THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

H.C.C.A. NO. 1 OF 1993

YAFESI TEGIIKE :::::::::::::::::::::::::::::::::::: APPELLANT
(JAMES OBBO)

VERSUS

JAMADA WAKAFUTULI :::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HONOURABLE JUSTICE C.M. KATO

J U D G M E N T

The appellant in this case is one James Obbo. The appeal was originally instituted by his father Yafesi Tegiike who died before the appeal was finalised. The present appellant applied for letters of administration to administer the estate of his late father and the court granted the same on 26/10/1994. He then applied to the court to substitute his name for that of his late father under Order 21 rule 3 of Civil Procedure Rules. By consent of both parties his name was substituted for that of his late father. The respondent is one Jamada Wakafutuli. The appeal is the second, the first having been before the Chief magistrate of Jinja against the decision of RC3 court.

The history of the case is that the late Yafesi Tegiike instituted a civil case in the court of RC3 at Nakalama where he won but the present respondent appealed to the Chief magistrate who allowed the appeal. The appellant who was the plaintiff in RC3 court then appealed to this court against the decision of the Chief magistrate.

The brief facts of the case as may be gathered from the record of RC3 court and the Chief magistrate's court are that the late Yafesi was the son of Zindu. Zindu had a number of wives one of whom was called Aliyinza this old woman was the mother of Patrick Busadha and Daniel Bulyaza, Yafesi was apparently her step son. According to the story as told by the respondent and his witnesses in the lower court Aliyinza was his grandmother. Before her husband Zindu died he gave the land to her. After the death of Zindu she in turn gave the same land to the respondent who was one of her grandchildren being a son of one of her sons. She did this in the presence of three people Patrick Busadha, Yafesi Tegiike and Daniel Bulyaza all those

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people except Yafesi testified in the RC3 court to the effect that the land was actually given to the respondent by his grandmother and the Chief magistrate's court found this as a fact. The story as told by Yafesi in the court of RC3 is that he being the heir to the late Zindu he was the only person to distribute property left behind by his late father Zindu and that his (Zindu's) widow had no powers to distribute that property among her grandchildren.

The learned Chief magistrate rejected the story as told by the appellant and gave judgment in favour of the present respondent, hence this appeal. The appellant in the present appeal gave five grounds of appeal which were as follows:-

1. That the learned Chief magistrate erred in law in that she allowed the respondent's appeal when the trial in the lower courts was a nulity.

2. That the learned Chief magistrate erred in law in that she misdirected herself when she allowed the appeal on the basis of the version of translation which contained faulty translation and was translated by someone not authorised by law to do so.

3. That the learned Chief magistrate erred in law in that she called further evidence to fill the gaps in the appellant's case when the law did not allow her to do so.

4. That the learned Chief magistrate erred in law in that she held that there was nothing like the clan having a right to decide on who takes what when someone dies for the clan is not an entity and therefore it cannot own anything when this was not in accordance with the custom at the time in question.

5. That the learned Chief magistrate erred in law in that she failed to evaluate the evidence and hold that since there was overwhelming evidence that the widow of Zindu had good title over the land she passed a good title to the appellant when this was not the case.

When this appeal came up for hearing the appellant appeared in person and he argued that the learned Chief magistrate was wrong because she did not visit the locus in quo he also argued that the judgment of the RC3 court was a correct one because that court had visited the locus in quo. This point cannot be entertained as it was not raised on the first appeal. He also attacked the judgment of the Chief magistrate on the ground that the translation which was presented before the Chief magistrate was faulty. He finally said that the learned Chief magistrate should not have called additional evidence of Aliyinza when she was dealing with this appeal, and that the original appellant Yafesi was never allowed to call additional evidence when the appeal was being heard by the Chief magistrate.

On the other hand Mr. Tuyiringire who appeared for the respondent maintained that there was nothing wrong with the judgment of the Chief magistrate regarding the translation and that he did not know which translation the appellant was refering to; he wondered as to what part of translation was faulty. He however agreed that Aliyinza was allowed to give evidence when the appeal was being heard by the Chief magistrate but in his view this was permitted by section 28 of the Resistance committee (Judicial powers) statute 1988 and Order 39 rule 22 of the Civil Procedure Rules and that there was nothing on record to show that the appellant had been denied permission to call witnesses when the appeal was being heard by the Chief magistrate. He further submitted that the Chief magistrate was correct to hold that the clan was wrong to deprive the respondent of his land and that the learned Chief magistrate gave reasons why she allowed the appeal and this was after she had evaluated the evidence from both sides.

I will deal with the five grounds of appeal in the order they are listed above. The first ground of appeal does not seem to make much sense as the appellant did not elaborate upon it and he did not clarify what he meant by the proceedings of the lower court being a nullity. To me this ground of appeal does not make sense because the same appellant had won in the court of RC3 so for him to say that the proceedings of that court were a nullity defeats the whole purpose of his litigation because it would mean the proceedings in the RC3 court were of no effect to him although he won the case in that court. Although the appellant did not say so, it would seem what he meant here was probably that the hearing of the suit should have started in RC1 court and should

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have reached RC3 court on appeal since generally RC3 courts deal with appeals only, but even if this was what the appellant intended to say still his argument would be defeated on two grounds; the first ground is that section 6 of Resistance committee (Judicial powers) statute 1988 permits RC3 courts to sit as a court of original jurisdiction where one of the parties has successfully objected to his case being tried in the lower courts. In the present case thercord shows that the case was tried by RC3 because the appellant objected to RC1 and RC2 courts hearing his case because those courts were confused. The other reason why the appellant could not rely on the above assumption is that it is he himself who took this case to RC3 court he is therefore estopped from complaining against the RC3 court having dealt with his case. In these circumstances I find no merit in the first ground of this appeal and it is accordingly rejected.

Regarding the second ground of this appeal, with due respect I do agree with Mr. Tuyiringire the learned counsel for the respondent when he says that the appellant did not point out or explain how the translation was faulty nor could he mention who translated the proceedings. It was his duty to point out the mistake made in the translation version or what happened in the lower court. In the absence of such an explanation I take it that the translation appearing on record is the correct version of what happened in the lower court of RC3. At any rate the vernacular record is also on the file and the appellant did not point out if there was any omission in the translation of that record. I find that this second ground of appeal is not helpful to the appellant. The latin expression: Omnia praesumuntur rite et solemniter esse acta, donec probetur in contrarium (All things are presumed to have been performed with all due formalities until it is proved to the contrary) applies to the present case.

I now turn to the third ground of this appeal which is to the effect that the learned Chief magistrate who heard the appeal was wrong to have admitted additional evidence from one of the witnesses. According to the record the learned Chief magistrate admitted the evidence of one Aliyinza. I agree with the learned counsel for the respondent when he pointed out that by provisions of section 28 of the Resistance committees (Judicial powers) statute 1988 an appellate court is allowed to call additional evidence on appeal. The evidence of this woman which is being

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complained of was not different from what she told the court of RC3, her evidence in both courts was to the effect that her late husband Zindu had given her the land and that in turn she had given that land to the respondent who is her grandson and also the grandson of Zindu. By calling this witness no miscarriage of justice was occasioned since this evidence had already been received in the RC3 court and the purpose of calling her was only to reinstate what she had said earlier in RC3 court. The appellant was given a chance to cross examine her and he did so. In these circumstances I reject this third ground of appeal as being of no value to the appellant.

Concerning the fourth ground of appeal, the appellant attacked the finding by the learned Chief magistrate that the clan had no right to decide as to who takes what after Zindu's death. I have gone through the record on the file and it is abundantly clear that the land had been given to Aliyinza by her husband Zindu inter vivos therefore the finding of the Chief magistrate that the clan had no right to take way that land from the respondent who had lawfully acquired it from his grandmother was correct. The old woman had the right to give away to any person of her choice what her late husband had given to her and the clan had no power to interfere with her right. I reject this fourth ground of appeal.

I finally turn to the fifth and last ground of this appeal which is to the effect that the learned Chief magistrate did not evaluate the evidence which was presented to her and in the lower court. It is trite law that a court of first appellate jurisdiction has a right to evaluate the evidence as given in the lower court and come to its own conclusion, but bearing in mind that the trial court had the benefit of seeing the witnesses in the witness box a benefit which the appellate court does not enjoy: Williamson Diamond Ltd v. Brown (1970)EA 1 and Pandya V. R. (1957) EA 336. In the present case in her well written judgment the learned Chief magistrate carefully evaluated the evidence on record and she made a number of findings which were supported by the evidence on record. One of such findings of fact was that the land in dispute belonged to Aliyinza the widow of the late Zindu and that she had given that land to her grandson the respondent now after the death of her husband. I find this finding to have been fully supported by evidence and she made it after evaluating the evidence before her. Her other finding that there was evidence overwhelmingly showing that Aliyinza had got

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good title from her late husband was also supported by evidence; she further held that the clan was wrong to get the land from Wakafutuli when the evidence had clearly shown that he had got that land lawfully. Her other finding was that the appellant had no right to remove property from those who had lawfully obtained it simply by claiming that he was the heir to the late Zindu. I failed to discover anything showing that the learned Chief magistrate did not evaluate the evidence before her, on the contrary the record shows clearly that she went through all the evidence and evaluated it before she came to her decision which in my opinion was a right decision.

In these circumstances I find that this appeal has no merit and it is accordingly dismissed with a result that the judgment of the learned Chief magistrate is to be sustained and Wakafutuli is to take the land in dispute. The appellant is to pay the respondent all costs of this case in this court and the courts below. So I order.

C. M. KATO
JUDGE
29/11/1995