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

HCT-04-CV-CA-0146-2015
(ARISING FROM PALLISA CIVIL SUIT NO. 029 OF 2010)

ISIIKO KASISA CHARLES	**::::::::::::::::**	**APPELLANT**
	VERSUS	
KASISA SIMON	**::::::::::::::**	**RESPONDENT**

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

JUDGMENT

Appellant was aggrieved by the judgment and orders of the Magistrate Grade I Pallisa, **Kedi Paul** of 16 September 2015, in Civil Suit 0029/2010, on four grounds namely:

1. The learned trial Magistrate did not evaluate the evidence properly.
2. Learned trial Magistrate's decision is tainted with fundamental non-direction and misdirection.
3. The learned trial Magistrate's decision is against the weight of evidence.
4. The learned trial Magistrate's decision occasioned a miscarriage of justice.

The appellant argued all the above grounds together. Respondent argued each ground separately. The grounds all raise one main complaint regarding failure by the learned trial Magistrate to properly evaluate the evidence. I will therefore consider all the grounds together.

The duty of a first appellate court was laid out in ***Pandya v. R (1957) EA 336***, and illustrated in ***Uganda Revenue Authority v. Rwakasaija A. & 2 Ors CACA 8/2007*** (unreported) thus:

> "*The legal obligation on the first appellate court to reappraise evidence is founded in the common law rather than rules of procedure. It is a well settled principle that on a first appeal, the parties court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen or heard the witnesses*."

I will be guided by the above principle as I now re-evaluate the evidence as here below.

The appellant **Isiiko Kasisa** sued the defendant **Kasiisa Simon** by plaint dated 12th August 2010, for vacant possession of his plot of land and business situate at Tirinyi I Zone, Kibuku. He averred in paragraph 4, that he acquired the plot upon the death of his father **Silver Kibuka** as his share, and developed it by constructing the business house in 2004.

He averred that all properties for the deceased had been distributed (paragraph 5-18) of plaint.

The defendant denied by written statement of defence and raised a counter claim basically that he is entitled to the property as a beneficiary to the estate of the late **Silver Kibuka**.

The law is that whoever alleges a fact has the burden to prove it. (Section 101, 102, 103 Evidence Act). The plaintiff in the main suit must prove the suit on the balance of probabilities, just as the counter claimant has the same burden.

From evidence on record, **PW.1 Isiiko Kasisa** told the court that he bought the room from **Musa Nsekere** at shs. 550,000/= and an agreement was made in the presence of local authority and written by **Steven Wankya**. He said the allegation by defendant that the room was part of this father's estate was false.

PW.2 Fredrick Kalyebi was called by PW.1 to witness the purchase of the Lock-up from **Musa Nsekere** in 2005. He measured it and payment of 550,000/= was made; in presence of LC.I Chairman. The witness signed on the agreement. He identified the agreement and his signature thereon in court.

PW.3 Musa Nsekere said he sold a house to plaintiff at Tirinyi Trading Centre at shs. 550,000/= and an agreement made in Luganda. He identified the said agreement, and it was admitted.

PW.4 Musoke Ali said on 12.02.2005, PW.3 sold a house/plot to plaintiff. The witness was present, sold at 550,000/= and **Wankya Stephen** wrote the agreement.

The defence case was through **DW.1 Kasisa** who said in 2009 plaintiff gave him a room from the house in Tirinyi, which was for his late father. That one **Musa Nsekere** added one room after their late father had given him a joint! (sic) He claimed he is occupying one room after their late father had given him a joint! (Sic) he claimed he is occupying one room and plaintiff 3 rooms on their father's building.

DW.2 Kyamugenyi Charles said he was the caretaker and brother of the late father to the plaintiff. He said the house formerly belonged to the late father, and plaintiff was appointed heir. In 2002 he handed to plaintiff all properties of his late father including the house. He said defendant is occupying a room which plaintiff gave him, the room which was for **Musa Nsekere** who later mortgaged it and it is one of the rooms that he handed over to the plaintiff.
The learned trial Magistrate basing on that evidence, gave judgment for defendant hence the appeal.

I have examined all grounds of appeal and counsel for appellant complains that the learned trial Magistrate ignored evidence on record and just declared the suit land part of estate property.

I do find that the evidence on record clearly establishes that the plaintiff and a one **Musa Nsekere** entered into a purchase agreement, witnessed by **PW.2 Fred Kalyebi** and **PW.4 Musoke.** It was also confirmed by **DW.2 Kyamugenyi Charles**. This evidence is crucial because it shows that plaintiff has a claim of right to the portion of property separately purchased from **Musa Nsekere**. Crucially DW.2 the caretaker confirms that prior to handing over the deceased's properties to plaintiff, a one **Musa Nsekere** had dealings on the land with the deceased and **Yowana**. The evidence of DW.2 is contradicting on details of the type of dealings **Nsekere** had on the land but he said that "*In 2002 the children had grown so I called plaintiff and handed to him all the properties of his late father which included a house at Tirinyi trading centre Pallisa Road. It had four rooms including the room which Musa Nsekere had mortgaged to Yowana*."

Also DW.1 stated, "*A one Musa Nsekere added one room after our father giving him a joint*."

I have noted that the evidence on record strongly supports the plaintiff's version that the room which he gave to the defendant to occupy was not part of the deceased's estate. It is the room traceable to **Musa Nsekere**; and the sale agreement duly exhibited.

The evidence of the plaintiff further shows that defendant is on the plot as a visitor or licensee having been invited thereby the plaintiff. Even DW.2 in evidence in chief and cross-examination conceded so.

The law of evidence requires proof of all facts alleged. Plaintiff was able to prove by both oral evidence of PW.1, PW.2, PW.3 and PW.4, alongside PIDI, that he bought the suit land from **Musa Nsekere**.

However the defendant, through DW.1 and DW.2 gave contradictory testimony regarding the ownership of the plot in question. Evidence of DW.2 is very confusing and uncoordinated regarding how a one **Musa Nsekere** came to be involved in the estate property. He mentioned a mortgage but quickly again referred to himself and **Yowana Kitumire**, as also being involved in construction of the deceased's house. He did not mention if the properties of the deceased were finally distributed. He did not help DW.1 prove on the balance of probability that he was on the said plot as a beneficiary thereof.

Given my findings, I do agree with appellant's counsel that the judgment by the learned trial Magistrate was perfunctorily written. It does not consider evidence on record. The learned trial Magistrate never evaluated the evidence on record but

chose to examine the law regarding succession in isolation of the facts before learned trial Magistrate and evidence adduced. The learned trial Magistrate's conclusions were therefore not based on the weight of evidence before court. The judgment is full of misdirections and non-directions. The decision amounts to a miscarriage of justice because it does not merit the standard of justice espoused in ***Oketh Okale v. R (1965) EA 555*** thus:

> "*It is the duty of the trial court to consider the evidence adduced by the part ies as a whole before accepting it or making findings of fact. That the conclusion of the case the court weighs all evidence and decides what to accept and what to reject*."

Having re-evaluated all evidence as above, I find that grounds 1, 2, 3, and 4 of the appeal do succeed. This appeal is allowed. The judgment and orders of the lower court are set aside and replaced with a finding for the plaintiff/appellant with costs.

Henry I. Kawesa

JUDGE

28.6.2017