THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KABALE

HIGH COURT CIVIL APPEAL NO. 0008 OF 2009

(From Rukungiri Chief Magistrate's Court Civil Suit No. 066 of 2008)

NDAGAHWEIRE GEORGE ::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

KAANA EPHRAIM :: RESPONDENT

BEFORE HONOURABLE JUSTICE J.W KWESIGA

J U D G M E N T

Ndagahweire George, the Appellant was dissatisfied with the judgment of the Chief Magistrate, Her Worship Wanume Debrah, sitting in her appellate jurisdiction, in a civil appeal from KANUNGU LC III Court, on 25th February, 2009. The Appeal was made on the following grounds:-

1. That the Chief Magistrate misdirected her mind to the well established Law and Procedure governing LOCUS IN QUO, upheld the decision of The LC III Court based entirely on extraneous matters solicited from the crowd and mere consultation from potential key witnesses and came to an erroneous decision.

2. The learned Chief Magistrate misdirected herself on the Law of Local Council Courts and conducting a retrial as a court of first instance and occasioned a total failure of justice.

The Appellant prays that the Appeal be allowed, the Lower Court decision be set aside and a retrial be ordered with costs to the Appellant.

On 22nd March, 2011 Counsel for the Appellant filed written submission which were basically a restatement of the grounds of Appeal without discussing the evidence or showing how the procedural errors of the Lower Court caused any miscarriage of justice. From the outset the submissions did not add any value to the memorandum of Appeal. The Respondent's case remains as he argued in the Lower courts. This is a typical case where the appellate court's decision has to be based on fresh evaluation of the evidence on record and come to the appropriate conclusion bearing in mind that the court did not have the opportunity of observing the demeanor of the witnesses while they testified.

The above position is even more prompted by the written submissions for the Appellant that did not discuss the evidence in support of the grounds of appeal or show how the lower court's decision caused miscarriage of justice. The Appellant prayed that this court orders for a retrial to justify the ordering of a retrial, the Appellant must prove that the trial of the Lower Court was conducted illegally with such outrageous procedural errors leading to a decision that no reasonable appeal can correct basing on the evidence recorded by the Lower Court. Unless there is proof that the evidence on record is useless the appellate court has the duty to revaluate the evidence and make a decision that finally determines case or dispute. Courts of Law, when considering the procedure or course of action to take must, among other things, be guided by the need to provide fair and speedy decisions without compromising any principals of natural justice especially the right to be heard and above all to avoid as much as possible indulging the parties in tedious, repeatitive and expensive trial/proceedings.

In view of the above minor irregularities which do not have the effect of causing miscarriage of justice would often be disregarded. While the Appellant alleges irregularities summarised in the memorandum of appeal and the written submission, the Respondent maintains his position of claim of ownership of the suit land that he purchased it from KABUZI on 19th March, 2007 and that he was sued from LC I to LC III courts which decided in his favour. During the hearing before the Chief Magistrate on Appeal, the Appellant, Ndagahweire averred that:-

(a) LC III Court adopted the Judgment of LC II Court to which he had appealed from LC I Court where he had lost. He lost in LC I, LC II and LC III courts. He raised a point of bias, he complained that LC II Court Chairman at the time of the hearing had been his political rival or opponent and that therefore LC III Court errered in adopting the decision of LC II Court which was tainted with bias. Sections 23 and 24 of L.C.C Acts preserves the observance of principals of natural justice while hearing disputes and one of the principals of natural justice being put in issue is that

no man shall be a Judge in his own cause. However, in the instant case there is no evidence to show that the LC II Chairman had direct or indirect interest in the land conflict. Section 8 of L.C.C Acts provides that decisions of the LC Courts are made by consensus or by majority vote of members. The Chairman does not have an original vote except where there is a draw in votes. There is no evidence that LC I and LC II court breached this provision. LC III Court decision was by consensus of all the six (6) members of this Court after hearing the case it can not be true that they merely adopted the LC II Court's decision. In the circumstances there is no basis for the allegation of bias at best the complaint is a mere useless speculation.

The criticism made against the LC III Court is that it merely adopted the LC II Court decision on the contrary, there was fresh hearing which is an irregularity committed by LC III Court which gave the Appellant extra opportunity to be heard. Whereas the LC III sitting in its appellate capacity was supposed to consider the case based on evidence on

record, they visited the **Locus in quo**, and heard the witnesses who had not testified before the lower court. This was irregular procedure because LC III should not have re-opened the parties' cases. The purpose of proceeding at the Locus in quo is for the court to give opportunity the witnesses already heard in court to make clarification of what they had stated in court. This should be done by the Court of first instance and not the LC III Court as an Appellate Court, be that as it may, I am guided by an earlier decision of this court. In the case of **BIRABWA VS SULAIMAN TIGAWALANA (I993) KAL R** where Justice C.M Kato (as he then was) held, and I agree, that LC Courts were intended to conduct their cases in as simple manner as possible without regard to technical rules of evidence and procedure. I find that the irregularity was not fatal to their decision. The procedural errors before LC III Court were cured by the fact that the appellant was given the opportunity to cross examine the witness, KABUZI, at great length. The existence of a written sale agreement, of the land in dispute, between Kabuzi and Kaana, the Respondent was solicited by the Appellant in Cross-

examination at this stage. I therefore find no merits in the Appellant's Counsel Criticism of admission of this exhibit at this stage. KAANA was the seller and he identified his signature as the signatory, it was not mandatory or fatal to the case supported by the exhibit merely because the writer of the Agreement was not called. The parties to the Agreement who are the signatories properly identified the Agreement and I can not fault the LC III Court for admitting the document as it did. The LC Court are not bound by the fast and hard rules of Civil procedures, Rules or Evidence Act applicable in ordinary courts. I am satisfied and commend the LC III Courts for observing the principal of natural justice by allowing all parties opportunity to be heard the court was able to decide the case on its merits. What the Appellant complaints of is basically procedural errors which did not prejudice administration of substantive justice which was determination of the rightful owner of the suit land.

Before taking leave of this ground of Appeal it is important to state that the appropriate court to visit the Locus in quo

should always be the court of the first instance. However in exceptional circumstances an appellate court may visit Locus in quo depending on exceptional requirement of each individual case. Whenever there is visiting of Locus in quo the following must be given due attention:-

(i) The court must ensure that all the parties and their witnesses are present.

(ii) Allow the parties and their witnesses to adduce evidence at the **Locus in quo** which must be recorded like any other evidence given in court.

(iii) Each party should be given opportunity to cross-examine the witnesses. The court should record all the relevant observations and where necessary draw a sketch plan of the scene to reflect the observations.

(iv) The court should avoid calling for statements or testimonies from people around the Locus in quo who are not witnesses in the court.

The purpose of the proceedings at the Locus in quo is to clarify or amplify the testimony of the witnesses who have already testified on behalf of the parties. This does not exclude any

court witness provided the opportunity to cross-examine is given to the parties.

The learned Chief Magistrate upheld the decision of LC III Court after re-evaluation of the evidence. She considered the fact that the Respondent proved that he bought the disputed land from Kabuzi Charles the Appellant's brother. The Chief Magistrate accepted the unchallenged evidence that after Kabuzi lost his sons who previous took care of the land he decided to sell it to the Respondent. The Agreement of sale/purchase of the land clearly describes the land giving names of people who have common boundaries with the land. Even without the criticized LC III proceedings at the **Locus in quo**, in absence of evidence that was capable of invalidating the sale of the land by Kabuzi Charles to Kaana, the dismissal of the Appellant's case would still be proper.

The Appellant sued in LC I Court and lost, he appealed to LC II where he lost then Appealed to LC III court where he lost. He appealed to the Chief Magistrate's Court where he lost hence this Appeal to the High Court. He has kept a protracted legal

battle through all these courts from 2007 until this day of a period of about (4) four years. Considering the case as a whole his suits and Appeals have no merits whatsoever. It is the final verdict of this court that this Appeal is hereby dismissed with costs to the Respondent on appeal and in the Lower court.

Dated at Kabale this **11th** day of **August,** 2011.

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J.W. KWESIGA
JUDGE
11-8-2011

LET this Judgment be delivered by the Assistant Registrar High Court, at Kabale.

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J.W. KWESIGA
JUDGE
11-8-2011