THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0130-2013

(ARISING FROM PALLISA CIVIL SUIT NO. 06/2006)

MUKENYE GUSTER.....APPELLANT

VERSUS

KAMINA TOMASI.....RESPONDENT

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

JUDGMENT

Appellant raised five grounds of appeal in his memorandum of appeal.

Parties were given a schedule to file their submissions.
At close of the schedule only appellants had filed their written submissions.

Appellants argued their grounds in this order. Grounds 1, 2 and 4 together, ground 3, 5 separately.

I will follow the same order.

The duty of a first appellate court is to re-evaluate the evidence and come up with own fresh conclusions thereon. The case of (*Pandya v. R 1957 EA*).

The brief cases were that in 1995 the appellant contended that in 1995 he mortgaged/pledged the suit land to one **Kamina Tomasi**, (Respondent) for a heifer and 4 goats. The transaction was allegedly witnessed by the late **Lausi Mujungo**, **Balamu** son of the respondent and **Wilberforce Kamiza. Dauson Ndoboli** authored the document sealing the transaction which was endorsed by both appellant and Respondent. It was appellant's claim that they agreed that the land would be returned to him as soon as he refunded the heifer and 4 goats with no time frame put therein to redeem the land. He claimed that in 2005 he took the heifer and 4 goats to redeem the land but the respondent disowned him hence this suit.

It was respondent's case that the claim by appellant was false because he bought the suit land from **Dagada Kintu** who had earlier on bought the land from **Daniel Mwigo** father of appellant.

After evaluating the evidence the learned trial Magistrate believed the respondent's evidence against the appellant and dismissed the suit, hence this appeal.

In his submissions counsel for appellant raised three issues to resolve grounds 1, 2 and 4.

1. Whether the plaintiff mortgaged land to the defendant.
2. Whether defendant has interest in the suit land.
3. Whether plaintiff is entitled to the remedies sought.

The main thrust of the arguments was that the learned trial Magistrate did not properly evaluate the evidence on record.

After reviewing the record and following the submissions, I agree with the observations by counsel for appellants that there was failure by the learned trial Magistrate to properly evaluate the evidence. This is because for example whereas in the judgment the learned trial Magistrate found that "*there was no land to mortgage*" and that "*plaintiff had no land to mortgage*," there is evidence to the contrary.

For instance the appellant led evidence in court and called evidence through **PW.1 Mukenye Guster** who said he bought the suit land from his late father **Daniel Mwigo** in 1980, and that it's situated in Nabuli/Busikane village and is about 6 acres. In 1995 he mortgaged it to **Kamina** (defendant) for a heifer and 4 goats witnessed by **Lausi Mujongo**, **Balamu, Wilberforce Kamiza and Dausai Ndoboli**. An agreement was made. **PW.2 Musinda Abdul** was LC.I chairman and saw the PW.1 mortgage the land to Respondent. He also saw him in 2001 trying to redeem the land. But PW.4 **Ndoboli Dausoni** was present during the transaction and was author of the document. In 2005 the appellant wanted to redeem the land, Respondent refused.

DW.1 Tomasi Kamina said he bought from **Dagada Kintu** and its 6-7 acres. This land had been subject of litigation in Kibuku court and he had won.

DW.2 confirmed DW.1 bought the land in 1971 from **Dagada** who bought from **Mwigo Daniel**.

I have found no suggestion on record to lead me to a conclusion that the evidence by defence was stronger than that of the plaintiff. No aggressive cross-examination of witnesses was done to discredit the plaintiff's version. It is therefore not clear from the learned trial Magistrate's judgment why he chose to believe the defence and disbelieve plaintiff's.

As rightly pointed out by counsel in submissions, respondent's evidence is a mere denial of the transaction, with no documentary evidence to back up his claims.

I agree with the cited cases of *John Kayibanda v. Uganda (1976) HCB 253* and *Sinaru Mbulakyalo v. B. Kigwere (1999) KALR 851*. Also *Luwero Green acres Ltd v. Marubeni Corporation (1997) 1 KALR 66* pointing out that there were gross misapprehensions of the evidence by the trial court.

I agree that conclusions that are made by the learned trial Magistrate in some aspects are contrary to what is on record or in evidence for example he stated that:

> "*All evidence showed that the land is the property of the defendant and the plaintiff is just obsessed with the idea of reclaiming what his late father disposed off long time ago.....*"

I did not find anywhere on record such evidence.

The Magistrate at page 3 of his judgment dismissed Exhibit P.1 which was the mortgage agreement as follows.

> "*I have looked at the document but I am unconvinced that two prudent people (plaintiff and defendant) should have left a clause to do with when the subject matter (land) would be redeemed if at all that document had to be believed. The*

plaintiff whose land was being mortgaged away should have insisted or promised a definite date on which to return whatever to redeem his dear land."

That type of analysis of evidence is unacceptable. It is not court that should dictate the contents of a document. Court only analyses its contents. This was an erroneous basis for rejecting this document. The law is that:

"*Once a mortgage, always a mortgage*."

A mortgagee has a right of redemption.

In conclusion for those reasons and those raised in submissions on those grounds, I agree that the learned trial Magistrate did not address his mind to all the evidence and the law on the above issues.

The grounds are therefore proved.

On ground 3, ground 5 basing on findings under grounds 1, 2 and 4 above. The court makes the following findings.

The failure to properly evaluate the evidence caused the learned trial Magistrate to fail to notice that the evidence raised by both plaintiff and defendant; seemed to suggest that each party was referring to a different piece of land.

Appellant specifically stated that these were two different pieces of land though they were in the same village. They all (plaintiff and defendant) spoke of different sizes of these lands; gave different neighbours, and descriptions surrounding these lands.

The above were very pertinent reasons that would have informed court of the need to visit the locus. However the locus was not visited.

I agree with the cited case of *Katuramu v. A.G. (1986) HCB 39* which guides that visiting locus must be done for justifiable causes. There was a just cause necessary for visiting locus. The failure by court to visit locus in this matter was therefore a fatal omission.

Ground 3 therefore succeeds.

I also agree with the definition of miscarriage of justice in *Matayo Okumu v. F. Oundhe (1979) HCB 229*. That a miscarriage of justice includes any circumstances where the decision of a court/tribunal prima facie appears not to be supported by evidence.

Or where the decision of court/tribunal is manifestly unfair, or where there has been a misdirection by the trial court on matters of facts relating to evidence.

Crane Insurance Co. v. Shelter v. Ltd CACA No. 14/98 (1999) KALR 612.

All the above definitions have been committed by the findings of the learned trial Magistrate in this matter, by virtue of findings under grounds 1, 2, 3 and 4 above. The decision complained of has been shown to have occasioned a miscarriage of justice. This ground succeeds as well.

The appeal succeeds on all grounds. The judgment and orders of the lower court are hereby set aside. An order for immediate retrial before another competent court is hereby granted. Costs to the appellants.

Henry I. Kawesa

JUDGE

12.06.2015