THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0078-2014
(ARISING FROM PALLISA CIVIL SUIT NO. 18/2012)

1. **KARIKODI KENNETH**
2. **NYAIT BERNARD…….……..APPELLANTS**

VERSUS

TUDDE MUHAMMED……..…….RESPONDENT

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

JUDGMENT

The appellant was dissatisfied by the judgment and order of **His Worship Kintu Imoran Isaac** Magistrate Grade I Pallisa, raising four grounds of appeal.

The grounds were that:

1. The learned trial Magistrate erred in law and fact when he failed to judiciously evaluate the evidence reaching a wrong conclusion.
2. The learned trial Magistrate erred not to visit the locus.
3. Learned trial Magistrate was biased.
4. Learned trial Magistrate's decision occasioned miscarriage of justice.

As per ***Pandya v. R (1957) EA 336***, the duty of a first appellant court is to re-evaluate the evidence and to reach its own conclusions aware that it did not listen to or observe the witnesses.

I have dully re-evaluated the evidence on record, and carefully considered the written submissions by counsel. I now do hold as follows:

Ground 1:

Failure to judiciously evaluate the evidence on record.

In his submissions in defence of ground I, counsel for the appellant avers that the learned trial Magistrate ignored the testimonies of 2nd Appellant (DW.2) and DW.3, regarding acreage of the land. He also complains that the learned trial Magistrate never gave any reasons for believing the plaintiff's version on the inheritance, and for disbelieving defendant's version as contained in **DW.3 Lipoto Ramathan**'s evidence. He further points at the learned trial Magistrate's finding that D.Ex.I shows land belongs to 2nd Defendant and then changed and held against him for the plaintiff.

In response the Respondent's counsel argued that the learned trial Magistrate in his judgment properly analyzed all that evidence.

I have examined the evidence.
I notice that the evidence on record as it stands shows that the parties all claim title from their late father. **PW.1 Tudde Mohamed** said he got the suit land which is about 2 acres situate at Sidoni village, Petete, Butebo, Pallisa from his father. He claimed a will was given to him, which he exhibited as P.Exh.I.

PW.2 Lebo Fabiano, said on 28. Sept. 2008 **Kirya Alfred** (father of PW.1) called him and others and made a Will in their presence naming **PW.1 Tudde** as heir, PW.2 signed on this will; and put on it the clan stamp being the clan county chief of the Bakanjoko Balyeta clan.

PW.3 Potyo Joseph said on 27.08.2008 plaintiff's father called the clan head and other people were present. He elected plaintiff as his heir and also handed him a weighing scale and a plough. He also gave the land at the swamp to the heir and his wife. He confirmed that he wrote the will and gave it to the clan leader.
PW.3 is the clan secretary for the clan to which PW.1 and D.2 belong.

PW.4 Mutindirye Hakim confirmed that he signed on the Will where plaintiff was willed the land by his late father.

DW.1 Karikodi Keneth told court that D.2 mortgaged the land to him which is about ¼ an acre; at Sidani "A" division. He tendered the mortgage agreement as DIDI.

DW.2 Nyaiti Benard said he mortgaged ½ an acre at Sidani "A" to D.1. He said he acquired it through inheritance from his father **Alfred Kirya**. He said the swamp had two ports the upper land and swamp land. All 7 sons got pieces and it is his piece that he mortgaged.

DW.3 Lipoto Ramathan, said that before his father, the clan convened a meeting and appointed him as the heir. After appointment he divided the land amongst the children, and the portion for D.2 is what he mortgaged to D.1. He drew a sketch map of what he gave out allowed and marked as DEX.2 for D.2.

From the analysis above I find the conclusions by the learned trial Magistrate on page 4 of his judgment regarding D.Ex.2 and D.Ex.1 confusing.

The learned trial Magistrate was mixed up in his analysis of the evidence of ownership, in this case which is straight forward.

The evidence on record clearly shows that the late **Kirya** did make a Will and named therein a heir. The Will is witnessed and was exhibited in court as P.Ex.I. there was evidence of PW.I, PW.2, PW.3, and PW.4 all who were present. PW.1, was named heir PW.2, was the clan chief, who convened the meeting and stamped on the Will.

PW.3 wrote the Will and is the clan secretary. **PW.4 Mutinye Hakim** signed on the Will (all were reflected on P.Ex.I and testified in court).

On the other hand defendants raise another thesis. That upon death of the said **Kirya** who is father to Plaintiff and D.2, the clan sat and elected **DW.3 Lipoto Ramathan** as heir. That DW.3 then divided the land among the 7 sons and gave D.2 the portion under conflict. I notice from this evidence that no independent witness was called to verify this claim. There is ExD.1 and ExD.2 which were all authored by defendant 2 and DW.3 respectively, and were also not independently supported.

In terms of evidential weight therefore, the defendant's evidence is wanting. While plaintiff is able to show a Will, Letters of Administration and independent witnesses from the clan and family as evidence of his claim, the defendant merely asserted what he and his witness (D.3) claim as their wish, contrary to what appears to have been the wish of the late **Kirya**.

I am therefore of the opinion that save for the mix up in the weight of DEx.2 and Dex.1. Regarding the conclusion on the whole evidential value before court, the learned trial Magistrate rightly concluded that the evidence weighs in favour of the plaintiff.

There is no way **DW.3 Olupot** would divide land which was already willed away by the late **Kiirya**. He had no legal authority. He did not hold letters of administration. He was not named heir by the late and was therefore an imposter. If he divided the land and gave D.2 a share, his action was illegal and amounted to intermeddling with the estate. The Plaintiff who has a Will and letters of Administration is the only one with a right to administer and divide land if at all.

From that evidence as it is on record, am unable to find any justification under ground 1 of the appeal. The ground is not proved.

Grounds 2, 3, and 4: Failing to visit locus:

The learned trial Magistrate did not visit locus. He cited failure to attain facilitation as the cause. Visiting of locus is part of the trial process. Whenever court wants to ascertain the evidence given in court, it should go to locus. In land case where boundaries, special marks like markstones, graveyards, waterways or ponds, trees, cultural sites that need special observation are at stake in evidence, court should visit locus to physically look at them and ascertain what the parties are telling court. The visit to locus does not cover up gaps in evidence, omitted by the parties in court. It only helps to further explain and clarify such evidence. Where it is crucial that locus should be visited, the failure so to do may be fatal to the trial. Each case is however subjected to its own facts. This court held in the case of ***Mukodha Twaha v. Wendo Christopher Mbale Hct.CA.142-2012,*** that, visits to locus should be mandatory and failure renders pleadings a nullity. In view of other superior decided cases, that position is not good law. Locus is necessary but not mandatory.

However, the court cannot abdicate its duty to visit locus on grounds that parties have frustrated the exercise for failure to facilitate court. That is illegall and the learned trial Magistrate erred so to say. He ought to have visited the locus if he felt it necessary so to do.

I however do not find the failure to visit the locus to have fatally affected the outcome of this trial. This is because there was nothing useful that court would benefit from such a visit because all issues at stake could be cleared from evidence which was led in court, as I have already discussed under ground I.

The plaintiff was able to show by both his witnesses and exhibits that he was the heir, legally holding letters of Administration, and therefore defendants had no locus standi on the land under issue. A visit to locus was not necessary. These grounds also fail.

I do not find any evidence of bias and hence no miscarriage of justice occurred either by the assessment of evidence, or the judgment and orders therefrom.
These grounds equally fail.

In all there is no merit in the appeal. It is dismissed with costs to the Respondent. I so order.

Henry I. Kawesa
JUDGE
6.12.2016

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1.4.2016

Mutembuli for Respondent present.

Respondent.

Appellants.

Wamimbi absent.

Olubwe on brief (for mention) parties be granted leave to file submissions.

Mutembuli: Matter has been in court since 2014. Appellants did nothing till we wrote a letter asking court to send back file for execution. It is a matter where there is lack of seriousness. We pray for dismissal.

Court: There are no records.

Olubwe: We have the copies.

Court: Since counsel has appeared and there appears to be interest in the matter court orders;

1. Record be supplied and served on Respondent.
2. The parties file written submissions as follows.
   (i) Appellants by the 14.4.2016.
   (ii) Respondent by the 28.4.2016.
   (iii) Rejoinders by the 12.5.2016.
   (iv) Mention is fixed on 12.5.2016.

Henry I. Kawesa
JUDGE
1.4.2016

07.07.2016

Both parties absent.

Counsel absent.

Court: Matter adjourned to the 29.09.2016 for mention.

AG. DEPUTY REGISTRAR

07.07.2016

28.09.2016

Appellant present.

Respondent absent.

Court: Judgment is fixed for 5.12.2016.

Henry I. Kawesa

JUDGE

28.09.2016

6.12.2016

Parties absent.

Mugoda for Respondent.

Appellants by Wamimbi absent.

Court: Judgment communicated.

Henry I. Kawesa

JUDGE

6.12.2016