

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA
AT MBALE**

HCT- CV –CA-00100 OF 2011

FLORENCE LOVE MUSIWAAPPELLANT

VERSUS

1. YUSUF LABU

2. PETER LABURESPONDENTS

BEFORE: THE HONOURABLE JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an appeal from the judgment and decree of the Magistrate Grade one Kapchorwa arising out of a suit where the appellant Florence love Musiwa sued the respondents to wit **1. Yusuf Labu , 2. Peter Kagu** jointly and severally for orders of vacant possession of land, a permanent injunction and damages for trespass and other consequential orders.

The 2nd defendant filed a counterclaim for the cost of building materials worth 13 million shillings, damages for defamation and costs for the counter claim.

In his judgment, the learned trial Magistrate entered judgment for the 2nd defendant/2nd respondent. He made no finding against the 1st defendant/1st respondent, **Yusuf Labu**. The appellant was dissatisfied with the judgment

and decree of the learned trial Magistrate and through M/S Owor & Company Advocates raised 7 grounds of appeal to wit that:

- 1 The learned trial Magistrate as a court of first instance formed an unbalanced view of the evidence and in the result reached a decision which was unsupported by the evidence as a whole.
- 2 The decision of the learned Magistrate was riddled with misdirections and non directions on both matters of fact and the law
- 3 The learned trial Magistrate did not address himself to the contradictions and conflicts “within” the evidence of the respondents and his witnesses.
- 4 The learned trial magistrate did not address his attention to the fact that an interlocutory judgment had been entered against the 1st defendant (1st respondent) on 16.09.2010 and that since the 2nd defendant acquired the said land from the 1st defendant, this ought to have affected the decision.
- 5 The learned trial Magistrate erred in law and fact when he purported to make a finding on who was to pay the costs for the counter claim.
- 6 The decision complained of appears to have occasioned a miscarriage of justice.
- 7 The learned trial Magistrate as a court of first instance failed to subject the whole evidence to an exhaustive scrutiny and appraisal the appellant was entitled to.

The appellant prayed that:

- i) This appeal be allowed

- ii) The lower court's decision be set aside
- iii) A retrial may be ordered before another competent court to judiciously and exhaustively appraise the evidence of the parties.
- iv) Costs here and below be provided for.

At the hearing of the appeal the respondents were represented by M/S Kob Advocates & Solicitors.

I allowed both learned counsel to file written submissions.

As rightly submitted by learned counsel for the respondents, it is the duty of the first appellate court to re-evaluate the evidence on record and draw its own conclusions having in mind. The law that the burden of proof in all civil suits is discharged on a balance of probabilities. It is the duty of the plaintiff to establish its case to that standard.

I have considered the submissions by both learned counsel and related the same to the lower courts record. I meticulously studied the evidence adduced at the trial on both sides and comprehended the judgment by the trial magistrate.

I will go ahead and decide this appeal generally.

I agreed with the complaints raised by the appellant in the grounds of appeal and the following are my reasons therefore:

- 1 The judgment by the learned trial magistrate is glaringly one sided. He dwelt entirely on analyzing the evidence by the appellant in

isolation of what was testified by the defence. This affected his conclusions tremendously and made him form an unbalanced view of the evidence. His conclusion could not be supported by the entire evidence

- 2 As rightly complained by learned counsel for the appellant, the learned trial magistrate did not address himself to the fact that his predecessor had entered an interlocutory judgment against the 1st respondent on 16.09.2010. The decision of the trial Magistrate concerns the 2nd respondent only . It is difficult to speculate how his decision would have been affected had he addressed his mind to this fact that an interlocutory judgment against the 1st respondent is on record and the fact that the 2nd respondent derived his interest from the 1st respondent. By not making a decision regarding the 1st respondent it rendered the trial incomplete. Such lopsided decision occasioned a miscarriage of justice against the appellant. The learned trial Magistrate as a court of first instance failed to subject the whole of the evidence before him to that exhaustive scrutiny and appraisal which the appellant was entitled to expect.

Regarding costs in the counterclaim, it appears the complaint by the appellant is unfounded because the learned trial magistrate struck out the counterclaim with costs. This implies he awarded costs against the counterclaimant.

Consequently I will uphold the grounds of appeal and order that a retrial be conducted expeditiously before a court of competent jurisdiction. The costs shall abide the outcome of the retrial.

I so order.

Stephen Musota

Judge.

10/12/2013