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

HCT-04-CV-CA-119-2012
(Arising from Tororo Civil Suit No. TL.32-2005)

1. **WEGULO EGESA JOHN PATRICK**
2. **AGNES WENENE WEGULO**
3. **MADEMBE CHRISTOPHER STEPHEN**
4. **WEGULO ALLEN..... APPELLANTS**

VERSUS

1. **BUTALEJA SUB-COUNTY COUNCIL**
2. **BIRABO GEORGE**
3. **WANDERA SAMSON.....RESPONDENTS**

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

JUDGMENT

The appellant in this case appeals on the following grounds.

1. The learned trial Magistrate erred in law and fact when he failed to properly record all evidence adduced at the trial and thereby came to a wrong conclusion.
2. That the learned trial Magistrate erred in law and fact when he failed to properly evaluate all the evidence adduced at the trial and as a result came to a wrong conclusion.
3. The learned trial Magistrate erred in law and fact when he determined whether plaintiffs are the owners of the suit land instead of whether defendants are trespassers onto the suit land.

Briefly the background to the appeal is as follows:
Appellants sued defendants in the land tribunal, for a claim that defendants had trespassed on their land and prayed for damages, injunction and declaration of ownership.

Before trial, tribunals were disbanded. The file was transferred to the Chief Magistrate's Court at Tororo for trial. An exparte judgment was entered against the respondents, but was set aside and when matter proceeded interparties the Chief Magistrate found for the respondents; hence this appeal.

In the case of *Pandya v. R (1957) EA 336*, the duty of a first appellate court was discussed. The court has to review the evidence on record and make its own findings thereon.

In the process of attempting the review the lower court record, I have encountered some short comings making it difficult for this appellate court to review the entire evidence as a whole. The following are the problems encountered.

1. The record is incomplete. The typed record of proceedings ends at page 26 with a record of upto 06.09.2012. However when read, it is not inclusive of the evidence in chief given by the plaintiff and his exhibits. The record of the exparte hearing, the proceedings setting it aside and the tribunal proceedings were not attached to the record of appeal as part of the record.

I however noted from the available record and the judgment of the Chief Magistrate, the following further problems.

At page 2 of his judgment the Magistrate struck off defendant No.2 and No.3 for their not being specifically outlined. He purportedly struck off their claim and ruled that the judgment was against only (Defendant 1). He also chose to frame his own issues and proceeded on them rather than the issues which parties had agreed on.

Further perusal of the judgment and proceedings shows on page 22 of the record that upon close of the defence hearing court adjourned for locus on 05.10.2011. Proceedings at locus are not indicated but on 18.01.2012, it's shown that there was a decision to call independent witnesses. These were, **Ndabire David** and **Maiguna John** for defence and **Lugerego Emmanuel** for plaintiffs. This was set for 13.02.2012.

On 13.02.2012, there was a new Chief Magistrate, who took over the writing of the judgment. On 26.03.2012 the Chief Magistrate, instead referred the file back for judgment writing to his predecessor "since he had visited the locus", to write the judgment.

I have highlighted the above procedural pitfalls because as a first appellate court, it is the record which informs the court of the matters in controversy as they were in the lower court. If a record is not well prepared, or is not available, the appellate court has no way it can reach a just decision.

Under grounds 1, 2, and 3 and in his submissions appellants' counsel alludes to the fact that the record was tampered with, though respondent's counsel downplayed it in her submissions.

It is therefore my finding as here below on the grounds of appeal.

Grounds 1 and 2:

The procedure adopted in the handling of the lower court proceedings from the tribunal to the Chief Magistrate is strange to the known rules of procedure. In his submission the appellants complain that appellants were denied a hearing contrary to Article 28 of the Constitution. The record shows that the plaintiffs' case began with cross-examination at page 6 of the supplied proceedings. This was contrary to the provisions of the Civil Procedure Rules (See Order 1- parties to suits; Order 6 r.30, Order 12- on scheduling, Order 15 Civil Procedure Rules- framing of issues, especially O.15 r.25 (1), and O.17 Civil Procedure Rules – Prosecution of suits and adjournments, O.18 Civil Procedure Rules (Hearing).

The procedure as it appears on record falls far short of the above legal provisions especially under O.18 r.1 Civil Procedure Rules, on the right to begin which provides;

> "*The plaintiff shall have the right to begin unless the defendant admits the facts alleged....*"

and,

Order 18 r.2 of the Civil Procedure Rules which, further provides;

> "*On the day fixed for hearing the suit on any other day to which the suit is adjourned, the party having the right to begin shall state his/her case and produce his or her evidence in support of the issues which he or she is bond to prove.....*"

In the present case the plaintiff was called on only for cross-examination because the counsel for defendant informed the trial Magistrate on 04.09.2008 that the evidence on record be adopted. (See page 4 of proceedings).

It's not clear which record was to be adopted since this was a fresh trial. However the availed record shows that on 2.10.2008, the trial Magistrate ruled that the plaintiff should appear for cross-examination. At page 4 it's recorded,

> "*Court: Matter adjourned to 06.11.2008 for hearing. Costs in the cause for defence and cross examination by defence prosecution witnesses*!" Sic!

The above procedure is grossly irregular and offends the provisions of O.18 r.2 of the Civil Procedure Rules above.
Moreover O.18 r.6 of the Civil Procedure Rules requires that if any other record is to be relied on, it has to be certified by the Judge as the correct and a proper record of the evidence or other proceedings for purposes of the suit. This was not done and no such record is on the record of the lower court.

Appellant is therefore justified in his complaints as raised in his submissions that the Magistrate followed an irregular procedure, and denied the plaintiffs and their witnesses a chance to be heard.

Without digracing further, and on the authority of prior decided cases I tend to agree. Courts must be fair to all parties in a trial, as required under Article 126 (2) of the Constitution. *In Re Christine Namatovu Tebajjukira 1992-93 HCB 85*, it was held that;

> "*the administration of justice should normally require that the substance of disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the persuit of his rights*."

In this case plaintiffs were disadvantaged by non representation of counsel and the defence unfairly took advantage of it and misled court to disregard the correct trial procedure. However prudent that procedure appeared, it was irregular. See *Allen Nassanga v. Nanyonga [1977] HCB 319*, holding that rules of procedure are a guide to the orderly disposal of suits and a means of achieving justice between the parties.

I have already pointed out that the record of the lower court is incomplete and did not enable me to comprehend some of the complaints raised by appellant, as to what transpired in the actual hearing. However for reasons above, I find that respondents' arguments are not sufficient to answer the complaints raised under ground 1 and ground 2.
I do find that the two grounds are proved, for reasons stated above.

Ground 3:
This ground raises the fact that the trial Magistrate substituted the issues and hence reached a wrong finding.
The provisions of O.15 r.5 of the Civil Procedure Rules provides;

> "(1)*The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be*

necessary for determining the matter in controversy between the parties shall be so made or framed.

(2) The court may also at any time before passing decree strike out any issues that appear to it to be wrongly framed or introduced."

Having perused the record and the judgment, the issues which the parties agreed were framed thus;

1. Whether the plaintiffs have occupied the land continuously uninterrupted.
2. Whether the defendants or plaintiffs/defendants' agents trespassed onto the land.
3. What damages have been suffered?
4. What remedies are available?

The trial Magistrate in his judgment preferred to reframe the issues to read.

1. Who is the owner of the land in dispute?
2. Whether or not there is trespass on the land by defendants.
3. What are the remedies available to the parties?

Appellants faulted the rephrasing that it led to wrong examination of the evidence and led to wrong conclusions.

In my view trespass cannot be determined without resolving the issue of ownership in a matter of this nature. Both plaintiffs and defendants laid claim to this land. It was therefore pertinent to determine the property rights of the parties.

In my view the appellant in attempting to argue the ground raised other pertinent issues which on examination of the record, I could not resolve because it is not a complete record. If those issues were properly considered and resolved by the trial, irrespective of the format of the issues, still justice would have been done.

However the appellants alleged it wasn't so because;

1. Appellants were not given sufficient opportunity to present their case as they had wished through all the appellants and their witnesses testifying before court (as earlier found).

The appellants also allude to the record being tampered with. I have already commented to the fact that the prepared text of the lower court record is incomprehensible, not well arranged and does not pass for a proper record for purposes of appeal. It is difficult for this court to check the correctness of the allegations presented.

However a reading of the judgment of the lower court and perusal of the provided lower court scanty record, my impression is that the trial Magistrate did not give this trial a professional touch especially given the procedure he adopted to deny plaintiffs/appellants the chance to call further evidence at locus, and the irregular procedure adopted by him at the trial. I therefore hereby adopt the finding and holding in *Makula International v. Cardinal Wamala 1982 HCB 11*,

> "*that illegality in proceedings from which an appeal stems, court can interfere as illegality overrides all questions of pleading including admissions thereon*."

In this case illegalities in the process of the trial have been shown by appellants. Also the record of appeal on which the appeal is based is flawed and incompetent. These illegalities hereby operate to override all other questions including the competence of the appeal as against A.2 and A.3 as argued by Respondents. An illegality once brought to the attention of court cannot be allowed to stand.

For the above reasons I will interfere in this appeal and hold ground 3 as proved.

For all reasons stated above therefore, I find that this appeal will succeed on the whole. It is my finding that the trial conducted before the Chief Magistrate did not amount to a fair trial and therefore as prayed by appellants in the alternative, the matter will have to be heard *denovo*.

I allow the appeal. The judgment and orders of the lower court are set aside. A retrial before another competent Chief Magistrate is hereby ordered.
Costs abide the cause.

Henry I. Kawesa

JUDGE

11.11.2014