kadiri Mugweri, Bakali Waluube, Simon Musamba and William Mirimo, the respondent is Samwiri Isazakulya.

The case which concerns a land dispute originated from the court of RC1 Budima where the present respondent lost, he appealed to RCII court of Budima where he also lost, the matter then went to RCIII court of Butagaya where he still lost, finally the matter went to the Chief Magistrate's court in its appellate jurisdiction and the learned Chief Magistrate decided the case against the 5 appellants in favour of the respondent. The appellants then appealed and gave 2 grounds of appeal which were as follows:

1. That the learned Chief Magistrate erred in law and fact when she failed to sufficiently consider or take all the evidence on record and thereby arrived at a wrong decision thereby occasioning a miscarriage of justice.

2. That the learned Chief Magistrate erred in law when she found for the respondent inspite of the fact that the respondent's claim was barred by the Limitation Act.

Mr. Tuyiringire who appeared for the appellants while arguing the 1st ground of the appeal argued that the learned Chief

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Magistrate ignored the evidence of Nsimbindala who supported the appellants' case and that if she had properly considered the evidence of this particular witness she would have come to a different decision. It must be said that this is one of the cases originating from RCs courts where ordinary court procedures are not properly followed as a result the evidence in all of these courts was not properly recorded nor was it recorded on oath, it was therefore very difficult for both the Chief Magistrate's court and this court to follow exactly the evidence of those people who allegedly made statements in the three RC courts.

This being the 4th appellate court is is not so much concerned with the evidence on matters of fact. It is concerned more with law rather than findings of fact in the lower courts. I have looked at the records of the learned Chief Magistrate and the records of the lower courts and I have come to the conclusion that there were a number of fundamental irregularities committed by the learned Chief Magistrate in this matter. In the 1st place the learned Chief Magistrate gave the impression that she was hearing an appeal from all the 3 RC courts, which was not the case. The appeal was specifically against the decision of RCIII court, it was therefore irregular for her to review the decision of the other 2 courts as she did.

The 2nd irregularity is that when the learned Chief Magistrate sent the Grade II Magistrate to visit the locus-in-quo on her behalf she relied on the findings of the Grade II Magistrate to make her decision. It was not quite clear as to what prompted the learned Chief Magistrate to adopt that procedure when she was hearing an appeal and not a re-trial. I have not come across any record as to whether or not the court was moved by any of the parties to take fresh evidence from the parties, in absence of that information on record I can only say that the procedure was irregular. By provisions of section 54 of the Civil Procedure Act court has power to send somebody else to record evidence on its behalf, by provisions of section 81(1)(d) of the Civil Procedure Act and Order 39 rules 22 and 23 of Civil Procedure Rules which are applicable to Chief Magistrate' court under section 231 of the M.C.A., a court is allowed to get

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fresh evidence on appeal but there are rules which must be followed, in this case the record does not show that such rules were followed. In her letter of 7/7/93 the leanred Chief Magistrate simply directed the Grade II Magistrate to go to the locus in quo and draw a sketch plan of the land in dispute because she did not find such a plan on the record, this clearly shows that the court was not moved by any of the parties to have additional evidence heard on appeal. The Grade II Magistrate who visited the locus in quo did not only draw a sketch plan as directed but he held another hearing at the locus in quo which was improper.

I now turn to Mr. Tuyiringire's argument that if the learned Chief Magistrate had not ignored the evidence of Nsimbindala she would have found for the appellants, with due respect, that is not true because according to the record of RC1 court a statement attributed to Nsimbindala seems to show that the land actually belonged to the present respondent; so this argument is not quite correct.

As regards to the 2nd ground of appeal Mr. Tuyiringire argued that the learned Chief Magistrate was wrong to have made a finding in favour of the respondent when the matter was time barred. With due respect to the learned counsel this issue cannot be maintained because it was the appellants who first instituted the suit against the present respondent in RC1 court of Budima, they are therefore estopped from raising the issue of Limiation Act on this appeal, if anything it was the appellants who were wrong to have instituted the suit when it was time barred. I find no merit in this 2nd ground of appeal.

In view of the two material irregularities evidenced in the court of the Chief Magistrate this appeal is allowed; each party is to meet his own costs. I order that the case be re-tried by another court of competent juridiction preferably magistrate grade II but not any of the RC courts. Unitl the re-trial is carried out the parties are to maintain the positions which they occupied before the suit was filed in RCI court.

C.M. KATO
JUDGE
29/3/1995