The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Civil Appeal Number 15 of 2018

(Arising from Kumi Civil Suit No. 019 of 2015 Consolidated with Civil Suit No. 05 arising from Administration Cause No. 11 of 2016)

Mai Faustine :: Appellant

Versus

Elungat Micheal and 3 Others :: Respondents

Before: Hon Justice Dr. Henry Peter Adonyo

Judgment

1. Brief Facts:

The appellant filed Civil Suit Number 30 of 2011, however it was transferred to Magistrates Court at Kumi and it was registered as Claim No. 19 of 2015.

The appellant brought the suit for recovery of 10 acres/gardens of customary land situate in Kodokoto and Kakures Villages, Mukongoro sub-county, Kumi District, an order that he is the rightful owner of the land, vacant possession, permanent injunction, general damages, mesne profits and costs of the suit.

This suit was brought against the Respondents jointly and severally who he claimed encroached upon his land in 2007.

The defendants all denied his claim and averred that they owned the land severally.

The appellant then filed Civil Suit Number 05 of 2016 seeking a declaration that the caveat lodged by the defendants (respondents) against his letters for administration to the estate of his deceased father was lodged illegally, fraudulently, general damages, punitive and exemplary damages and costs.

The defendants contended that their caveat was legal as the application for letters of administration included the suit land which belongs to them.

The trial Magistrate consolidated both suits and made judgement in favour of the Respondents. The decision of the lower court in favour of the respondents led to this appeal.

The appellant also filed three applications during the pendency of the suit. Miscellaneous Application No. 23 of 2015 for a temporary injunction, Miscellaneous Application No. 22 of 2015 for an interim injunction and Miscellaneous Application No. 15 of 2016 for orders that the defendants/respondents be condemned in costs for wilful violation of the order for a temporary injunction issued by the trial Magistrate.

2. Grounds of Appeal:

The appeal was brought on seven grounds:

a) That the learned trial Magistrate erred in law and fact when she failed to evaluate the evidence as a whole thus arriving at an erroneous decision and occasioning miscarriage of justice to the appellant?

b) That the learned trial Magistrate erred in law when she misunderstood, misconstrued and misinterpreted the doctrine of constructive notice thus arriving at an erroneous decision?

c) That the trial Magistrate erred in law and fact when she misunderstood, misconstrued and misinterpreted the doctrine of adverse possession thus occasioning miscarriage of justice to the appellant?

d) That the trial Magistrate erred in law and fact when she found out that the Respondent's caveat was valid thereby occasioning a miscarriage of justice to the appellant?

e) That the trial Magistrate erred in law when she failed to find that the Respondents violated court orders thereby occasioning a miscarriage of justice to the appellant?

f) That the trial Magistrate erred in law and fact when she manifested bias against the appellant's case therefore occasioning a miscarriage of justice to the appellant?

g) That the trial Magistrate erred in law and fact when she failed to record proceedings at "locus in quo" thus occasioning a miscarriage of justice to the appellant?

3. <u>Background</u>

a. Duty of the 1st appellate court.

In ***Kifamute Henry vs Uganda SCCA No. 10 of 1997***, the Supreme Court held that the duty of a first appellate court was to review the evidence of the case and to reconsider the materials before the trial court. Further that the appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

In the case of ***Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236***, the Supreme Court further noted that a first appellate court was further under an obligation to re-hear the case before it by subjecting the evidence presented to the

trial court to a fresh and exhaustive scrutiny and to re appraise the same before coming to its own conclusion.

The above legal positions are borne in mind in resolving this appeal.

4. Representation:

The appellant herein was represented by M/s Odokel & Co Advocates Kampala, while the respondents were represented by M/s Ogire & Co Advocates of Soroti.

Both counsels file final written submissions in arguing this appeal. These are on record and are considered together with the proceedings of the lower trial court as well as its judgment.

5. Resolution of this Appeal:

Counsel for the appellant argued grounds 1 and 6 together. I will, however discuss and conclude on each ground as presented.

a. Ground 1:

That the learned trial Magistrate erred in law and fact when she failed to evaluate the evidence as a whole thus arriving at an erroneous decision and occasioning miscarriage of justice to the appellant?

It was submitted by counsel for the appellant that the trial Magistrate in determining ownership of the suit land evaluated the evidence in respect of each defendant separately and thus arrived at a wrong conclusion.

That with regard to the first respondent the trial Magistrate found that it was not disputed that he had cultivated the suit land since 2006 but that what was in contention was who occupied the land prior to 2006.

The appellant testified that he and his father were in possession of the land till 1997 when the father passed on and he last cultivated the land in 2000.

The 1st respondent's claim to part of the suit land (four gardens) is that he purchased the same from Mariko Ijala on the 29.01.2006. His entire claim is based on the prior ownership of the 4 gardens by Ijala Mariko.

Elungat Michael-The first respondent (DW1) testified that Ijala Mariko inherited the suit land from his own father who passed away but that he had no letters of administration when he sold the land to him. He testified that Ijala was alive at the time of the sale and had been cultivating the land before 1980 and he took him around the land before he purchased it and he bought it jointly but that he never measured the size of the gardens. He further testified that the land is far from that of Okalebo and when he bought it was free with nothing on it and so he cut the trees which were on the land and no one reported him to the police.

He also stated that during the sale all the family members of Mariko Ijala were present and signed the sale agreement with none of them ever complaining about the sale.

Ogwapait Estauko-DW7 corroborated this evidence to the extent that he was around during the sale of the land and its boundaries, but did not give evidence with regard to the seller, Mariko Ijala.

DW5-Okimat Paul also testified that the 1st respondent bought the land in 2006. He was not there during the sale. He bases his evidence on the sale agreement he saw with Elungat Michael, the 1st Respondent. He corroborates the 1st respondent's evidence that Mariko Ijala inherited the land from his father but he did not remember the year.

Mai Faustine, the appellant on the other hand claimed the land belonged to his late father Mariko Okalebo.

PW5-Ojilong Julius testified that he was aware of the 1st respondent's intended purchase and he told him not to purchase it because it did not

belong to Ijala. He also testified that relatives of the parties, Micheal Ijala and Leonard Anguria went to the LC II court in 2005 over the suit land and it was Ijala claiming the land however, the matter was abandoned. He further testified that before the appellant used the land his father was using it.

PW6-Etyang Constant testified that the appellant was not using the land because he was working and as he was growing up the suit land was vacant.

PW7-Okiria Francis testified that he always participated in the transactions of his grandfather called Okalebo and knew all the boundaries of the suit land. He testified that the appellant has never cultivated the suit land but that Okalebo used to cultivate it.

PW8-Anguria Leonard testified that he moved around the suit land on different occasions with his grandfather Okalebo, his grandmother and uncle called Okalebo Deo and they used to graze on the land. That his grandfather Okalebo showed him the entire land he owned including the suit land.

He testified that the appellant cultivated the suit land from 2000 and that Okalebo was not buried on the suit land.

During re-examination he testified that he began using the land in 2000 after the appellant who was the heir to the late Okalebo authorised him to use the land.

PW9-Okiria John Wilson testified that he had never seen the appellant using the land however he saw his father Okalebo) using it.

P. Exh.3 are clan minutes of a land distribution and shows that Imariko Ijala was given 1 garden on the upper end and three on the lower land near the wetland. This document was not objected during the hearing.

PW4-Emukedet Alosio testified that the land in dispute was bought by Elungat Michael from Imariko Ijala and was in the upper part and not near the swamp.

The above formed the evidence received in relations to the land in dispute.

The trial Magistrate in determining the issue of ownership found that the Elungat Michael who is the 1st respondent had been in actual possession of the suit land since 2006 and the appellant was not and from her analysis the 1st respondent was in adverse possession of the suit land with the appellant's father having passed on in 1997.

It is clear from the evidence above that Elungat Michael was not able to prove that Imariko Ijala was actually the owner of the entire portion of land he sold to him.

The clan minutes under which Ijala was given land show that he was given land in two locations and the one on the upper side which he sold to the 1st respondent was only 1 garden.

From that piece of evidence, I would find that that was the only portion that the 1st respondent was entitled to.

The Trial Magistrate attributed the doctrine of adverse possession to the 1st respondent and decided that his ownership of the suit land based on that.

I would, however, find that in the same way when she declined the appellant's submissions in the lower court on the 1st Respondent not being a bonafide purchaser for value because the same had not been pleaded is the same way the doctrine of adverse possession should be treated.

This is because Elungat Michael, the 1st respondent never pleaded the defence of adverse possession and was not cross-examined upon it during

the hearing and therefore the trial Magistrate had no reason to use it in the determination of the suit.

It should be noted that the Adverse possession is also known as squatter's rights. Adverse possession is a legal principle that states that a person can acquire legal ownership of someone else's property. The idea of adverse possession is important because it ensures that land is used efficiently. legal principle of adverse possession also known as squatter's rights presumes the acquisition of a legal ownership of someone else's property.

With regard to Omoding Stephen, the 2nd respondent, he testified that the part of land he occupies on the suit land was acquired by way of inheritance in 2006 from his called father Akol Joseph who also had inherited from his own father Okiror s/o Akol.

He testified that the appellant's land does not stretch to his, however, he did not know the size of the appellant's land. He denied that the appellant's land neighbours any of the respondents' land. He also testified that the respondents were all of different clans but they were neighbours. **DW6-Iwasiei Gabriel** testified that since his childhood he has seen the late father of Omoding Stephen, the 2nd Respondent cultivating the land in issue and never the appellant. He shares a boundary with the second respondent and before him he shared a boundary with his father Akol Joseph and he has been occupation of the land since 2006.

DW-Ogwapait Estauko corroborated this by testifying that since his childhood he had seen the late fathers of the 2nd and 4th Respondent cultivating parts of the suit land and had never seen the appellant or his relative cultivating the suit land.

Both **DW6- Iwasiei and DW7 -Ogwapait Estauko** witnessed the Omoding Stephen, 2nd respondent carrying out his duties as heir to the estate of the late Akol.

Omoding Stephen, the 2nd respondent is the only respondent with an established home on the suit land.

PW5- Ojilong Julius testified that Akol never used the suit land, however, **PW6- Etyang Constant** testified to the contrary and stated that Akol used to use the land where Omoding Stephen, the 2nd respondent was and therefore the 2nd respondent was on the father's land. He also stated that as he was growing up the suit land was vacant.

PW7- Okiria Francis testified that Akol had land bordering the suit land but he died without using the suit land.

PW8-Anguria Leonard testified that when he was going around the suit land with his grandparents the late Akol Joseph was present and in 2000 he trespassed on the land by about 2 big gardens and the issue was never sorted out and after his death his sons continued using the land. **PW9- Okiria John Wilson** did not know the extent of the late Akol Joseph's land.

From the summary of the testimonies above, I would find and conclude that the trial Magistrate was partly right when she resolved the ownership of the land in favour of Omoding Stephen, the 2nd respondent.

However, there is that part of the land which was not accounted for in evidence. These are the two (2) gardens which Akol trespassed upon and his children continued trespassing upon even after his death which belonged to Mai Faustine, the appellant.

This fact was never resolved and the fact that the 2nd respondent has been in continuous possession does not give him ownership of the land.

I, therefore, would conclude that the 2 gardens do not belong to the 2nd respondent.

Achola Florence, the 3rd respondent claimed ownership of the disputed land by virtue of inheriting it from her late grandfather, Okiria Adriano. She told court that she was allocated 3 gardens on 07.05.2007 by her brother Okiria John Robert who the heir to their grandfather. The clan minutes for that date shows that Achola Florence was given land as inheritance from her father Okia Agenatio. DW7-Ogwapait Estauko testified he knows the land of the late Okiria Adriano who was not his immediate neighbour. He testified that his father shared a common boundary with Adriano and after the death of his father and the 3rd respondent's grandfather, he started sharing a common boundary with the 3rd respondent. He stated that he had a dispute with Okiria, who is the 3rd respondent's brother.

When court asked him to clarify this statement, he stated that all his father's land that was neighbouring Adriano was sold to Ochen after his death.

PW5-Ojilong Julius testified that he had never seen Okia Agenatio or Okiria John Robert use the suit land. However, **PW 6-Etyang Constant** testified that he knew Okia Agenatio and that he used to cultivate the suit land and he was on one side and he was on the other. PW7- Okiria Francis testified that Achola's grandfather's land was next to Okalebo's land but Achola trespassed onto Okalebo's land.

PW3-Oluk Cuthbert testified that Adraino Okiria never used the suit land and he was only a neighbour.

During re-examination he testified that the late Okalebo Mariko used the suit land to grow cotton. Mai Faustine, the appellant testified that Achola

Florence, the 3rd Respondent never got a share of the suit land from her father because her father's land did not include the suit land. He further testified that he attended the meeting after the demise of Achola Florence, the 3rd respondent's father and she was given one garden to compensate her for the expenses she spent treating her father.

PW6-Constant Etyang testified that Okia was cultivating in Iseku's land and that is where Achola and Okanya were. He further testified that Okia used part of the suit land for cultivation but did not settle there.

Given the testimonies of witnesses as above, it can be firmly stated that Achola Florence, the 3rd respondent encroached on the appellant's land, that is the part of the land she is cultivating which belongs to the appellant.

Aoloi Gapito, the 4th respondent claimed that he got his part of the suit land from his father Gideon Okerenyang in 1973. That is father had inherited the same from one Asoka s/o Okerenyang who was also his father. He testified that he has been in use of the suit land since 1973. This statement was corroborated by **DW5-Okimat Paul**.

Mai Faustine, the appellant testified that Aoloi Gapito, the 4th respondent's father never used the suit land and his land was a mile away from the suit land and Aoloi Gapito was using 2 gardens in the suit land.

PW6- Etyang Constant testified that Aoloi Gapito began using the land after the suit came to court and trespassed on it.

Weighing all the evidence received in the lower court as a whole, a clear pattern of encroachment of the appellant's land can be seen. This is because when Mai Faustine's father passed on in 1997 him Mai subsequently getting work away from home in Kumi in 2000, he left his land vacant as testified to by most of the witnesses and thereafter the persons the respondent's acquired the land from encroached on the

appellant's land and used it. This fact is solidified more as seen from the time within which all who claimed to have acquired the disputed land told court.

Most of them attest to having acquire part of the suit land i after 2006 and even Aoloi Gapito, the 4th defendant who claims to have got the land from his father in 1973, clearly extends his inheritance by cultivating on the suit land.

From the above, I am satisfied that the suit land originally belonged to the father of the appellant but was encroached and even sold off by persons who had no any colour of right to do so who took advantage of the appellant being away from the suit land.

Ground 1 therefore succeeds and I would declare the appellant as the rightful owner of the suit land.

b. <u>Ground 2 and 3.</u>

- *That the learned trial Magistrate erred in law when she misunderstood, misconstrued and misinterpreted the doctrine of constructive notice thus arriving at an erroneous decision?*
- *That the trial Magistrate erred in law and fact when she misunderstood, misconstrued and misinterpreted the doctrine of adverse possession thus occasioning miscarriage of justice to the appellant?*

These relate to constructive notice and adverse possession. The Trial Magistrate in her judgment relied on the doctrine of adverse possession when determining the question of ownership. She found that the appellant was neither in constructive nor actual possession of the suit land and the 1st respondent enjoyed quiet possession of the land in that period and therefore acquired it through adverse possession.

It should be noted that by the trial magistrate using this doctrine, it meant that she acknowledged the appellant's ownership of the suit land and disqualifies the 1st respondent's claim that he rightfully purchased the land from Ijaala Mariko. The fact, however, is that the respondents did not plead adverse possession and that alone should have been sufficient bar for the trial magistrate to using that principle in her determination of the suit. This ground is over taken by the analysis in Ground 1.

Having found that the appellant is the rightful owner of the suit land I see no reason to determine he was in possession. Grounds 2 and 3 thus succeeds.

c. Ground 4:

That the trial Magistrate erred in law and fact when she found out that the Respondent's caveat was valid thereby occasioning a miscarriage of justice to the appellant?

Having determined that the land in dispute belongs to the appellant the caveat lodged against his letters for administration is invalid. Ground 4 therefore succeeds.

d. Grounds 5,6 and 7:

- That the trial Magistrate erred in law when she failed to find that the Respondents violated court orders thereby occasioning a miscarriage of justice to the appellant?

- That the trial Magistrate erred in law and fact when she manifested bias against the appellant's case therefore occasioning a miscarriage of justice to the appellant?

- *That the trial Magistrate erred in law and fact when she failed to record proceedings at "locus in quo" thus occasioning a miscarriage of justice to the appellant?*

The record clearly shows that the trial magistrate conducted locus however she only drew sketch maps of the respondent's claimed portions of the suit land and their approximate sizes, however, there were no real notes on her observations of the land marks on the suit land and no notes on what the appellant stated.

The law relating to the conduct of *locus in quo* visits is very clear. It is **Practice Direction No.1 of 2007**.

Guideline 3 of which provides thus;

During the hearing of land disputes the court should take interest in visiting the locus in quo, and while there;

(a) Ensure that all the parties, their witnesses, and advocates (if any) are present.

(b) Allow the parties and their witnesses to adduce evidence at the locus in quo.

(c) Allow cross-examination by either party, or his/her counsel.

(d) Record all the proceedings at the locus in quo.

(e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.

In ***Kwebiiha Emmanuel and Anor Vs Rwanga Furujensio and 2 Ors CA No.021 Of 2011[2017] UGHCCD148***, it was held that the purpose of visiting locus in quo is to clarify on evidence already given

in court. It is for purposes of the parties and witnesses to clarify on special features such as graves and/or grave yards of departed ones on either side, to confirm boundaries and neighbours to the disputed land, to show whatever developments either party may have put up on the disputed land, and any other matters relevant to the case.

It is during *locus in quo* that witnesses who were unable to go to court either due to physical disability or advanced age may testify.

However, if the trial court finds/or is satisfied that the evidence given in court is enough, then he or she may not visit the *locus in quo*.

Evidence at the *locus in quo* cannot substitute for evidence already given in court. It can only supplement.

It should therefore be noted that visiting *locus in quo* is not mandatory.

It depends on the circumstances of each case. However, once locus in quo is visited, all the relevant procedures must be followed.

Witnesses must testify or give evidence after taking oath or affirmation and they are liable to cross examination by the parties and/or their advocates.

In this respect, I would find that the trial magistrate erred in law when she did not record findings regarding both parties at locus. That she depended on her unwritten findings in her judgment also made it impossible for the appellate court to re-evaluate what observations she made at the locus in quo. By not preparing and placing on record a locus in quo report, the trial magistrate erred in law and fact and therefore occasioned a miscarriage of justice to the appellant.

6. Conclusion:

Based on my findings and conclusions overall above, this appeal would succeed as it is meritorious.

7. Orders:

- This appeal is allowed.
- The judgment and orders of the lower trial court awarding the suit land to the respondents is overturned and substituted with judgment in favour of the appellant.
- The appellant is similarly awarded the cost of this appeal and the costs in the lower court.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

8th June 2022