THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA.

CIVIL APPEAL NO.24 OF 1986

MUSULAYIMU MUSOKE : : : : : : : : : : : APPELLANT

VERSUS

PJYINENTOS.K.NULUMBA:::::::::;:::;:::::::::::: RESPONDENT

Before: The Honorable Mrs. Justice M. Kireju

J U D GM E N E N T.

This is a second appeal in a land (Kibanja) dispute in which the trial magistrate Grade II at Lugazi gave judgment on of the present respondent who was the plaintiff 8/1/1986 in favour.

On first appeal the trial magistrate's judgment was upheld by tile Chief Magistrate at Mukono on 5/9/1986. Leave to appeal to this court was given by the Chief Magistrate on 16/9/1986 under section.232 (1) (c) of the Magistrate's Courts Act 1970. On 7/4/87, the appellant applied to this court and was granted a stay of execution pending the hearing of this appeal. The appellant's application to adduce additional evidence was dismissed on 29/1/1992. The appellant/defendant in this appeal was represented by Mr. Kaala of M/s Kaala & Co. Advocates who also represented him in the lower courts.

The respondent/plaintiff was represented in this appeal by Mr. Buule of M/s Katende and Ssempebwa Advocates, the respondent was not represented in the lower courts.

The brief background to this appeal is that the respondent/ plaintiff, Mulumba sued the appellant/defendant in Magistrate Grade II court for trespass on his Kibanja by the appellant. The plaintiff was alleged to have bought the Kibanja from Iga who was the heir to the late Paulo Matovu the original owner.

The defence case was that the Kibanja belonged to Nambalirwa who was allegedly a daughter of late Paulo Matovu', and the defendant was just looking after the Kibanja on behalf of Nambalirwa. Nambalirwa is supposed to have acquired the Kibanja after the death of her mother .The magistrate grade II court found that Nambalirwa was not a daughter of late Matovu, as he had died childless and that the Kibanja belonged o tie plaintiff / respondent who bought it from the heir of Paulo Matovu, one Iga. As already stated the defendant appealed to the Chief Magistrate who also found in favour of the plaintiff/respondent. Hence this appeal by the appellant/defendant to this court.

Counsel for the appellant argued the first two grounds of appeal together namely that; —
(i) The learned chief magistrate misdirected himself in law and fact when he failed to consider seriously the injustice which was occasioned to the appellant by the lower court when the case had been adjourned for the opinion of the assessors mysteriously the trial magistrate decided to visit the locus in quo in the absence of the defence counsel. This irregularity in procedure amounted in law and fact to a greatly miscarriage of justice.

(2) The learned chief magistrate misdirected himself when he held that there was abundant evidence on record adduced at the locus in quo, when a number of elders gave evidence to the effect that DM2 (Nambalirwa) was not a daughter of the late Paulo Matovu, whereas the visit of the court below, and the presence of such elders was irregular sad a great miscarriage of justice to the appellant's case, whereas at the trial, the paternity of Nambalirwa DW2 stood unshaken.

Counsel for the appellant argued that when the respondent/ plaintiff and the appellant /defendant had closed their cases, the case was adjourned to 18/9/85 for the opinion of the assessors. Counsel alleged that he requested the trial magistrate to absent when the assessors were giving their opinion and also to be absent on the date of judgment. However, when I perused the court record I did not find any application by counsel to be excused from attending court or any response by the magistrate.

Counsel further stated that on 18/9/85 when the case came up for the opinion of the assessors a, the plaintiff/ respondent prayed to court that trail court visits the locus in quo before delivering judgment. The defendant/appellant who was present concurred to the plaintiff's prayer. As one of the assessors was not present the visit was fixed for 25/9/85 at 3.30 p.m. and it did take place before both parties on that day. Counsel argues that it was wrong for the court to visit the locus in quo after the case had been closed and that it occasioned miscarriage of justice. Counsel referred court to the following case De souza vs. Uganda (1967) Z1i Yeseri Wajbi vs. Edjsa Lusj Byandala 1982 HCB 28 JarilCa iiiirjbi vs. Lovinsa Nankya HCB [1998] 81 - in support of his submission. Counsel submitted. That that the magistrate wanted to fill in the gaps so witnesses can testify that Nambalirwa was not a daughter of Matovu and she was not of Ngabi clan, that Matovu died childless and Iga succeeded Matovu. Counsel argued that the Chief magistrate blundered when he decided that the visit of locus in quo was irregular but did not occasion any miscarriage of justice. Counsel stressed that the evidence adduced at the locus in quo caused injustice to his client and on this point alone the appeal should succeed.

Counsel for the respondent submitted on these two grounds that the visiting of the locus in quo after the case had seen closed did not amount to a miscarriage of justice. He submitted that the court was moved by consent of both parties while at the locus in quo the court called witnesses, who testified on the two main issues, namely the Ownership of the Kibanja, and whether Nambalirwa was a daughter of the deceased Matovu. The 3 witnesses testified that the Kibanja belonged to late Matovu and that Nambalirwa was not a daughter of Matovu. Counsel submitted that the court rightly called evidence under rule 23(3) of the Civil Procedures Rules for courts presided Over by magistrates' grade 1 and III. Referring to the authorities cited by counsel for the appellant, counsel submitted that they were distinguishable from the present case as the visit of the locus in quo in this Case did not amount to any miscarriage of justice.

On the second ground of appeal counsel for the respondent that submitted that the Chief Magistrate did rely on the evidence from the witnesses at the locus in quo alone but relied mainly an the evidence of the 3 witnesses at the trial who testified that Nambalirwa was not a daughter

of Paulo Matovu, That this evidence was overwhelming and the Magistrate could not have found otherwise Rule 23(3) of Schedule 3 to the magistrates Courts act which the trial magistrate relied on test the evidence at the locus in quo is as follows;-

> "The court may at any time put questions to either party or to any witness and may in its discretion call such additional evidence as it considers necessary"

What should be noted here is that, the visit to locus in quo was initiated by the plaintiff and was supported by the defendant. It was not the court which wanted to visit the locus in quo. The issue now is whether the visit t the locus in quo was properly done according to the law or whether there was any miscarriage of justice as claimed by the appellant.

The court record, the locus in quo was visited by the Magistrate Grade II, the 2 assessors and both parties. There were also elders from the locality and the magistrate decided to call then to testify so that they could clarify the matters at issue. The three witnesses all above 60 years of age were individually sworn and they testified, both parties were given on opportunity to cross examine the witnesses, but no questions were put. All the 3 witnesses at the locus in quo testified that Iga was the, heir of Paulo Matovu, and Matovu died childless, Nambalirwa was not a daughter of Matovu as Seforoza Kigongo (the mother of Nambalirwa) came to live with matovu when she already had Nambalirwa. That Nambalirwa belonged to Ngabi clan. After the visit of locus in quo the appellant/defendant was given a chance under S.98 of the magistrates Courts Act 1970 to recall Nambalirwa so that she could be re-examined. The appellant informed court after one adjournment that he was unable to trace Nambalirwa. The court therefore decided to deliver judgment without hearing from Nambalirwa. Mr.Kaala counsel for the appellant did not appear at all at these adjourned hearings and also on the Day of Judgment on 3/1/1986 he was not present. When the parties agreed to visit the locus in quo they did not visit until 7 days later which was ample time for the appellant to alert his advocate to be present if he needed him. During the hearing when counsel for the appellant did not appear at all in court, the appellant never asked court for an adjournment to allow him call his counsel. I am of the view that the trial magistrate did not occasion any miscarriage of justice when he visited the locus in quo in the absence of counsel for the defendant, as he did not know why counsel for the

appellant was absent, and the case was fixed for the last time the case was fixed for the opinion of the assessors counsel was present and he did not indicate to court that he intended to absent himself. It is the responsibility of counsel to make sure that he attends court on behalf of his client throughout the proceedings as he cannot predict what is going to happen. The trial magistrate correctly exercised his powers under Rule 23(3) which allows court to call such additional evidences it considers necessary.

Counsel for the appellant referred court to several authorities. I have had the opportunity to study the cases specifically that of Do Souza vs. Uganda, I am of the considered opinion that the case can be distinguished from the present case besides being a criminal case, it was a magistrate in that case who wanted to visit the locus in quo in order to fill in the gaps in evidence unlike in this case where the parties moved court to visit the locus in quo. The trial magistrate in this case visited the locus in quo in order to confirm the evidence already given by the witnesses and this is legally acceptable. The magistrate visited the locus in quo before the assessors gave their opinion unlike in the cited case. The procedure followed by the trial magistrate when he visited the locus in quo was properly done unlike in the case of Byandala and James Nsibambi vs. Lovinsa Nankya cited above. It is also important to note that the evidence relied on by the Chief Magistrate when he made his judgment was not only that taken at the locus in quo as indicated in the second ground of appeal but that on the whole record, In conclusion I have found that the chief magistrate properly directed himself on the issue of the locus in quo. There was no miscarriage of justice as the visit was properly conducted. Grounds 1 and 2 of the appeal must therefore fail. The 3rd ground of appeal was that the learned chief magistrate misdirected himself in law and fact, when ho held that Nambalirwa DW2 was not a daughter of the deceased Paulo Matovu an the ground that the name Nambalirwa indicates that she was of a Mamba clan where as Matovu the deceased was of ‘Ngabi’ basing his conclusion on the strength of the evidence adduced. the locus in quo, he there proceeded for the unwarranted revocation of the granted Letters of administration of the Estate of her late mother sefoloza Kigongo and not that of Paulo Matovu. I shall first deal with the letters of administration allegedly granted to Nambalirwa to administer the estate of late Matovu. In her testimony page 12 of the proceedings Narnbalirwa DW 2 testified

’”The defendant is taking care of my Kibanja and the disputed Kibanja is my property. I succeeded the Kibanja after the late my mother and even granted letters of administration under administration Cause No.14 of 1984”.

From the above evidence, it would appear that the letters of administration were granted to Nambalirwa in respect of her late mother’s estate. The purported revocation of the letters of administration by the Chief Magistrate in respect of late Matovu estate was therefore erroneous and of no effect as the letters which were to be revoked did not exist. The first part of this ground of appeal focuses on the custom whether the name Nambalirwa indicates that she was of mamba clan. When I perused the judgment of the Chief Magistrate I found that he did not base his revocation of the letters of administration on the fact that Nambalirwa was of Mamba clan and Matovu was of Ngabi clan. From his judgment it is clear that he based his finding on the evidence which was on record namely that lot Matovu had died childless end therefore Nambalirwa was not his daughter and could not inherit his property. The testimony of PW1 and PW2 and PW3 refer.

It is not true as alleged by counsel for the appellant t that the chief magistrate based his decision on the custom but he based his decision on the evidence on record and came to a correct conclusion my opinion, that Matovu had died childless.

The fourth ground of appeal was that the learned chief Magistrate misdirected himself in law and fact when he failed to direct his mind seriously that if the said Paulo Matovu died intestate as he so held, then ipso facto Emmanuel Iga PW1 by failing to either obtain letters of Administration to the estate of Paulo Matovu or being installed as customary heir to the late Matovu, had no power/authority in law, neither under customary law to dispose and pass a good title in the Kibanja to the purchaser (the respondent) which suit property was neither acquired by Iga or under the succession as customary heir or otherwise. Counsel for the appellant argued that since the chief Magistrate found that the late Matovu died intestate. Iga had no authority to sell Matovu Kibanja in dispute as he was never installed as a customary heir and he did not apply for letters of administration. Counsel referred court to the case Re Sulemani Serwanga Salongo

deceased administration Cause No. 143 of /1971/ULR /1972/ 122 where the then Chief Justice Benedicto Kiwanuka held that in Kiganda custom Omusika is a principal successor to the deceased and he is installed at a well arranged ceremony. Counsel submitted that since Iga was not properly installed under the custom he was not an heir to Matovu and he could not acquire a title and could not pass on a good title.

Counsel for the respondent submitted that as an heir, Iga had power to dispose of the customary holding. That Iga PW.2 had testified that he had performed the last funeral rites of Paulo Matovu and installed himself as was recognized by the witnesses as the heir. Counsel submitted that the case of Suleiman Serwanga Salongo cited by counsel for the appellant was not an authority on the installation of a customary heir under Kiganda custom that what *was* said by the Chief Justice in that case was obiter.

Counsel supported the finding of the lower courts that Iga was the heir of the late Matovu with powers to dispose of his property. I would like to first mention that was unfortunate for the trial magistrate not to have joined DW2 Nambawalira as a second defendant. The defendant's counsel did not also find it necessary to apply to court to have her joined as a defendant, since it was really her Kibanja which was in dispute, she would have defended her interest better as a party to the suit rather than just as a witness. I agree with the finding by the Chief magistrate that late Matovu died intestate as there was no valid will proved before court. The main argument of counsel for the appellant is that Iga who claims to be heir to late Matovu was not properly installed according to the Kiganda custom. However, on record there was no evidence led by the appellant in the lower court as to how a heir should be installed in Kiganda custom. The case cited of Suleiman Serwanga Salongo described the meaning of the word 'Omusika' in kiganda custom, the Chief Justice said

> "Omusika means the principal successor to the deceased.
>
> He is installed at a well arranged ceremony …"

The ceremony was not described; I therefore find that this case cannot assist us as to how a heir is installed in Kiganda custom. Turning to the present case it appears that most witnesses who testified recognized Iga as the heir to late Matovu. On the strength of the evidence on record and in the absence of any evidence to dispute the installation of Iga as heir to late Matovu. Iga as the heir, had a right under the customary law to dispose of Matovu's property. The courts below having found that Nambalirwa was not a daughter o late Matovu they could not say that his property belonged to her when they were not related at all. I agree that Iga as heir had a right to dispose matovu's property and the respondent, Mulumba acquired a good title.

Counsel for the appellant also submitted that the trial magistrate on page 4, 2nd last paragraph misdirected himself when he said that the letters of administration granted to Nambalirwa in administration Cause No. 10/1984 in reset of Seforosa Kigongo's estate was only in respect of personal property. I have not had the opportunity to look at the letters of administration whether they were limited to personal property of Seforoza Kigongo but I think the trial magistrate misdirected himself here because usually letters are granted in respect of all the property of the deceased. if the Kibanja in dispute did not belong to Seforoza then Nambalirwa would not have a right to administer it but this would not mean that she had a limited grant unless it Was specifically stated.

The other grounds of appeal were abandoned by counsel for the appellant.

In conclusion I must say that there were some errors in the findings of the two lower courts but these did not occasion any miscarriage of justice and in the end a correct decision was made on the balance of probabilities.
In the result the appeal fails and is accordingly dismissed. I uphold the decision of the Chief Magistrate. The appellant shall pay the costs of this appeal and in courts below.

M. KIREJU
JUDGE.

2/2/1993.

Mr. Kaala - for the appellant

Mr. Buule - for the respondent

Mrs. B. Senoga - Court Clerk.