THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-119-2008
(ARISING FROM PALLISA CIVIL SUIT NO. 0086-2004)

KIDAMUSE S/O KATIKIRO.....APPELLANT
VERSUS
ONYOPA ALEXANDER.....RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The appellant raised four grounds of appeal.
The appeal was against the judgment of **Zinsaze Ismael** Magistrate Grade I at Pallisa on 18th December, 2008.

The grounds are that;

1. The Learned trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence before him.
2. Decision occasioned a grave failure of justice.
3. Failure to visit locus in quo.
4. Order for costs bad in law.

As a first appellate court, I have the duty to re-evaluate the evidence and reach my own conclusions thereto- aware of the fact that I never had chance to assess the witnesses.

I have dully done so, and will proceed to consider the grounds as presented.

Ground 1: Failure to properly evaluate evidence:

The supplied record indicates that, the suit was for recovery of land. The plaintiff called four witnesses including himself, while defendant called five witnesses including himself. Plaintiff also supplied documentary exhibits recorded on court record as PE.1-PE.6.

From evidence from plaintiff and his witnesses the disputed land is described as about 20 acres situated at Butebo village. PW.2 George William's evidence was against D.2- whom he said was using about 2 acres of plaintiff's land. D.2 accepted and judgment was entered against him for the 2 acres admitted.

PW.3 was author of agreements tendered in, and affirmed when cross-examined by D.1 that he could show court the exiting location of plaintiff's land, which he allegedly bought.

PW.4 said the disputed land is at Kotiyayi village, and another part in Katakwi village. He told court that D.1 had settled his brother at one corner of the plaintiff's land, and his son. In cross-examination he stated that D.1 took him around the land after plaintiff had ran away from the land.

D.1 told court the land is in Katakwi village, Butebo sub-county; and it was given to him by his uncle **Ouka Tede**.

PW.2 (DW.2) Badiru Mugoma- conceded to buying land not knowing it was for plaintiff.

DW.3 – stated the land is at Kotyayi village, and it is about 30 acres.

DW.4 Tedeo Ouka- said land is in Katiya village, that the land was theirs (Katikoro) and successors in title. He brought documentary evidence which court only noted didn't concern 'D.1'.

DW.5 Katikiro said the land is at Katakwi village and that it is land held in trusteeship for the clan.

My assessment of the above evidence leads me to agree with appellant's contention that the framing of issues by the trial Magistrate led him to consider the wrong issues. The issue here that the court ought to have addressed its mind to would be to answer the following questions.

1. Which land was in dispute between plaintiff and defendants?
2. Who was the owner of the disputed land?
3. What type of property rights existed between the parties?
4. What were the possible remedies?

The above questions could have led the trial Magistrate to a thorough examination of the entire evidence in order to determine if the land plaintiff was describing was the same land D.1 and D.2 were describing. Evidence seems to show that parties referred to different pieces of land described in various ways as –" 20 acres at Butebo" (PW.1), "2 ACRES (PW.2), "Kotiyayi village" and "Katakwi village" (by PW.4), "Katakwi village" (D.1), "30 acres at Kotyayi village" (DW.3).

This discrepancy is not referred to or considered at all by the Magistrate.

In his judgment he simply notes that "defendant I exhibited no iota of evidence to show he had any least interest in the suit land".

It is my view that the conclusion is not based on a correct assessment of the evidence, since witnesses were called and the Magistrate simply did not believe them including the document which DW.5 produced to prove that the land in question was part of "clan land." These are matters court ought to have inquired into since it had been brought to its attention. My view is that, the court failed to correctly evaluate the evidence and rushed into findings based only on an erroneous assessment.
The ground succeeds as argued by the appellant.

Grounds 2, 3, and 4

The failure to visit locus in quo has been considered in several cases. In a case of this nature where the acreage is uncertain, parties description of location of lands and boundaries is unclear and at variance and where clearly documents have been brought to court which appear to contradict each other, there is no way a court can determine such a dispute without visiting the locus. The guidance to courts by the Hon. The Chief Justice under Practise Direction 1 of 2007 is paramount.

Cases in this court in earlier decisions of ***Mukodha Twaha v. Wendo Christopher CA 142/12*** (following ***James Nsibambi v. Lovisa Nankya 1980 HCB 81***,
Have found failure to visit locus in similar scenarios fatal and calling for a retrial.

I do not need to differ. This case for all purposes needs court to visit the locus. No decision can be justly reached on the available evidence on record without court's physical visit to analyse the actual situation on the ground. The failure by the Trial Magistrate to do so was a very fatal omission. In the case of ***James Nsibambi v. Lovisa Nankya*** (supra).

It was held that this failure renders the trial a nullity and is a basis for retrial. I do agree. I find that the failure to visit was a fatal omission rendering the trial a nullity. For this ground alone I would allow this appeal.

I therefore find that for this reason, there was grave failure of justice- rendering ground 2 as proved. In ground 4 the order for costs is also found bad in law, since it was based on wrong findings.

In all the appeal succeeds on all grounds raised. As prayed, the lower court Judgment and orders are set aside. A retrial is hereby ordered before another competent Magistrate. Costs to abide the results of the retrial. I so order.

Henry I. Kawesa

JUDGE

29.08.2014