THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA- 192 OF 2015
(ARISING FROM MBALE CIVIL SUIT NO. 88 OF 2012)

YUSUF KAMYA :::
APPELLANT

VERSUS

MALIRO AKIM :: RESPONDENT

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

JUDGMENT

The Appellant was dissatisfied with the decision and orders of Her Worship Agwero Catherine dated 22nd December, 2015, where she found for the Respondent.

The Appellant raised three grounds of appeal.

1. That the learned trial Magistrate failed to evaluate the evidence.
2. The learned trial Magistrate wrongly accepting the Respondent's case.
3. Learned trial Magistrate's decision led to a miscarriage of justice.

In resolving this appeal this court as a first appellate court, will re-appraise the evidence on record and make its own conclusions but taking caution that it never had the chance to observe and listen to the witnesses.

Ground 1: The learned trial Magistrate erred in law and fact when she failed to judiciously scrutinize, evaluate and appraise the evidence before her as a result reached a wrong decision.
I have internalized the appellant's complaint on this ground. It is his complaint that the learned trial Magistrate only considered the evidence of the witnesses of the defence.

> "*The learned trial Magistrate did not give any explanation as to why she refused to consider the evidence of the appellant's witnesses and did not carry out any evaluation of the evidence at all.*"

Respondent's counsel on the other hand supported the evaluation of evidence by the learned trial Magistrate.

I have examined the pleadings and the reasoning by the learned trial Magistrate in her judgment. I have noticed that the judgment is not elaborate, but is short and concise on its pronouncements. To a large extent it would appear as though it was too brief and did not go into the depth of analysis of the evidence as it appears on pages 3-4 of the judgment.

That be as it is however, the learned trial Magistrate considered all evidence before concluding the way he did. I notice on page 3 that after reviewing evidence the learned trial Magistrate referred to counsel Wamimbi's submission, then made finding arising "*from the above evidence*".
The style of writing the judgment comes into play here. Though brief, I find that it represents a fair analysis of what the evidence on record actually shows, about these parties rights.

My own assessment of the evidence shows that from the evidence of PW.1, PW.2, PW.3, PW.4 and PW.5 alongside DW.1, DW.2, and DW.3. alongside DW.1, DW.2, and DW.3. alongside DW.1, DW.2, and DW.3 the evidence showed that:

1. The Plaintiff and defendant both trace their title to the land from their grandfather Dugo Maliro.
2. The evidence also shows that Dugo Maliro had two wives Nantabo and Munabo.
3. It is not disputed that the parties were all claiming by virtue of the ownership of the late Dugo Maliro's estate, upon his demise.

The evidence when assessed very well shows that the surviving children and grandchildren of Dugo Maliro are conflicting over what naturally was Dugo's land on which his two wives

Munaba and Nantabo allegedly dwelt and survived. From evidence of plaintiff an attempt was made to show by evidence that defendant was a trespassper who came on the land as a squatter. However the under the adversarial system is that he who asserts a fact proves it. (Section 101-103)Evidence Act.

That means that once the plaintiff alleged the fact that the defendant was a squatter on this land he had to prove it. The burden became heavier when defendant led evidence through D.1, D.2, D.3, showing that he was on the land as a natural grandson of Dugo Maliro (see D.1's evidence page 21 of the proceedings). The evidence of D.2 Fazil Swaga- the clan chairman further corroborates D.1's evidence. In essence evidence shows that both plaintiff and defendants benefit from Dugo Maliro's land as grandchildren, and that the land is specifically demarcated and is referred to by reference to Nantabo's land and that of Munaba (mothers of the parties).

At the locus it was noted by the learned trial Magistrate that there was a clan boundary from the road to the swamp separating the land of Yusuf kamya and Higenyi Ahamed the father of the plaintiff.

My own assessments of that evidence leads me to conclude that this land belongs to the estate of the late Dugo Maliro.

I believe evidence led through the clan head (DW.2) who explained that this land was divided between the two wives whereby Nantabo was using land on the right while Munaba used the one on the left, and there is a boundary mark separating them. (This boundary mark was seen at the locus by virtue of the learned trial Magistrate's comment in the judgment page 3). The defence evidence of DW.1 and DW.3 further alludes to those facts.

On the other hand plaintiff's assertions that defendant was merely allowed on the land cannot stand in view of DW.2's evidence (uncontroverted) that a clan meeting sat and reconciled the parties and they each hugged (page 25) of proceedings.

This shows that plaintiff's case when weighed on the standard of probability is found lacking. This is a family land held customarily and for the estate of the late Dugo Maliro. The conclusion reached by the learned trial Magistrate therefore that the land in dispute was for defendant is correct. I do uphold that finding and hence this ground fails.

Ground 2: Learned trial Magistrate formed an unbalanced view of the case by accepting the Respondent's case without giving reasons.

In determining ground 1, I have discussed the complaints raised above. I have concluded that the learned trial Magistrate's style of writing judgment was problematic, but nonetheless having reviewed the evidence afresh, I have reached a similar conclusion on the evidence. The learned trial Magistrate was right in finding that plaintiff/appellant failed to discharge the legal burden of proof, and hence found for the Respondent. I have also found the same. This ground therefore fails.

Ground 3: Miscarriage of Justice

Having resolved ground 1 and ground 2 as above there was no non-direction or misdirection committed by the learned trial magistrate, and hence no miscarriage of justice was occasioned to the appellant. This ground also fails.

In conclusion this appeal has failed on all grounds, I do dismiss it with costs to Respondents. I so order.

Henry I. Kawesa

JUDGE

23.03.2017