THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0080-2009)
(ARISING FROM PALLISA CIVIL SUIT NO. 66 OF 2005)

MWEMEKE GODFREY.....APPELLANT

VERSUS

1. **KAKONGE MAGONA**
2. **MUKUNU MESULAMU**
3. **SISYE PAUL**
4. **MUGODA WILSON**
5. **KATAIKE LUSI MAGONA**
6. **TAZENYA SADIKI**
7. **TAZENYA THOMAS.....RESPONDENTS**

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

JUDGMENT

Appellant being dissatisfied with the Judgment and Orders of His Worship Magistrate Grade I Pallisa dated 19th June, 2009, appealed to the High Court on grounds that:

1. The Trial Magistrate erred in law and fact when he failed to evaluate properly the evidence adduced by the appellant hence arrived at a wrong decision.
2. The trial Magistrate was totally biased during and at the time of delivering the judgment.
3. That the said decision has occasioned a miscarriage of justice.

He prayed that appeal be allowed, the Judgment and orders of the lower court be set aside, and judgment be entered for appellant with costs.

Appellant sued Respondents for recovery of land situate at Magala village, Kagumu in Pallisa District; which land he allegedly purchased from the 1st Respondent.
The learned Trial Magistrate heard the matter and decided it in favour of the Respondents.

It is the duty of a first appellate court to review the evidence with a fresh scrutiny and to come up with its own conclusions bearing in mind the fact that it did not have the benefit of listening to the witnesses and take note of their demeanour. See ***Baguma Fred v. Uganda SCC No. 7/2004*** and ***PANDYA V. R (1957) EA 336***.

From the lower court record the plaintiff's case was as follows:
PW.1 Mwemeke told court he had bought the disputed land for shs. 1,350,000/= millions from **D.I (Kakonge Magona**) in 1997. The transaction was witnessed by **Ariong John Chairman LC.I, Daudi Mugoda (D.4**) all defendants were in attendance, and a one Edward Stephen wrote the agreement for them. He exhibited a copy of the agreement which he told court he thumb marked, and D.1 and his son endorsed. In 2005 he received information that his crops on the land had been damaged and new boundaries elected using "Birowa trees". He established that this act was done by **Kakonge, Sadiiki, Tomasi, Mugoda** and **Sisye**. He reported to LC.I Majangala village who referred him to Kamuge Police who in turn referred him to Pallisa land tribunal.

A suit was opened in the land tribunal which matter was inherited by the Pallisa Court.

PW.2 Dumba Stephen was the writer of the sale agreement and his signature. He confirmed that PW.1 was the buyer.

PW.3 Aryongo John told court that he has been LC.I Chairman since 1988 todate of testimony. He informed court that PW.1 had requested him to witness a sale transaction between him and DW.1. This was at Majala village in 1997. This was the final payment since earlier he had paid shs.280,000/= valued in a bull which he also witnessed. He confirmed that an agreement was made between the parties. He identified the agreement, his name thereon and his LC.I stamp.

He further confirmed that after the transaction plaintiff built homes on the land and used it until 2005. He was informed by his vice chairman that defendants had conspired to deprive plaintiff of the land they had earlier sold to him. A report was made to him and he verified that indeed plaintiff's crops had been destroyed and he forwarded all defendants to Kamuge Police Post as culprits. He confirmed to court that the land which D.1 sold to plaintiff was his but because he wanted to grab it he alleged it is for his won.

PW.4 Daudi Ounyu, a neighbour to plaintiff and confirmed that he also bought his piece f land from D.1. He bought in 1993. When plaintiff bought he was present and attended the sale transactions which involved a first payment of a bull valued at 280,000/=. He was not present when he finalised the next instalment but was informed about it. Plaintiff's houses collapsed and he began committing to attend to his crops thereon till 2005. In 2005, the defendants met as a clan and

resolved that the land be given to **D.6 Tesanya Sadiq**. All plaintiff's land was thereby given to D.6 and all his crops thereon were destroyed. **Sadiki** began using the land and this witness went and informed plaintiff of the said developments.

In defence, the defendants testified as follows:-

DW.1 (D.1) Magona Kakonge denied ever selling the land to plaintiff. He said PW.1 was a mere friend to whom he entrusted his land. In 2005, the clan met and handed the land to D.6; but plaintiff had no crops thereon.

DW.2 Mesulamu Makum claimed he was residing a land given to him by his father **Zinsanze**. He attended the clan meeting on 13.11.205 which resolved to give the land in dispute to D.6; who wanted land from D.1 as a share. Until then, he conceded he used to see plaintiff utilising the said land.

DW.3 Sisye Paulo told court that the disputed land belonged to **D.6 Terezenya Sadiki** and it was given to him by his grandfather **Misaki Kakonge** in 1986. At that time D.6 was one year old baby with his mother **Lusi (D.5**). He denied knowledge of the sale by D.1 to PW.1.

DW.4 Mugoda Wilson said the land was never sold to plaintiff. He said in 1997 the land was entrusted to D.1 a fact he knew from a clan meeting of 23.10.2005 when the clan handed the land to D.6. That at the time there were maize crops and cotton on the land, though he didn't participate in their destruction.

DW.5 Kataike Ruth told court that plaintiff was very good friend of D.1. D.1 entrusted his land to PW.1 while going to Busoga. When D.6 attained majority

age, she took him to show him the land entrusted to plaintiff in absence of her husband (D.1). Later she went to Busoga and complained to D.1 that plaintiff had put up a house on the suit land. D.1 confronted PW.1, who broke the house, vacated the land, and it was handed over to D.6. That D.6 was 6 years when she showed him the land in 1997.

DW.6 Sadiki Tazenya; that the land was given to him by his mother in 2003. That plaintiff surrendered the land to him voluntarily in 2003, and in 2005 he went to clear the land but plaintiff warned him, claiming ownership of the land.

DW.7 Tazenya Tomasi told court that the land belongs to D.6 who got it from their grandfather **Misaki Kakonge** in 1986 while D.6 was five years. That he was in attendance with DW.8.

DW.8 Pulisi Aramanzan claimed the land was given to D.6 by their grandfather **Misaki Kakonge** in 1998 when D.6 was one year old; and that he was present.

DW.9 Sisye Paulo, told court the land was given to D.6 by their grandfather in 1986, and D.6 was 2 months old. He was present.

DW.10 Dodoviko Ndulwe told court that he is a neighbour to the suit land and it belongs to (D.6) who got it in 1986 from his grandfather **Misaki**.

All that evidence on record having been reviewed, in his Judgment the trial Magistrate is on record as having considered four issues, which he resolved all in

favour of a finding that the land did not belong to the plaintiff. His reason was basically that:

Exp.1- the sale agreement to him was not reliable because well as plaintiff claimed that he could neither read nor write, and thumb marked the agreement, "there is no proof that the thumb mark reflected on the agreement belongs to him (plaintiff)".

Secondly that the author of the sale agreement (PW.2) didn't endorse all his names on the agreement therefore "Court doubts his sincerity".

Thirdly that PW.3 and PW.4 do not appear on the agreement as witnesses. He therefore rejected the agreement and thereby found no evidence to support plaintiff's case, finding that defendant's explanation entitles him to the suit land.

In his submission Appellant's counsel argued grounds 1 and 2 together. He reviewed the evidence and pointed out that the trial Magistrate had no valid reason to reject plaintiff's evidence as he did. He pointed out problems reflected as defendant's case pointing out various lies and inconsistencies there in which the Magistrate ignored yet they go to the root of the case. He also pointed out an illegality that court never visited the locus, an omission which led the court to wrong conclusions.

On ground 3, he argued that the decision occasioned a miscarriage of justice since D.1 claimed the land was his yet other witnesses claimed the land is for D.6, a fact which led to court giving away plaintiff's land rendering him landless. He also lost his crops. He therefore prayed for compensation.

However respondents' counsel invited court to find that the trial Magistrate property evaluated the evidence. He also invited court to ignore the "smuggled in"

issue of failure to visit the locus. He prayed that ground 2 of bias be disregarded as no evidence shows bias. Ground 3 was to him unmerited.

In answering this appeal, I will handle each ground separately as presented by appellants in submission.

Ground 1 and 2: Evaluation of evidence and bias

The learned trial Magistrate enumerated the evidence of the witnesses and made certain conclusions as in his judgment. However the record as reviewed by this court contains evidence which clearly shows that there was a sale of land transaction between PW.1 (Appellant) and D.1 (Respondent), properly evidenced by Exp.1 and PW.2, PW.3 and PW.4.

The law of evidence clearly stipulates in sections 60 and 61, that documents are proved by them being produced for inspection of the court – which was done in this case. Secondly the issue of the "thumb print" was not raised in the trial by anybody. The court on its own motion should have given the plaintiff chance to be heard on this matter if it needed further proof by invoking section 72 (2) of the Evidence Act by requiring the plaintiff for an impression of his thumb print from which he would infer his conclusions. This was not done, and court should not condemn a party unheard on any issue before it. Moreover section 69 of the Evidence Act provides that "the admission of a party to an attested document of its execution by himself or herself shall be sufficient proof of its execution against him or her." It is on record that the author of that agreement PW.2 testified. His testimony was well collaborated by PW.3, who not only witnessed the making of the agreement but was the LC.I Chairman who even stamped the said agreement.

It is important to note that PW.3 gave a detailed testimony regarding the nature of this transaction and how defendants conspired later so that D.1 who is father to D.6, when confronted for land by D.6 chose to repossess PW.1's land which he had sold to him.

All this evidence was ignored by the Magistrate on a flimsy excuse that since the writer of the agreement did not put his names (both) he was doubtable. What was doubtable about an author of a document who comes to testify, identifies his name, and consistently gives evidence which is collaborated by other witnesses (PW.3 and PW.4)?

The findings of the trial Court that because PW.3 and PW.4 did not appear on the agreement as "Ababadewo" is strange. The agreement shows that among "Ababadewo" were some of the defendants including "D.6". Why didn't he as court find it pertinent to question the fact that some of the defendants appear on this agreement?

The agreement was not properly assessed by the trial Court, and its rejection was not based on known rules of law or natural justice. Similarly the brushing aside of PW.2, PW.3, and PW.4's evidence, which I find consistent and well articulated was erroneous and without reason.

There is no evaluation of the defence case by the trial Magistrate. If he had bothered, he would have found that the defendants deliberately told court lies, were very contradictory and denied obvious truth. I will show some of it here.

1. The defendant (1) in evidence in chief claimed to be the owner of the suit land, and that he entrusted it to plaintiff until 2005, when the clan met and gave it to D6; his son.
2. D.6 testified that he owned the land since 2003, when plaintiff vacated, since his grandfather gave it to him (so it was never D.1's land!!).
3. DW.3 – claimed land was for D.6 who got it in 1986 from his grandfather when 1 year old.
4. DW.5 said land was for D.6- he got it in 1997 while he was 6 years old.
5. D.7 said D.6 got the land in 1986 at five years of age; and he attended the giveaway function.
6. D.8 and D.6 got it at 6 years of age in 1986 and he also attended the function.
7. D.9 said D.6 was 2 months old in 1986 when he got land from his grandfather.

The above contradictions are not innocent. If the giveaway meeting was held why is it that each witness cannot remember the age of D.6 at the time and year of the giveaway? These are close relatives and all came to court with a single mission- to dispossess plaintiff of land they had sold to him under the guise of a clan meeting held in 2005. Had the trial Magistrate addressed himself to this evidence together with evidence of PW.1, PW.2, PW.3, PW.4 and PEX.1, he would have found that the land in question had been sold by D.1 who had lawful possession of it in 1997, to PW.1.

To prove the above further as a first appellate court I had occasion to peruse the entire lower court record including the tribunal proceedings which PW.1 referred

to in his evidence in chief. On the land tribunal file between the same parties referenced claim No. PDLT.66/2005, is a letter dated 3.11.2005 to the tribunal from the Magistrate of Bakatemina clan, informing the tribunal that the clan sat on 23.11.2005 to settle the dispute between the son and his father (***SADIKI TAZENYA V. MAGONA KAKONGE***), where the son accused his father for selling land to a non clan member without their consent. They decided that the father refunds the money on 12.11.2005. The said **Kakonge Magona** signed on attachment acknowledging that he would give back the land to his son. All this is dated 15.11.2005, and is on the Tribunal proceedings record.

It is important that the defendants all testified that in 2005 they met as a clan and handed back the land to the (D.6), claiming the plaintiff had grabbed it. This piece of evidence is important as it shows that defendants deliberately lied to court about the sale of the land by D.1 to plaintiff as evidenced by the above pieces of evidence on the tribunal record.

I wonder why the trial Magistrate who inherited the file from the land tribunal and was meant to study and internalise it could fail to connect it to the matter he was purportedly hearing between same parties and on same facts. If it wasn't relevant then it wouldn't be forming part of the lower court records forwarded to the Appellate court. There was definitely a failure by the trial Magistrate to evaluate the evidence correctly and he thereby reached erroneous conclusions. This ground must succeed.

Before I take leave of this ground, I would like to address the issue of visiting locus.

The matter though smuggled in, is a relevant factor to bring to the attention of court. Contrary to arguments advanced by counsel for Respondents to show that it is not mandatory, I beg to differ with due respect to cases he referred to. I wish to point out that it has been continuously held by this court and superior courts before that failure to visit locus in a land matter is fatal and renders the trial a nullity. See cases of ***James Nsibambi v. Lovinsa Nankya (1980) HCB*** followed in MUKDHA ***TWAHA V. WENDO CHRISTOPHER MBALE HCA00142/2012***, and many others. It is therefore necessary to distinguish the quoted cases from the above cases which clearly stipulate that a trial Magistrate/Judge in a land matter must visit the locus and follow the outlined guidelines in order to judiciously make findings of fact related to the dispute. On this ground alone which has been drawn to my attention, I would allow the Appeal. An illegality once drawn to the attention of court cannot be allowed to stand as held in (***MAKULA INTERNATIONAL V. CARDINAL NSUBUGA).***

The above findings dispose of ground 1 and ground 2.

Ground 3: Miscarriage of Justice.

It was held in ***Matayo Okumu v. Fransisko Amudhe & 2 Ors (1979) HCB 229*** by **J. Odoki** as he then was that:

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

This is in agreement with the defunction cited by defence (Respondent's Counsel from Halsbury laws of England Vol.10 page 583- "*Where there has been*

misdirection by the trial court in a matter of law or fact relating to the evidence given, or where there has been unfairness in the conduct of the trial."

From the findings of ground 1 and ground 2 there were gross misdirections committed by the trial Court while assessing evidence. There is prima facie evidence that the trial Magistrate erred in disregarding the appellant's vital evidence and in failing to visit the locus, and to review evidence as a whole. His findings therefore occasioned a miscarriage of justice. This ground succeeds as well.

In the final analysis I find that the appeal has been proved on all grounds. It is accordingly allowed, the Judgment and orders of the lower court are hereby set aside. Evidence proved that the land belongs to the Appellant who bought it from D.1. Costs of the appeal and in the lower court are granted to the appellants. I so order.

Henry I. Kawesa

JUDGE

24.07.2014

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25.03.2014

Appellant present.

Wamimbi for Appellant present.

Madaba Alfred for Respondent.

All Respondents in court.

Wamimbi: Matter is for hearing. We seek leave of court to file written submissions. We are ready to file by end of the next week and serve Respondent's counsel.

Madaba: We have no objection. We can reply within one week if so granted by court.

Henry I. Kawesa
JUDGE

Court: Prayer to file written submissions is granted. The appellant to file by the 14.April.2014, Respondents by 26/ April/ 2014 Rejoinders by 29/ April/2014. File mentioned on 30/April/2014 for fixation of judgment date- I so order.

Henry I. Kawesa

JUDGE

04.07.2014

Wamimbi for Appellant.

Appellant absent.

Obedo for **Counsel Madaba** for Respondents.

Respondents present.

Wamimbi: Matter is for fixation of Judgment.

Court: Judgment fixed for 24/July/2014.

Henry I. Kawesa

JUDGE

24.07.2014

Jude Wamimbi for Appellants.

Madaba Alfred for Respondent.

Parties absent (were around but left).

Wachemba Robert Clerk for **Madaba** present.

Court: The Judgment duly communicated to parties above.

Henry I. Kawesa

JUDGE