THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0142-2012

MUKODHA TWAHA VS WENDO CHRISTOPHER

BEFORE: HON JUSTICE H.I.KAWESA

JUDGMENT

This is an appeal from the Judgment of the Principle Magistrate Grade1Pallisa of 13th November 2012, whereby he found for the respondent and made Orders that the suit land is the property of the respondent.

The appellant raised seven grounds of appeal. These grounds were:

1. That the trial magistrate erred both in law and fact in that the same did not evaluate the evidence properly or at all.
2. That trial Magistrate erred in both law and fact in that the same did not visit the locus in quo.
3. The learned magistrate erred in law and fact in holding that the respondent had proved his case beyond reasonable doubt.

4. That the learned magistrate erred in law and fact when he admitted false land agreements in respect of the suit land since the purported seller and witnesses died a long time ago.

5. The learned trial magistrate erred in law and fact when he failed to evaluate the fact that the respondent has never owned nor used the suit land since the time he claims to have bought up to date.

6. That the trial magistrate erred in law and fact when he ignored the judgment of the LC1 court of Gadumire.

7. That the decision of the trial magistrate has occasioned a miscarriage of natural justice.

He then prayed that court allows the appeal, sets aside the judgment of the lower court, grants the appellant costs of the appeal, and the lower court and also grants any further relief the court may deem fit.

In support of the appellant's case, Mbale law chambers who are on record the appellant`s counsel forwarded to court written submissions.

The appellants counsel chose to argue grounds 1, 3, 4, 5, and 6 together while grounds 2and 7 separately.

GROUNDS1, 3, 4,5and 6:

The gist of grounds 1, 3, 4, 5, and 6 was that the learned trial Magistrate did not evaluate the evidence properly or at all.

Counsel referred to page 1 of the judgment and noted that the magistrate had identified the issues as follows:

(1) Whether on a balance of probability the plaintiff has proved his claim.

(2) Whether the claim is resjudicata.

(3) What remedies are available and to who?

Counsel submitted that on the first issue the respondent was under a duty, to prove on a balance of probability the sale of the land to him by the late Efulaim Mukoda.From the record he only exhibited

a photocopy of the agreement. Secondly none of the witnesses to the sale was called as a witness .The learned trial Magistrate did not consider these points in his evaluation. Instead he considered the evidence of PW2who apart from being a neighbor gave evidence regarding a different portion of land which he purchased.

The second issue was whether the claim is resjudicata, the appellant in his written statement of defense pleaded that the matter was heard and determined by the Local Council Court of Gadumire LC1 Budaka.He referred the copy of the decision annexed and marked "A".

He further argued that apart from holding that there was no evidence of resjudicata, the trial Magistrate was under duty to try the issue as a preliminary point of law.

Counsel pointed out that it was misleading for court while evaluating the evidence to find that just because the Appellant and his witnesses were under tension in court then they were untruthful .He pointed out that these were laymen, unrepresented and who were just fearful of court. He concluded that when one becomes tense it does not mean that one is a liar.

GROUND: 2.That the trial Magistrate erred in both law and fact in that the same did not visit the locus in quo.

On this issue counsel referred to the case of **JAMES NSIBAMBI VS LOVINSA NANKYA [1980] HCB 81at P, 82** where J Odoki expounded the principles governing the conduct of judicial proceedings at the locus in qou.These are:

(a)The Judge or Magistrate himself or herself as well as the assessors if any must be present at the locus.

(b) All parties, witnesses, Advocates if any must be present.

(c) Parties and witnesses must adduce evidence at the locus in quo and cross-examination must be allowed by either party.

(d) The court must record all proceedings at the locus in qou.

(e) The opinion, view, observation or conclusion of the court or assessors be on record.

Counsel observed that there was nowhere on record to show that court visited the locus.

GROUND 7: That the decision of the trial Magistrate has occasioned a miscarriage of natural justice.

To support this ground, counsel quoted the case of **MATAYO OKUMU V FRANSISKO AMUDHE &2 ORS (1979) HCB** 229,where Odoki J (as he then was) held that a decision appears to have caused a miscarriage of justice where there is a primafacie case that an error has been made. He concluded by observing that the Magistrate did not evaluate the evidence properly or at all.

The respondent was not represented. He however filed a written response to counsel's submissions. He called upon the court to uphold the lower court judgment with costs.

Respondent argued that the trial magistrate properly evaluated the evidence, listened to all witnesses and made conclusions which he gave in the judgment

On the issue of resjudicata he pointed out that appellant did not produce the LC1 judgment before the trial court.

Regarding the demeanor of the witnesses he said that the court had a right to assess them and make its observations as it did observe.

On the issue of locus the respondent conceded that the Magistrate did not visit the locus but that to him it was not a fatal omission.

All in all it was the case for the respondent that the appeal should be rejected and the lower court judgment should be up held with costs, to the respondents.

The duty of the 1ST appellate court was summarized in BAGUMA FRED VSUGANDA SCC in appeal No7 of 2004 where it was stated that

> *‘’First it is trite law that the duty of a first appellant court is to reconsider all material evidence that was before the trial court, and while making allowance for the fact that it has neither seen nor heard the witnesses, to come to its own conclusions on the evidence. Secondly in so doing it must consider the evidence on any issue in its totality and not any piece in isolation……”,(see PANDYA VSR[1957]EA336.*

I will deal with the issues in the order they have been argued by the appellant. He chose to bundle up the grounds of appeal into three clusters so as to fit them within the issues which the lower court considered in its judgment. For purposes of consistency, I will follow the same pattern.

GROUNDS 1,3,4,5 and 6:

The above grounds in summary arise from the issue whether trial Magistrate properly evaluated the evidence.

The lower court record indicates that the plaintiff brought the case for recovery of land measuring approximately six acres located in Gadumire; Budaka. The Plaintiff claimed that has been in occupation since 1979.According to the plaint, defendant has trespassed on the land converted it to her use causing damage to plaintiff

On the other hand, the defendant's written statement of defense shows that the matter was heard and determined by the LC1 Court of Budaka in favor of the defendant. A copy of the decision was annexed and marked "A".

The defendant claimed that she has always been in occupation having inherited it from her father who died in 1986.The defendant averred that the plaintiff nor his relatives have never utilized the land.

During the hearing the plaintiff called a total of 3 witnesses. The defendant called 4 witnesses. From that evidence, the court made a judgment and concluded that the plaintiff evidence and that of his witnesses was more consistent than that of the defendant, more so that of PW2…

With due respect, I have reviewed the evidence on record but found that the Magistrate did not accord enough consideration to all the evidence before him. If he had done so, he would have come to a different

conclusion. This is so, because the record indicates that while the plaintiff claimed to have bought this land he did not call any evidence to prove so apart from a photocopy of a sale agreement. The provisions of the law of evidence require such photocopies to be proved before admission in evidence which was not done.

Pw2, who is the witness that the magistrate relied on in my view, did not offer useful weight to explain how plaintiff came into possession of this land. He only bought from him. PW3, also did not know how plaintiff got to this land .He claimed to have known plaintiff from 1989, yet plaintiff claims he got the land in 1979

Other hand, the defendant and his witnesses were all consistent in asserting that the defendant inherited this land from his father. This was confirmed by D2 and Dw4.Consistently all these witnesses who appear to be advanced in age attested to the fact that the land was passed on upon death as an inheritance.

The trial magistrate overlooked these important points of evidence and hence reached wrong conclusion on the evidence.

On the issue of resjudcarta,I have failed to see any sufficient reason why the magistrate chose to ignore this matter. He claimed that there was no evidence. This was a point of law raised by defendant in the pleadings. Since the judgment of the LC1 court was annexed, the magistrate needed no further evidence. As a lawyer and judicial officer, he ought to have

taken judicial notice of this judgment and pronounced himself on the issue. His finding on this issue is therefore erroneous.

There is no connection between being on tension and being untruthful. However it's not uncommon for unrepresented litigants to be on tension in court. I do not think that this was a good taste to apply in this circumstance against the defense witnesses, as the trial court did.

In the result therefore I agree with the observations by appellant that the learned trial magistrate failed to evaluate the evidence on the balance of probability and thereby came to a wrong conclusion. This ground will therefore succeed.

On the second GROUND of not visiting the locus, the record bears this out. The court did not visit the locus. The authority cited above and many others have held that a trial of any land matter where the locus is not visited or where the proceedings did not follow the principles in the James Nsibambi case renders such pleadings a nullity.

This ground therefore succeeds.

The last ground was that the failure by the magistrate to properly evaluate the evidence caused a miscarriage of justice.

The case of MATAYO OKUMU, cited, presents the correct position. Where there is a primafacie case that an error has been made there is an inference that a miscarriage of justice has occurred. In this case it has

been shown that the magistrate committed a number of erros.I agree with the appellant that a miscarriage of justice occurred.

This ground therefore succeeds.

Having gone through the grounds of appeal as above, and having reached the conclusions and findings on the same as enumerated, I hereby allow this appeal with costs as prayed. The lower court judgment is hereby nullified.

H.I.KAWESA

JUDGE

03.10.2013