THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0096 OF 2009
(FROM ORIGINAL BUSIA LAND SUIT NO. TOR-00-0036 OF 2007)

THE REGISTERED TRUSTEES OF
THE ARCHDIOCESE OF TORORO ::::::::::: APPELLANT

VERSUS

1. **WESONGA REUBEN MALABA**
2. **WESONGA JOSEPH MALABA**
3. **MALABA MILTON**
4. **HADOTO DAVID PAUL MALABA**
5. **HADOTO ABRAHAM**
6. **WERE JAMES ::::::::: RESPONDENT**

BEFORE: HON. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellant raised 5 grounds of appeal. Two grounds were raised in cross appeal.

This is a first appellate court. Its duty is to reevaluate the evidence and come up with fresh findings there on. See *PANDYA V. R (1957) E.A 336.*

I will not reproduce the facts as they have been well articulated by both counsel in the appeal and cross appeal. I will move into discussion of grounds as argued by the parties, bearing in mind the facts and evidence, as on record in the lower court.

GROUND NO.2: LOCUS IN QUO

There is a wealth of decisions on this topic. Both counsel have cited some of them. What matters however is to consider each case on its own facts and then apply those facts to a given set of governing laws and procedure.

The general rule in land practice today is that courts, before finalizing the trial of land matters, should visit the locus. The purpose of this visit was well articulated in the case of ***Deo Matsanga Vs. Uganda 1998 KALR 57*****,** that:

> "*The purpose of visiting the locus in quo is to cross check on the evidence adduced during the trial. The proceedings at the locus should form part of the court record. The trial Magistrate should record everything that a witness states in the locus in quo and recall him to give evidence of what occurred on oath and opposite party is afforded an opportunity to cross examine him*"

The case above made reference to earlier cases of *ACAR & 3 OTHERS VS. ALFRED ACAR (1982) HCB* ,

EMUKANA JAMAGORA V OBBO OGOLA (1976) HCB 31, and

YASERI WEIBI VS. EDISA BYANDALA (1982)HCB 28

The gist of all those cases is that once court visits the locus, evidence at the locus is conducted as part of the trial. There is no adding to or closing gaps at the locus. The evidence only clarifies what has already been testified in court.

In view of arguments made by respondent as to whether visiting locus is fatal or not, the majority of court decisions cited seem to suggest that failure to visit the locus is most likely to result into a failure of justice because it is intended that court should move at the scene where the land is so as to clarify the facts raised in open court. It's the peculiar nature of land transactions that makes the visit a necessary part of the trial and proper conduct of it to be exercised by the trial Magistrate /Judge. Where there is failure so to do, it is more often than not likely to

result into a nullification of the trial depending on the facts of the case. This position was well articulated in the following cases:

DAVID ACAR AND ORS VS. ALFRED ACAR (1987) HCB 60

YASERI WEIBI VS. EDISA BYANDALA (1982) HCB 28,

OKOTH OWOR VS. SUNDAY MUVUWALA CA 0028/2013,

JAMES NSIBAMBI VS. LOVISA NANKYA (1980) HCB.

I have gone through the record in this case. I find that the case involved two parties each claiming that they were the rightful owners of the land in question. The plaintiffs gave evidence showing that they were given the land long before defendant's claim arose. Plaintiffs also showed by evidence that they were successors in Title and their father had donated land to the school which encroached on their land through the "Church parishioners." The evidence in the lower court refers to "three claimants. These were the "plaintiff", "the Church", and the "School." The visit to the locus therefore was very vital in this type of case to enable the parties to clarify the boundaries, the locations of the Church land vis-a-vis the school land. It would enable court to make the observations and to clarify evidence on record. None of that is on record of the visit on locus. As much as the learned trial Magistrate did not refer to the proceedings at locus in his judgment, it becomes questionable, in view of the balance of probabilities what was the basis of his convictions that plaintiffs' title was inferior to that of defendants. The failure to record the proceedings at locus and make them part of the record, so as to guide the appellate court on the lower court's findings on the issues is in my view a fatal omission. I therefore do uphold ground 2 as proved.

GROUNDS 1, 3, 4 AND 5 AND GROUND 1 CROSS APPEAL.

These relate to evaluation of evidence by the learned trial Magistrate. It is appellant's contention that if the trial Magistrate had properly evaluated the evidence he would have found that each party laid claim to a portion of the land, and that trespass was never proved.

Reference was made to case of *LUTAYA VS. STIRLING CIVIL ENGINEERING COMPANY LIMITED SCCA 11/2002* & that of *SEBULIBA BUSULWA Vs. COPERATIVE BANK LTD (1982) HCB*, which held that documents tendered in, form part of the evidence. The learned trial Magistrate ignored the defendants' documents in his judgment.

However counsel for respondent made contrary arguments and invited court to find as such.

The review of the lower court judgment in my view leaves more to be desired than it answers on the question of trespass.

In discussing this issue at paper N0.4 (no pages) of his judgment he states thus in paragraph 4 thereof:

> "*As regards whether or not the church trespassed on the land the defence shows that the church claims ownership of the land but it was the duty of the prosecution to prove that the church entered into the land. According to the pleadings it was the parishioners who entered… the evidence of PW1 shows it's the church entered in the land through Mavero primary school which is Church funded. Other witnesses said it was the church*."

This leaves court with many unanswered questions like, who entered? Parishioners? School? Church? Who was on trial?

These questions show that plaintiff's case was not proved on the necessary standard of balance of probability. Indeed the learned trial Magistrate finally states;

> "*In my view there was need to produce evidence to prove that the church actually participated in the alleged acts….. If trespass was committed by the School it's the School management committee which should have been sued not the Church, I am unable to find the Church liable…*"(paper 4 paragraph 5 of the lower court's judgment).

Having found as above, it is surprising to find that the learned trial Magistrate again concluded that:

> "*The land belongs to the plaintiffs, but the parishioners are representatives of the Church, but the Church can be restrained from interfering with the land*."

Clearly the learned trial Magistrate was confused in his assessment of this evidence.

My own review of the evidence shows that a lot of vital evidence from the defence was never assessed. The court's failure to properly evaluate this evidence led the court to fail in its conclusions even as to who was liable. There was evidence by documentary exhibits from both parties on the basis of which they were claiming rights. The court was faced with the problem of deciding who was the right party to come to court. Was it the plaintiffs in their respective capacities? Were the trustees rightly sued? Who is the Church? Who is the School? Who is the management committee? All these questions unless answered left the judgment of

the learned trial Magistrate suspect. It is correct therefore to conclude that trespass was never proved. Liability was never proved. Ownership was never proved. All these grounds in the main appeal succeed but ground 1 of the cross appeal fails.

CROSS APPEAL GROUND 2

The refusal to grant costs was premised on the fact that court failed to find appellants in trespass. I have made a similar finding. The law is truly as quoted in ***KANOBLIC GROUP COMPANIES LTD VS. SUGAR GROUP OF UGANDA SCCA N0.15/ 194***

> "*Courts have held that a successful party is entitled to his costs*."

The nature of this case as it were showed that the trial Magistrate though found for plaintiffs again denied them costs. I do not agree with the principle he used to deny costs because if he found for plaintiffs, he ought to have granted them costs. The finding of the learned trial Magistrate to deny costs was therefore wrong in law.

However having found that his findings that plaintiffs were the owners was also erroneous, this ground will be denied.

In the final analysis the appeal succeeds on all grounds while the cross appeal fails on all grounds. Appellants are granted costs. It is ordered that a retrial be conducted before another competent court. I so order.

Henry I. Kawesa

JUDGE

31.03.2015