THE REUPLIC OF UGANDA

IN TH HIGH COURT OF UGANDA AT FORT PORTAL DISTRICT REGISTRAR

CIVIL APPEAL NO. DR. MF 1/90

(Original Misc. Application No. DR. MFP 5/89*)*

(Original Civil Appeal No. MFP 54/87)

(Original Kibiito Civil No. MFP 60/86)

DR. RUBINGA : : : : : : : : : : :: : : : : : : : : :APPELLANT

VERSUS

1.YAKOBO KATO : : : : : : :: : : : : : : : : RESPONDENTS

2. APOLLO ISINGOMA

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING

This is an application by notice of motion brought under section 232 (1) (3) (4) of the Magistrates courts Act 1970 seeking for an order from the High Court that the applicant be granted leave to appeal to this court against the decision of the Chief Magistrate/Ag. Deputy Chief Registrar sitting at Fort Portal where he allowed the appeal and upset the decision of the Magistrate grade II Kibiito that the land in dispute did not belong to the defendant/applicant.

The background of this application was that the plaintiffs now the respondents (twins) in the present applicant filed a civil suit against the defendant/applicant accusing the latter of having encroached on their land situated at Bukuba/Kanyangoma Bukara Parish, Kibiito Gombolola. The case was registered in the Magistrate Grade II Court Kibiito as Civil suit No. MFP 60/86. A full trial was held. The presiding Magistrate grade II found that thee was no such encroachment on the plaintiff's land. He found that the defendant/Applicant had satisfied the court that he acquired the disputed land at Bukuba and Kanyangome Hills through inheritance and that the applicant/defendant had even taken steps to legalise that customary ownership by applying to the District Land Committee to have the same registered in his names. He dismissed therefore the respondents/plaintiffs' claim.

The plaintiffs/Respondents having not been satisfied with the decision of the trial Magistrate appealed to the Chief Magistrates court, Fort Port, The appeal was registered as Civil Appeal No. MFP 54/87. It was presided over by his worship Mr. Byaruhanga Ag. Deputy Registrar, who on 8th December 1988 allowed the appeal with costs and thus upset the decision of the Magistrate Grade II.

The applicant/defendant applied for leave to appeal to the High court under section 232 MCA 1970. The application was turned down with costs to the respondents/plaintiffs'.

In his brief ruling the learned Chief Magistrate different from the one who heard the appeal had this to say:—

> *"Going to the ground raised in the memorandum of appeal Draft singly and in total effect I have gone through the evidence carefully and the judgment of the appellant court. The judgment was in line with the general trend of available evidence. Any of these alleged slips in the judgment are so cosmetic that they don't amount to substantial miscarriage of justice."*

Before considering the merits and demerits of this application I am of the view that it is fit and proper at this stage to restate the law in connection with the applications of this nature. Of course leave was sought from the Chief Magistrate in order to appeal to this court and the same was refused and leave is now being sought from the High Court itself.

The law is that:-

> *"Leave to appeal to the High Court shall not be granted except where the intending appellant satisfies the High Court that the decision against which an appeal is intended involves a substantial question of law or is a decision appearing to have caused a substantial miscarriage of justice*." See section 232 (3)of the Magistrates courts Act 1970.

I now turn to consider the application itself. In the notice of motion the grounds for the application were stated to have been set out in the draft memorandum of appeal annexed to the

application and that those contained the substantial points of law and orders by the Chief Magistrate which caused a substantial miscarriage of justice to the applicant.

With due respect to the learned counsel the grounds for the application should have been included in the notice of motion itself or in an affidavit in support of the application. I see no point why this court should be referred to a draft memorandum of appeal as if the learned counsel was confident that after all his application was going to be allowed and that whatever was in the draft memorandum was his grounds of appeal. That practice is not commendable and has to stop. The applicant is referred to as the appellant in the draft memorandum of appeal. That was very absurd. The applicant has not been granted leave to appeal here. He should have been referred to as the intended appellant or simply as applicant. The applicants' grievances were however:-

1. That the learned Chief Magistrate Ag. Deputy Chief Regis erred in law when he made a singular observation that the lease offer to the respondents in 1975 was not disputed by either the appellant or the appellants' relatives when in fact there is evidence to the contrary.

2. What the learned Chief Magistrate/Ag. Deputy Registrar erred in law when he observed that the respondents *were* first in time and therefore first in title when there is nothing in evidence to support the assertion.

3. That the learned Chief Magistrate/Ag. Deputy registrar erred in law when he treated a lease offer like a grant of lease and;

4. Finally that the learned Chief Magistrate/Ag. Deputy Registrar erred when he upset the finding of the trial Magistrate despite overwhelming evidence tending the contrary.

I will start off with the last complaint that the learned Chief Magistrate/Ag. Deputy Registrar erred when he upset the finding of of the trial Magistrate despite the first that there was overwhelming evidence to the contrary

I have read the judgment of the trial Magistrate. I was also given an opportunity to peruse the judgment of the learned Ag. Deputy Registrar and the ruling of the incumbent Chief Magistrate where he refused to grant the applicant/ defendant leave to appeal to this court. I shall start off briefly by considering what transpired at the court of first instance and that was at the Magistrate Grade II court at Kibiito.

As I stated earlier the respondents/plaintiffs are twins. They claimed the defendant/applicant encroached on their bibanja situated at Kanyangoma by cutting down the banana shambas Misambya trees. He removed boundary marks from their land they inherited from their forefathers whose names they never informed the lower court. They say the land was situated at Kanyangoma hill Bukara Parish. Plaintiff No. 1 testified that they applied for 40 hectares and they were surveyed. He was given lease offer but no certificate of title yet. They were given the lease offer in 1978. That they had on the disputed land crops, cattle farms coffee trees, banana shambas and extra. Yeremiya Nuhurwa PW.1 was the son of the 2nd plaintiff aged 35 came out in support of the respondents claim and added that the plaintiff/Respondent bought their Kibanja from Mukirane/Mwesigwa when he was still a school boy.

The applicant/defendant on the other hand testified that the plaintiff wrongly entered upon his land situated on the 2 hills Bukabina and Kanyangoma in Bukara Parish. He gave the background of the land mentioning that the land was first occupied by his grandfather Yohana Kageju. After his death one Busasa Julie took over the Land. When the latter died his aunt Florence Kabege took over and when the latter died in 1980 the applicant took over in 1983. He mentioned the names of people leaving on the disputed land and that he had taken steps to have the land leased to him. He produced the relevant documents and showed it to the lower courts. And even called two gentlemen with whom they share the grandparents Yosamu Kagaju to support his defence. They were Andera Rwakaikara DW2 aged 60 years and Rwomundago DW3 also aged 60 years.

DW2 was positive that the respondent/plaintiffs live at Kinyampanika where they had their homes and that in 1980 plaintiff bought land from Katadari at Bukuba. That when the District Land Committee visited the land in dispute the respondents/plaintiffs who were present never raised any objections and also when the Chief Mpaka went to settle the dispute, the dispute was

resolved in favour of the applicant. He testified the land in dispute share a common boundary and it belongs to the defendant/applicant DW3 had lived on the disputed land since his childhood. That plaintiffs/ respondents were coming from very far away to interfere with the disputed land. There as yet another witness in support of the applicants' claim that was DW4 Mwesigye who manages the defendant's/applicants farm on the disputed land called UNEMP. He was positive that the applicant was a resident of Bukuba & Kanyangoma. He used to see the plaintiff's on the opposite hill and they had no gardens on Bukuba & Kanyongoma & that the plaintiffs encroached on the defendant/applicant's land.

Besides the testimonies of the parties and their witnesses the Hon. trial Magistrate had the occasion to visit the disputed area. The parties and their supporters were present when he drew a sketch plan at the locus in quo. The parties physically showed him what each claimed to be its land and also each called in supporting witnesses.

From the evidence as adduced by the parties and their witnesses it was established that the applicant/defendant inherited the land in dispute Bukuba and Kanyangoma by inheritance from his ancestors. See the evidence o def and that of DW2 and DW3. The plaintiffs on their other hand failed to prove the inheritance. They never called any witnesses to prove such inheritance but were only able to prove that they bought a piece of land from Mukirane/Mwesigye on one of the disputed land (hill).

Even at the locus in quo the court found that the old trees seen around were planted by the applicants aunt Basara. The Hon. trial Magistrate found that the plaintiffs failed to prove their assertion that the applicant was trying to chase them from the disputed land because they owned no land there.

When the court moved to the locus in quo was able to see the patch of banana which the plaintiff bought from Katabazi and the one bought from Mwesigye which were mere bush. Apart from that the plaintiff's failed to show them any developments either on Bukuba & Kanyongoma as claimed by them in their testimonies. The lower court found that the plaintiffs home and developments stand on a different hill at Ngomya on Kinyampanika. Also the trial court did not

support the plaintiff's assertion that the survey stones were removed from the disputed land by the defendant or any evidence to show that they were ever planted there.

From the testimonies of the applicant and those of his witnesses plus the findings of the trial Magistrate at the locus in quo it is the considered opinion of this court that there was overwhelming evidence to show that the disputed land belonged to the applicant. In effect refusing the applicant leave to appeal to this court would in my opinion cause a substantial miscarriage of justice. In fact that ground alone would have disposed of the application but I would however proceed to disposed of the rest of the grounds.

The first ground was that the learned Chief Magistrate Ag. Dy. Chief Registrar erred in law when he made a singular observation that the lease offer to the respondents in 1975 was not disputed by the applicant or applicant's relatives.

The learned counsel appearing for the applicant did not elaborate much on this ground in his submissions. He simply submitted that the Chief Magistrate lay much score on his conclusion that the respondents had been granted lease but infact the position up to now was that the Ugandan land Commission had given them a lease offer as opposed to the grant of lease. The records show that both parties applied for the lease offer of the disputed land but because of the wrangle over the ownership of the customary land tenure none of the parties has been granted a lease. The position was that there was opposition when the respondent made the application for the lease offer and even in their testimonies the respondents accused the applicant as being the stumbling block to grant of the lease.

The second ground for this application was that the learned Chief Magistrate/Ag. Deputy Registrar erred in law when he observed that the respondents were first in time and therefore first in title when there was nothing in the evidence to support the assertion.

None of the parties had title over the disputed land. It is true that the respondents were the first applicants to apply for the lease offer. There *was* however evidence according to the records to show that they had land under customary tenure elsewhere other than the disputed area. The evidence showed that they had never occupied the disputed area by inheritance from their

forefathers as claimed by them. The maxim therefore that the first in time is stronger in law did not apply here. This ground therefore succeeds.

The third ground in support of the application was that the learned Chief Magistrate/Dy. Registrar erred in law when he treated a lease offer like a grant. I am of the view that this ground merits no consideration as t1 same has been covered up in my argument above. The respondents however oppose the application because the applicant had been cultivating their land cutting down their banana shambas and even on one occasions attempted to run over one of the respondents with his car. They also accused the applicant of having been a stumbling block to the development of their land in question. The evidence on record and the court record &t the locus in quo found that most of the accusations were baseless.

My findings however was that the decision of His worship, the Ag. Dy. Registrar when he allowed the appeal and upset the decision of the trial Magistrate Grade II Kibiito and also when the Chief Magistrate refuse to grant the applicant leave to appeal to the High Court seem to have caused a substantial miscarriage of justice. The applicant is therefore granted leave to appeal to the High Court against the decision of the Chief Magistrate's court and costs of this application is provided for.

I. MUKANZA

JUDGE

20/2/90