THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA

HCT – 08 – CV – CA – 0029 – 2011

1. THE REGISTERED TRUSTEES OF THE PENTECOSTAL ASSEMBLY

2. MOYO DISCTRICT _______________ APPELLANTS

=VERSUS=

IGGA ANYI GODFREY

& 14 OTHERS _______________ RESPONDENTS

JUDGMENT

BEFORE HON. JUSTICE VINCENT OKWANGA

This appeal arises from the judgment and orders of the Chief Magistrate Moyo, H/W Kaskhya Muhammad delivered at Moyo on 30/11/2011, in original land claim No. HCT – 02 – CV – CS – 0005 – 2008 in which judgment was given in favour of the 15 respondents above.

Brief facts:

The brief facts of the appeal are that in 2002, the 15 respondents had sued the two appellants before the High at Gulu which then referred that matter to the land tribunal Moyo for disposal. However, it appeared that the land tribunal's mandate expired before that matter could be heard before it, hence the matter then somehow jurisdiction of Moyo Chief Magistrate's Court by virtue of.

The hearing then proceeded before the Moyo Chief Magistrate's Court between 17/10/2005 and 30/11/2011, when judgment was delivered by the trial Court.

The two appellants being dissatisfied and aggrieved by the decision and orders of the trial court appealed to this Hon. Court on 13/12/2011.

Five grounds of appeal were formulated as follows:-

1) That the learned trial Chief Magistrate erred in law and fact when he prematurely closed the 2nd appellant's case without affording the latter an opportunity to be heard on defence thus occasioning a miscarriage of justice to both appellants.
2) That the learned trial Chief Magistrate erred in law and fact when he wrongfully evaluated the law and the evidence on record thus coming to the wrong conclusion to the prejudice of the appellants.
3) The learned trial Chief Magistrate erred in law and fact by finding that the allocation of the suit land to the 1st appellant was arbitrary, irregular and contrary to the law.
4) The learned trial Chief Magistrate went against the weight of evidence on record by finding that the disputed land belongs to the plaintiff's customarily and by or allocation.
5) That the failure by the trial Magistrate to visit the locus in quo led him to make erroneous decisions to the prejudice of the appellants.

The two appellants then pray that this Hon. Court allows the appeal, quashes the orders of the trial court and sets aside the judgment, orders for costs and an order that the matter be heard denovo.

It was argued for the appellants that in 1993, the 2nd appellant, acting within the law in force then and within its powers as the controlling authority allocated the suit land to the first appellant, which land was surveyed with the full consent of all the parties herein before the first appellant obtained a leasehold certificate thereto which process of obtaining such leasehold certificate was lawfully done and the valuation of the property of the affected people duly made and some people who accepted were given compensation due to then while some of the respondents rejected compensation and continued cultivating on the same land.

On their first ground of appeal it was contended for the 2nd appellant that the trial magistrate erred in law and fact that when he prematurely closed the 2nd appellant's defence without affording it and opportunity to be heard on such a defence this occasioning gross miscarriage of justice to the appellants.

My duty as the first appellant court is to subject the entire evidence before court to an exhaustion scrutiny and analysed before drawing up any conclusion while giving due allowance to the fact that I didn't have the benefit to hear and see the witnesses at the trial.

In the case of **Narsensio Begunisa and Another =Vs= Eric Tibeaga; Civil Appeal No. 0017 of 2012** SSC J Mulengo (JSC) (unreported); it was stated that it is a well settled principle that on a first appeal the parties were entitled to obtain from the appeal court its own decision on issues of fact as well as law.

Although in the case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witness, it must weigh the conflicting evidence and draw its own inference and conclusions.

From the records of the trial court, the case for the 1st appellant (1st defendant) was closed on 06/04/2011 and the matter was adjourned to 04/05/2011 for further hearing. The next hearing could not take off on 04/05/2011, and further adjournments were made for various reasons till 30/06/2011 when the trial Magistrate ordered the case for the second defendant (2nd appellant) closed. The court record reads:-

30/06/2011

> "1st, 3rd, 4th, 5th, 7th, 8th, 14th, and 15th plaintiffs present. 2nd,6th, 9th,10th,11th, 12th, and 13th plaintiffs absent.
>
> Alule for the plaintiffs present
>
> 1st defendant present.
>
> 2nd respondent absent,
>
> Vuyaya Thomas; court clerk, Alule; I pray to proceed expert under O.9rr 20 and 25 CPR against the 2nd defendants and pray that their case be closed and the matter be fixed for judgment…….

Court:

Having hard Hon Mr. Alule the learned Advocate for the plaintiffs, applying to this Hon. Court to close the proceeding, upon the grounds that the 2nd respondents knows the day fixed for hearing up this case, has fixed to appear in court and has assigned us reason(s) for his absence, and having carefully looked through the proceedings, I am satisfied that the 2nd defendant is aware of the day fixed for hearing of the day case but has failed to appear, and has assigned no reason for his absence. In the absence of any sufficient cause shown for the absence of the 2nd defendant, I agree with Mr. Alule in the application that this matter be closed and do order that the same be closed and it is hereby closed".

Signed: Chief Magistrate.

From that records as above, I find that the 2nd defendant's case was closed on the order of the trial court in the absence of the 2nd defendant and its counsel. That closure of the 2nd defendant's case denied the latter an opportunity to be heard on the claims of the respondent's (plaintiffs) against the two appellants.

Article 28 (1) of the Constitution of the Republic of Uganda states:

> "(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law"

Article 44 (c) goes further to emphasize thus:

> "Notwithstanding anything in this constitution there shall be no derogation from the enjoyment of the following rights and freedoms".

(c) the right to fair hearing;

It is my finding therefore that the trial court having ordered for the closure of the 2nd defendant's (appellant's) case before the latter is heard on the claims against them (the 2 appellants), such action denied the 2nd appellant an opportunity to be heard and the right to a fair hearing as enshrined under the above provisions of the constitution of the Republic of Uganda.

Needless to say that such infringement must have prejudiced the two appellants' case as there was no evidence before courts that the 2nd, 2nd defendant / appellant or its counsel was aware of that days having.

Accordingly I find and held that the ground of appeal succeeds.

Regarding ground 1,2,3 and 4 of the appeal, I find that it is only pw1 Toloko Alfred, the chief of Opia Opi elder who claims that the suit hand belongs to the 15 plaintiffs as their customary holding.

Pw2 –Cezira. That who is the plaintiff No 2 is the only plaintiff who claims that her father in- law was given part of the suit land after she got married to the Peter I km, the rest of the prosecution witnesses like, pw3, pw4 and pw5 all claims to be temporary occupants on a license from Moyo town council in 1990s some of the plaintiffs paid for such temporary occupation parents.

It is therefore doubtful whether the plaintiffs were customary holders of the suit could as claimed. The first defendants (appellants) claims that when it acquired the suit land there were seven sitting tenants on the suit land namely. Iga Amyi Godfrey P I. Ijuriri William p11 Iga Raymond plaintiff No-15, Adia Cissaria plaintiff No-2 Ippe Velentine plaintiff No. 13, Tom Jurugo plaintiff No 14 and Justin Kolirira plaintiff No. 3 would be more plausible version some of these plaintiffs were offered compensation by the 1st appellant but declined the offer based on the valuation report of Pw.3, Palwak Rome.

In my analysis I am of the view that the finding of the learned trial Chief Magistrate that the Plaintiffs were customary owners of the suit land at the time of allocation, save for Isuriri Drale William who was allocated a piece of land by the Moyo Town Council as not supported by the totality of evidence before Court. Had he considered and evaluated the entire evidence before him properly, he wouldn't have found that the plaintiffs were not sitting tenants on the suit land at the time it was allocated to the 1st appellant by the 2nd appellant. By holding and making a finding that the allocation of the suit land to the 1st appellant to the 2nd appellant took a form of compulsory acquisition of land from the customary owners. It is my most considered view that the trial Chief Magistrate placed reliance on extraneous matters not supported by evidence in arriving at such a decision.

Under section 59 of the RTA, (cap. 230) a certificate of title to land is conclusive proof of ownership unless fraud is proved in the acquisition of such a title.

In the instant case the plaintiffs do not allege any fraud on the part of the 1st appellant and neither did they pray that the 1st appellant certificate of title, received at the trial as exhibit DEG1 be impeached on the ground of fraud.

The finding by the learned trial Magistrate that the allocation took a form of compulsory acquisition of land from the customary owners does not impute fraud on the part of the first appellant nor does it prove any fraudulent conduct on their part in the acquisition of that certificate of title. The plaintiffs did not seek for any order of cancellation of the 1st appellant's certificate of title and no ground has been advanced from the same to be cancelled. Neither do I find any basis for such a course of action basing on the evidence before court.

Accordingly, I find that grounds 2, 3 and 4 of the appeal all succeed and are allowed.

That now leads me to the appellant's 5th ground of appeal in which they contend that the learned trial Chief Magistrate erred in failing to visit the locus in quo which resulted in him making erroneous decisions to the prejudice of the appellants.

From the evidence on record the 1st appellant is allowed to have encroached on same burial grounds of the Opi-vira clam within the suit land where the Vira-Opi chiefs burry their wives and many other developments including permanent structures alleged to be on the suit land during the time the 2nd appellant allocated the suit land to the 1st appellant. In view of such evidence, it was most prudent for the learned trial Chief Magistrate to have made a locus visit before making his final decision. This is the practice in our courts especially where the boundary, siege (acreage) and level number of developments are in issue and the need to visit the locus in quo was greater in the instant case where many of the plaintiffs claim ownership over the suit land through customary inheritance from generation to generation in which case certain features and developments thereon could greatly assisted the court in arriving at a just decision. There is no justification for the trial court not to have visited the Locus in quo and that failure occasioned a miscarriage of justice.

Ground 5 of the appeal also succeeds.

All in all I find that the appeals of the two appellants succeed on all grounds and are hereby allowed with costs.

The order of eviction against the 1st appellant, a permanent injunction against the two appellants to restrain the appellants and their agents set aside. The orders for costs on the taxed bill of costs to be divided between the two appellants in equal installments is hereby set aside as well.

The first appellant being the holder of the certificate of title to the suit land an order of permanent injunction hereby issued to restrain the respondents, their agents, servants or assignees and all persons claiming under them from interfering with the first appellant's quite enjoyment of the suit land.

The counsel for the appellants have prayed for an order of a retrial and in the alternative, for continuant of the defence of the 2nd appellant.

With all due respect, I find that the latter leg of the prayer by the appellants' counsel is impracticable in that the trial Chief Magistrate having signed his judgment of the trial court on 30/11/2011, he is now "*functus officio*" and no further proceedings in regard to the hearing of evidence or defence of any party in the trial court can be legally permitted.

In the end this Hon. Court shall order that a retrial before another Magistrate of competent jurisdiction be done. It is hereby directed! R/A

VINCENT OKWANGA

JUDGE

02/10/2015