IN THE HIGH COURT OF UGANDA

HOLDEN AT KAMPALA

CIVIL APPEAL NO 70 OF 1971

[(ORIGINAL Civil Appeal No. 173 of 1970 of the Chief Magistrate's Court of Mbarara Before: P.A.P.J: Allen Esq. Chief Magistrate)From Civil Case No. 50 of 1968 of the Magistrate's Court 0f Bushenyi Before: P. Male Esq. Magistrate Grade III]

E. TIBARUMU.....PLAINTIFF

V E R S U S

W. BANGUMYA……. DEFENDANT

29 April, 1975

BEFORE: THE HON. MR. AG JUSTICE F. M. SSEKANDI

JUDGMENT:

The appellant in this case, E. Tibarrimu, was the plaintiff at the trial before the Grade III Magistrate sitting at Bushenyi. Judgment was given against him by the Grade III Magistrate on 23.2.70 on the grounds that he had not proved his case to the satisfaction of the trial Magistrate. The respondent, W. Bangumya, was the defendant at the trial. The appellant sued him as the Headmaster of Kyanyakatura Girls' School for trespass on his land. The appellant alleged that the respondent had constructed volleyball play grounds on the land, in dispute for use of the School. The respondent contended that the land in dispute belonged to the Church of Uganda which had obtained a temporary occupation licence from the Land office and had been properly allocated to the School for its use. The trial Magistrate dismissed the case for lack of proof.

The appellant filed an appeal with the Magistrate Grade II sitting at Bushenyi. The Magistrate Grade II ruled in favour of the appellant and set aside the judgment of the Magistrate Grade III.

The appeal was decided against the respondent on the ground that he had failed to turn up at the hearing of the appeal. On appeal to the Chief Magistrate, sitting at Mbarara, the Chief Magistrate set aside the judgment of the Magistrate Grade II and restored the judgment of the Magistrate Grade III.

Mr. Mulenga, for the appellant, argued this appeal before The Memorandum of Appeal filed, contained seven grounds of appeal and Mr. Mulenga submitted arguments on each one of them. Mr. Mulenga's main argument was that the Chief Magistrate failed to re-hear and re-adjudicate the case and make his own conclusions as it was his duty so to do. The appeal before the Magistrate Grade II had been properly set aside as having been decided incorrectly. The Magistrate had no power to make a ruling in favour of the appellant without entering into the merits of the case just because the respondent had failed to be present.

In those circumstances, Mr. Mulenga argued, the Chief Magistrate ought to have treated the appeal before him as a first appeal. The first appellate Court has a duty to subject the evidence at the trial to a fresh review and drew its own conclusions. He then seriously criticised the judgment of the trial Magistrate. He submitted that the trial Magistrate had required of the plaintiff a higher degree of proof than was needed in civil cases. Had he properly directed himself on the required degree of proof, he would have found that the appellant had fully established his case on a balance of probabilities.

Mr. Mpaka for the respondent replied each and every one of the arguments set up in support of this appeal. He submitted that the Chief Magistrate had fully weighed the evidence and had correctly up-held the judgment of the trial Magistrate. Mr. Mpaka analysed the evidence before the Chief Magistrate as found by the trial Court. In his submission, the plaintiff had indeed failed to prove his case.

The Chief Magistrate disposed of the appeal before him in a fairly short judgment.
He considered the decision of the Magistrate Grade II in allowing the appeal ex-parte and said,

> "An appeal must be decided in favour of the appellant only on the merits of that appeal and not simply because he turned up in court. The appeal Magistrate gave no consideration at all to the trial court proceedings and judgment, nor to the petition of appeal. His decision amounted to a miscarriage of Justice and it must be set aside"

With regard to the judgment of the Magistrate Grade III, he said:

> "The Magistrate Grade III heard both parties and their witnesses and he also visited the locus in quo and properly recorded what he saw there. I cannot find that he seriously misdirected himself and, in my opinion, he properly dismissed the respondent/plaintiff's claim for lack of proof. I cannot find any reason to disagree with that decision."

I agree with Mr. Mulenga that the Chief Magistrate disposed of the appeal rather summarily. However, I cannot agree with the submission that the Chief Magistrate failed to re-hear and re-adjudicate the case. Whereas it is the duty of the first appeal court to make its own findings and arrive at its own conclusions from the evidence on record, it is also the duty of such appeal court to attach the greatest weight to the opinion of the trial Magistrate who saw the witnesses. An appeal court will not substitute its own opinion for that of the trial court and a judgment of facts will be upheld unless it is satisfactorily shown to be unsound or contrary to the weight of the evidence on record. See***: Okeno v. Republic [1972] E.A. 32 and Watt v. Thomas (1947) 2 All. E. R. 584.*** In the instant case, the Chief Magistrate considered the evidence below together with the judgment of the trial Magistrate and arrived at his own conclusions. He was of the opinion that the trial Magistrate had properly dismissed the appellant's claim for lack of proof. He could find no reason to disagree with the decision of the trial Magistrate.

He of course, ought to have made a fresh evaluation of the evidence but, failure to do so in this case did not in any way, amount to a failure of Justice as the Chief Magistrate said he had made the necessary mental review of the whole testimony and was satisfied with the judgment of the trial court.

This is now a third appeal. My concern is mainly to see whether the decision appealed from is one which, on the facts as found by the courts below, a proper tribunal properly directing itself would reasonably come to. It is a valid ground of appeal to show that the judgment could not be supported, on the facts as found by the trial and appeal courts. The issue in this case is whether or not the decision of the Chief Magistrate, supporting the judgment of the trial court, is one to which no court could reasonably come to.

See: ***Bracegirdee v. Oxley (1947)1 All. E. R. 126*****.** It would, therefore, be inappropriate at this stage

to enter into' the facts afresh with a view to making in dependent findings and conclusions from the evidence. The judgment of fact arrived at by the trial Magistrate, who had the advantage of hearing the witnesses and observing their demeanour, is of course, entitled to the greatest weight in this court. The only occasion this court would interfere with such findings, on third appeal, is when it is shown that the conclusions drawn from the facts, as found, are unsound. The facts in this case were adequately summmarised in the judgment of the trial Magistrate. The plaintiff had sued the Headmaster of Kyanyakature Primary School for trespass on his land. He claimed to have inherited the land from his brother when he died. His brother had inherited the land from their common father. The land in dispute was in nature of a “Kibanja ” and it is not in doubt that the appellant had paid rent as a tenant of the Ex-Omugabe.

The Ex-Omugabe owned the land on a free hold title. It was contended by the appellant that the Headmaster crossed the boundaries between the Ex-Omugabe's Mailo land and the land allocated to the Church of Uganda under a temporary occupation licence. The defendant testified that he had only been transferred to that School as the Headmaster.

The boundaries shown to him were marked with mounds and Mitoma trees. The play grounds which had been constructed were within the boundaries shown to him. The place was bushy so he constructed play grounds for use by the School children.

The trial Magistrate considered the evidence for both the plaintiff and the defendant and weighed it carefully. He properly bore in mind the fact that the boundaries between the Church land and the Ex-Omugabe's land were clearly marked by survey marks. The appellant/plaintiff had asserted that the survey marks were under the Mitoma trees. The trial Magistrate adjourned the case for three months to allow the appellant/plaintiff to cut down the trees and show the survey marks. This was not done.

There is no merit in the argument that the Magistrate had taken this failure to cut down the Mitoma trees against the appellant/plaintiff. The Magistrate merely mentioned these facts and there is no evidence that he took this failure to cut down the Mitoma trees against the appellant/plaintiff have no doubt that his overall decision may have been somewhat influenced by this fact but, this would only be a natural instinct.

I am satisfied that no miscarriage of justice was occasioned on a proper consideration of all the circumstances of this case. It appears to me that the plaintiff's claim was that his Kibanja had been trespassed on by the defendant.

If he had confined himself to this alone, he would probably have had a better chance of success. He would probably have shown the boundaries of his Kibanja to prove that the land used by the School was part of the Kibanja he had inherited from his brother, which originally belonged to his father.

In order to do this, it was his duty to produce the necessary evidence to show that the Kibanja he inherited included the disputed land. The evidence required was in the form of existing structures on the land or established boundaries demarcating the Kibanja.

However when the Magistrate visited the land, the appellant /plaintiff attempted to base his claim on survey boundaries planted for the Ex- Omugabe’s freehold land. In doing this, he assumed the duty to prove that the Ex – Omugabe's freehold land included the disputed land within its boundaries.

This is surveyed land and evidence required is of a different nature from unsurveyed land.

It was the duty of the plaintiff in such circumstances to prove to the court the existence of the survey marks demarcating the Ex- Omugabe’s land. As had turned out, this proved difficult and I cannot say that the decision of the trial court dismissing the suit is one to which a court properly directing itself could reasonably come to.

I therefore, agree with the decision of the learned chief Magistrate that the suit was properly dismissed for lack of proof.

Accordingly, this appeal is dismissed with costs both here and courts below.