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

HCT-04-CV-CA-224-2014
(ARISING FROM CIVIL SUIT NO. 0067/2012)

SHOSHO SIMON :::::::::::::::::: APPELLANT

VERSUS

1. **NIMROD WANIALA**
2. **PHYLIS NABENDE**
3. **KIBOMA GUMUI**
4. **WASIKYE SAMWIRI**

(Executors of the Will of the late WILLIAM KITEYWA) :::::::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Appellant being dissatisfied with the judgment of **Agwero Catherine** (Esq) Magistrate Grade I-Mbale of 4th December 2014 appealed to this honourable court on 6 grounds of appeal.

The background to the appeal is that the appellant was sued by the Respondent (now deceased) for land.

The Respondent alleged that the suit land was his having bought it in 1988 from **Khadija Kimono**. He alleged that he entrusted the land to the defendant to look after on his behalf in 2004, but defendant grabbed the land and converted it to his personal use. The defendant/appellant however averred that Plaintiff/Respondent had sold the land to him and had made a sale agreement for him in 2000.

The Plaintiff/Respondent led evidence of **PW.1-William Kiteywa, PW.2 Wamari Ephraim, PW.3 Khaumba Locky Malinga, PW.4 Kimono Hadija, PW.5 Nabwire Damali**, PE.3 (power of Attorney), PE.11 (cheque and acknowledgement).

The defendant led evidence through **DW.1 Shosho, DW.2 Khaukha Vicent,** and **DW.3 Wabwire Jafali** (at locus). Also court heard from **Byansi Fred** chairman LC.I (at locus). Independent evidence was solicited from **CW.1- Sebufu Edirisa** (expert witness).

From the evidence, the learned trial Magistrate found for the Plaintiff/Respondent.

The duty of this court as a first appellant court is to re-evaluate the evidence, scrutinize it afresh and reach conclusions aware that the court is to re-evaluate the evidence, scrutinize it afresh and reach conclusions aware that the court had no opportunity to listen to and observe the witnesses. Having re-evaluated the evidence, I now determine the grounds raised as follows:-

Grounds 1 and 5:

Learned trial Magistrate erred in law and fact to find that suit land belongs to plaintiff, yet defendant had a sale agreement showing that there was a valid sale transaction between the parties.

The above arguments were argued jointly by the appellant's counsel. He pointed at evidence of DW.1 and DW.2- regarding the alleged sale, and the fact that DW.2 claimed that he was a witness to the alleged sale. Appellant averred that this evidence ought to have been believed by the learned trial Magistrate. The Respondent in submissions however referred to evidence of PW.1, PW.2, PW.3, proved trespass to plaintiff's land by the defendant.

I have carefully analyzed all evidence and the pleadings.

According to "paragraph 3 of the plaint the plaintiff's claim against the defendant is for general and special damages for trespass, eviction order and costs….."

In order to prove a fact in court the provisions of sections 101, 102 and 103 of the Evidence Act require the one who asserts the fact to prove its existence.

The Plaintiff/Respondent by law had the burden to prove that the land in question belonged to him- he had possession up to the time the trespasser came thereon. It was by the evidence contained in testimonies of PW.1, PW.2, PW.3 and PW.4- and P.Ex.I and Ex.2.

That court was shown that the suit land was bought PW.1-from PW.4 in 1988. PW.1 entrusted the land to PW.3 to care take until the year 2004, when defendant began his trespass thereon. PW.2 confirmed the fact that PW.1 owned the land and was entered upon by defendant who however encroached on it when PW.1 was sick in 2004.

PW.3 confirmed that the land was for PW.1. He was caretaking it till 2002 when he was transferred and PW.1 brought defendant to him as the next caretaker.

The plaintiff showed court evidence of purchase contained in PE.2. The Plaintiff also categorically denied the alleged purchase agreement by DW.1. The only link to this transaction brought to court as an independent piece of evidence capable of controverting the evidence of the plaintiff was the sale agreement DIDE. However this evidence was grossly discredited by the elaborate expatriate opinion of CW.1-**Sebuwufu Edirisa**. This evidence being of an expert was persuasive not binding on the court. I agree with the notion as stated by ***Cross and Tapper on Evidence Butterworths 1995, 8th Edition page 556-557*** thus: "*an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise*."

The evidence of CW.1- in my opinion gave guidance to the court on the authenticity of the sale agreement. It helped to elaborate PW.1's allegations that he never sold the land to DW.1. DW.1 had support of PW.2, PW.3, and PW.4 all who confirmed that he was owner of the land, fell sick around 2002 and later on defendant came on the land. DW.1's explanation meanwhile lacked proof on the balance of probability. When CW.1 placed his DIDI in doubt the weight of his evidence became lighter compared to that of PW.1. I do therefore agree with the conclusions by the learned trial Magistrate on this evidence. I do not find merit in the allegations raised under grounds 1 and 5. They do fail.

Grounds 2, 3, and 4 (failing to consider evidence of defendant, wrongly considering evidence of handwriting expert, not considering evidence at locus).

I have in the course of determining the grounds 1 and 5 ruled that the learned trial Magistrate took into consideration all evidence including that of the defendant. I also have found that it was right for learned trial Magistrate to be guided by the findings of the opinion of CW.1. This

evidence was requested for by PW.1 who pointed out to court that the signature on the agreement sought to be relied on by the defendant was forged and not his. In his testimony vide PW.1 and PW.3 the Plaintiff had alluded to the fact that defendant took advantage of his sickness to try and unlawfully take over his land. He also gave evidence contained in evidence of PW.1, PW.2 and PW.3 to show that he had never sold the land. However D.1 and D.2 produced evidence of DIDI to try and prove the sale. The independent expert opinion by CW.1 was therefore crucial in guiding the court in deciding the truth.

In ***Divie v. Edinburgh Magistrates (1953) SC 34 at 40***, it was held that:

> "*The duty of the expert witnesses is to furnish the Judge with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence*."

I notice from the learned trial Magistrate's judgment that she considered the opinion of the handwriting expert (CW.1) from page 3 (last paragraph) to page 4 of the typed judgment- she then weighed the whole evidence and concluded that:

> "*There was a forgery and there was therefore no valid sales transaction between the plaintiff and the defendant and court finds that plaintiff owns the land*."

The conclusion was reached independently of the opinion of the expert. Court has the discretion to believe or not to believe the report. The learned trial Magistrate did believe the report for reasons she gave. I do not fault her findings and on the weight of the evidence as adduced in court, I do reach a similar finding. I do confirm the finding that the agreement was not authentic; by virtue of the opinion of CW.1, weighed alongside evidence of PW.1, PW.2, PW.3 and PW.4.

Locus:

The record shows that court visited locus and took evidence from two witnesses. These were recorded as **DW.3- Wabwire Jafali** and "Evidence of chairman LC.I."

Counsel for appellant complains that court did not consider the evidence at locus which was fatal. The purpose of visiting locus is not to bolster up the case of either party. Whenever court goes to locus, it does so to check on evidence already given by the parties in court. This court has held in several cases the position as contained in ***Waibi v. Byandala (1982) HCB 28-29; and David Acar v. Alfred Acar Aliro (1982) HCB 60***.

The learned trial magistrate here was in error to record additional evidence of witnesses for the defendant who were not part of the evidence in open court. This error would have vitiated this trial of the learned trial Magistrate had gone ahead to base her decision on that evidence. (See ***Paineto Omwero v. Saulo S/o Zabuloni HCCS 31/2010*** (unreported). I however notice that the evidence was not considered in her evidence and therefore there was no fatality occasioned to the case. The proceedings at locus therefore though contained a procedural error (above), did not affect the learned trial Magistrate's final decision; and I hold that the error was not fatal.
I therefore hold that grounds 2, 3, and 4 also do fail.

Ground 6: (Miscarriage of Justice).
The appellant complained that there was miscarriage of justice.

The Respondent relied on the case of ***Matayo Okumu v. Fransisko Amudhe & 2 Others (1979) HCB 229*** to argue that no such miscarriage of justice occurred.
The complaints that appellant alleges to have occasioned miscarriage of justice are the grounds which this court has already found without merit.

It has been found that the learned trial magistrate correctly evaluated the evidence, the learned trial Magistrate was right to ignore the evidence of DW.3 at locus for having been received in error, and court has found that the visit to the locus was not in violation of Practice Direction 1 of 2007- save the error already noted and found not fatal. The complaints raised therefore do not satisfy the standard of proof laid down in ***Matayo Okumu v. Amudhe*** (supra). I do find that there was no miscarriage of justice and this ground as well fails.

In the result the appeal is dismissed with costs.

Henry I. Kawesa

JUDGE

10.5.2017