THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0180-2014

(ARISING FROM TORORO CIVIL SUIT NO. 71/2013)

(ARISING FROM ADMINISTRATION CAUSE NO. 0160/2011)

EKWARO PAUL……..……..APPELLANT

VERSUS

NYAKECHO EMERESIANO…….…….…….RESPONDENT

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

JUDGMENT

The Appellant filed an appeal against the judgment and orders of Her Worship **Acaa Ketty Joan** Magistrate Grade I Tororo of 17th October 2014.

The grounds of appeal were that:

1. The learned trial Magistrate erred in law and fact in failing to visit the locus in quo hence making an erroneous decision.
2. The learned trial Magistrate erred in law and fact in failing to properly evaluate the evidence on record.
3. The learned trial Magistrate's decision occasioned a miscarriage of justice.

He prayed that the appeal be allowed and the judgment and orders of the lower court be set aside with costs here and below.

The duty of a first appellate court are laid out in the famous case of ***Baguma Fred v. Uganda SCC Appeal 7 of 2004*** that the duty of a first appellate court is to reconsider all material evidence that was before the trial court and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusions on the evidence.

Also as per ***Pandya v. R [1957] EA 336*** it's the duty of this court therefore to re-evaluate the evidence and in so doing to reach its own conclusions. I will follow the order of arguments as presented by the appellant.

Ground 1: Failure to visit locus:

The appellant argued that the failure to visit the locus in quo so as to determine whether the Respondent was the right person to administer the estate of her late husband which included clan land was a gross omission which led the learned trial Magistrate to reach an erroneous decision.

In reply the respondent argued that this was a misguided argument. The principle issue before court was who had the rights of grant to the Letters of Administration. Ownership of the suit land was therefore not a principle issue and the visit to the locus in quo was not necessary or vital to the proceedings.

This court finds that the parties were before the lower court, regarding an application for letters of administration by the Respondent. The facts were that the Respondent applied to the Tororo Chief Magistrate's Court for Letters of Administration to her late husband; **Oketcho Boniventure**. The appellant opposed the application by lodging a caveat and contended that the land in dispute for which the Respondent sought letters of Administration was clan land.

I notice from the lower court record that a full trial was conducted and court considered among other issues who was the right party to administer the estate.

The record indicates that the Respondent/Plaintiff led evidence in court of three witnesses in a bid to establish before court why she was applying for the grant. She was able to show through PW.1, PW.2, PW.3 that she was a widow to the deceased and had hence applied in that capacity to administer the deceased's estate. Among the properties left by the deceased was the land in issue.

On record the Appellant/Defendant led evidence in court through DW.1-DW.6, all who sought to show court that the Respondent should not be given letters of administration because the land was clan land.

Counsel for the Respondent referred this court to decide cases ***Asiya Nalule Kigozi v. Hamisi Walusimbi HCAC. 14 of 1994*** where **Justice Kania** pointed out that in granting letters of

Administration courts consider the person with the greatest interest in the estate. The widow, a legal wife of the deceased therefore took precedence over the appellant who was a mere clan head. (Section 28 and 201 of the Succession Act).

He also referred to ***Veronica Nyadoi vs. Waryamo Obbo HCCA 0060/2007*** where **J. Muhanguzi** held that a visit to locus is only necessary to clarify matters referred to in court and the material put before court was enough to form a basis for the decision then the visit would not be necessary. Similar holdings have been held in ***Silai Mbulante vs. Joyce Mayeku HCCS No. 0050 of 2002*** and ***Safina Bakulimya & Anor. V. yusuf Musa Wamala CA 68/2007*** where the Judge opined that courts move to locus in quo only in deserving cases to verify evidence already given in court in land matters.

I am therefore persuaded by the arguments above in my findings that:

1. The matter before court was not a land dispute, but rather an application for Letters of Administration.
2. The issue of land was raised by the Appellant, as a basis of raising a caveat. The hearing before court was aimed at determining the merits and demerits of the caveat. Since there was no evidence before court either from PW.1-PW.3, or DW.1-DW.6, showing that the widow (Respondent) was in breach of the requirements to apply for the letters of Administration, there was no need for court to visit the locus.

Evidence in court sufficiently established the rights of the appellant viz-a-viz the Respondent.

I find that the Magistrate at page 5 of her judgment referred to section 201 of the Succession Act to find a legal basis for her finding that the Respondent by virtue of Section 27 (c) (ii) of the Succession Act, was legally entitled to apply. The trial Court further considered the fact that for a person to lodge a caveat he/she must show that he/she has a legal or equitable interest in the property. The learned trial Magistrate found that neither PW.1 to PW.2 or DW.1 to DW.6 showed that defendant/appellant had any interest in the suit land.

I have examined the evidence on record and do agree with the conclusions above by the learned trial Magistrate.

The appellant claimed the land was for the clan, yet conceded the deceased lived on it since 1957 with his wife (widow). The land is part of the estate of the deceased and I find no evidence that leads to a contrary finding. I do not therefore find any merit in the arguments raised under ground 1 and it accordingly fails.

Ground 2:

The learned trial Magistrate failed to properly evaluate evidence on record.

The appellant's counsel in submission referred to evidence in the lower court by DW.1-DW.6, which was to the effect that the Plaintiff/Respondent intended to sale the land if granted letters. He also faulted the learned trial Magistrate for failing to find that as a clan head the appellant had interests to protect the land in issue. The learned trial Magistrate was accused of descending into the arena and was also faulted for the finding that appellant had no interests in the land.

In reply the Counsel for the Respondents, pointed at the cases earlier cited to argue that appellant had no locus to bring the suit. He referred to ***Gizamba Francis v. Nabusita Jane HCCA 74/2005*** and ***Israel Kabwa v. Martin Banobwa Musiga SCC No. 52 (1995/96) KALR 109*** where it was held that a beneficiary of the estate of an intestate had no locus to sue in his own name and protect the estate of the intestate for his own benefit without first having to obtain Letters of Administration.

I agree with Respondent's arguments and find that the learned trial Magistrate considered all evidence before her from pages 4 to 6 of her judgment and reached a conclusion that appellant had no legal or equitable interest to sustain the caveat lodged.

I have not found on record any justifiable reason why the caveat that was filed by the defendant/appellant could not be lifted. The appellant has issues on the land – which he claims is clan land but that is not a ground to deny a widow rightful access to the estate of her late husband. I do not find any merit in ground 2 and it fails.

Ground 3 was argued with ground 2 and it therefore fails as well.

In the result therefore, I find that the appellant has failed on all grounds of appeal raised. The appeal has no merit and is dismissed with costs to the Respondent, here and below.

Henry I. Kawesa

JUDGE

28.10.2016