

THE SUPREME COURT OF UGANDA

MENGO

CORAM: MANYINDO D.C.J, ODER, J.S.C, & PLATT, J.S.C.

CIVIL APPEAL NO .14 OF 1990

BETWEEN

YAFESI KIRUNDA Appellant

AND

SEDULAKI ISANGARESPONDENT

(Appeal from the decision of the High Court of Uganda at Jinja

(Mrs. Justice Alice Mpagi Bahigaine) dated 4.5.89)

IN

HIGH COURT CIVIL APPEAL NO.35 OF 1986

JUDGEMENT OF PLATT J.S.C.

This is a second appeal against the judgment of the Magistrate Grade 1 at Jinja. The first appeal was dismissed by the High court at Jinja. The Appellant appeals again to this court having been unsuccessful in both lower courts.

The Appellant appeals ostensibly on matters of law as are appropriate to this second appeal. The first error alleged is that the learned Judge failed in her duty to subject the evidence to afresh and exhaustive examination, and so to draw her own conclusions, in the light of the findings of the trial court. Secondly it is said that the drawing of the sketch plan was not prepared in accordance with the provisions of the law. Thirdly it is said the evidence of Mwase Nkaire was accepted by

the learned Judge when she ought to have found that this was contrary to the evidence on the record.

On the first ground, Counsel for the Appellant was at great pains to point out that Mwase had been misunderstood as simply a person present when he was actually a member of a team appointed by the court. It is not a question, whether he was the member of the team. The Court appointed two emissaries and Mwase was not one of them. Mwase's own evidence on point reads like this

“This is the case of Kirunda and Sedulaki.

Kirunda won the case. Kirunda went and asked for court emissaries –

Katende and one Mwigombe were appointed court emissaries.

They went to the land and demarcated the boundaries. I was there ...”.

It is thus clear the Mwase was an interested by-stander. He could have given valid evidence as such; but the courts below preferred the evidence of Mwigombe. I do not see any value in the argument that Mwase's evidence were not given the weight due to it, as a member of the court team. The evaluation of Mwase's evidence cannot be faulted purely on the question whether he was a court appointee of merely present. In general, it would be understandable if the lower court preferred the testimony of the actual emissary- mwigombe.

The second ground raises a very important matter not put to the lower courts. There is, as Mr. Zaabwe pointed out, a certain confusion whether the boundary pointed out by mwigombe was parallel to, or perpendicular to, the boundary pointed out by Mwase .Mr. Zaabwe contended that Mwase's boundary was perpendicular to that of mwigombe ; but when the sketch map was produced at the time of the judgment , it was parallel. There was a dark suggestion that the first sketch with the boundaries perpendicular to each other, had been replaced by a sketch showing the boundaries parallel. This amounted to an allegation of tampering with the evidence; it might even go the length of fraud.

In such a case, it is necessary for learned Counsel to raise the matter as early as possible and carry out the challenge supporting the attack by affidavit or evidence, thus allowing the trial Magistrate to answer. This was not done and it is too late now to raise it.

This would have been a matter leading to the acceptance or rejection of Mwase's evidence, and thus to the fact of boundary's position, a matter for the lower courts.

There might also be an innocent explanation as to the misuse of those terms. There seems to be no other explanation of the confusion in the trial court's judgment where "parallel" is used at p 61 and "perpendicular" at p 64. It is not clear that both counsel ought to have made the position clear to the court whether they both rejected the map. If both Counsel rejected the map, the High court must have ordered a re- hearing. But the Appellant never put the matter squarely before the High Court, nor asked for a rehearing. Accordingly it is not a matter of law with which we are seized.

The third ground relates to a matter of fact .The trial court and High court rejected Mwase's evidence. There is no good reason to interfere.

A further "additional" ground of appeal was surreptitiously put forward in a supplementary record of appeal. It was not pressed, having in mind the need for leave to put it forward. But it raised no matter of law in any event.

I agree with the other members of the Court that the Appeal should be dismissed with costs.

Delivered at Mengo this 19th day of March 1991.

H.G. PLATT
JUSTICE OF THE SUPREME COURT

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Appellant

AND

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.....RESPONDENT

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JUDGEMENT OF ODER , J.S.C.

I have had the opportunity of reading the judgements of Manyindo , D.C.J and Platt , J.S.C.

I agree with them that the appeal should fail and, therefore, be dismissed,

Dated at Mengo this 19th day of March ,1991

A.H.O. ODER

JUSTICE OF THE SUPREME COURT.