THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: E. MUSOKE, MUZAMIRU KIBEEDI, C. GASHIRABAKE, JJA)

CIVIL APPEAL NO.239 OF 2016

(An Appeal arising from the Judgment of the High Court (Soroti) in Civil Appeal No.3 of 2013 dated 12th July 2016 delivered by the Hon. Lady Justice H. Wolayo)

BOITI BONNY:: APPELLANT

VERSUS

IMALINGAT LAWRENCE:: RESPONDENT

JUDGMENT OF CHRISTOPHER GASHIRABAKE, JA

Introduction

This is a second Appeal. It arises from the decision and Judgment of Hon. Lady Justice H.Wolayo rendered on the 12th July, 2016. That Appeal arose from original Civil Suit No. 105 of 2010 at the Bukedea Grade 1 Magistrates Court.

BACKGROUND

At the trial Court, the Respondent (then plaintiff) sued the Appellant (then defendant) for trespass and herding of cattle without his consent on land situated at Akakaat Village, Kumutur Parish, Kolir Sub-county, Bukedea district (hereinafter referred to as the "suit land"). It is the case for the Respondent that he

acquired the land as a customary heir and beneficiary to the estate of his late father Imagoro George and that he has been in possession of the land before and after his success in Local Council Court III and that the Defendants together with their families have since 2010 invaded and trespassed upon the suit land. On the other hand, the case for the Appellant in the trial court was that the suit land has never been the property of the estate of Imagoro George as alleged. That he has never occupied the Respondent's land and that the land he occupies had been their traditional land, but for a brief season when he had been driven out by the Karimajong Cattle Rustlers in 1979 to 2010 and in May 2010 they lawfully resumed their lawful occupation of their customary holding.

The trial Magistrate found that it was just and equitable that the suit land be shared equally between both the Appellant and the Respondent because they both had equitable interest which must be protected. Both parties were dissatisfied with the Judgement and they each appealed to the High Court at Soroti but the Appellant withdrew his Appeal. The Appeal of the Respondent proceeded and it was allowed by the learned Judge who found that the entire suit land belonged to the Respondent. The Appellant, being dissatisfied with the decision of the first Appellate Court lodged this Appeal.

GROUNDS OF APPEAL

The following are the grounds of Appeal in this matter:

1) The learned Judge as the first Appellate Court erred in law when she failed to properly re-appraise and or re-evaluate the evidence on record, thereby reaching a wrong conclusion that the Respondent was the lawful owner of the entire disputed land.

2) The learned Judge erred in law and fact when she held that the Respondent had enjoyed quiet possession of the suit land for 30 years and had conferred on him an exclusive title without considering the occurrence of insurgencies that had forced the Appellant and his family to flee the suit land temporarily.

3) The learned Judge erred in law and fact when she held that the Appellant's evidence and that of his witnesses was full of untruthfulness and contradictions regarding the L.C letters and ownership of the toll tax receipts tendered in without examining the relevancy of the same about the ownership of the suit land.

4) The learned Judge erred in law when she held that the Respondent had proved that he had a more superior title to the suit land, and that of the Appellant has been extinguished by a thirty year absence.

5) That the decision of the learned trial Judge has occasioned a miscarriage of justice.

Representations

At the hearing, the Appellant was represented by Mr. Kato Fred. The respondent was present but was not represented by Counsel. However, upon his request, the Court granted him leave to retain counsel to assist him in making submissions.

DUTY OF THE COURT

I shall, before addressing the grounds as set out in the Memorandum of Appeal, re-state the duty of this court when handling second Appeals.

Rule 66 (2) of the Judicature (Court of Appeal Rules) Directions *provides that:*

"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal the points of law or fact or mixed law and fact and, in the case of a second appeal, the point of law, or mixed law and fact, which are alleged to have been wrongly decided ..."

In the case of **Kifamunte Henry v Uganda Criminal Appeal No.10 of 1997 (SC)**. The Supreme Court held as follows on issues of second Appeals;-

"Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal

to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the court of first appellate Court has wrongly held that the trial Court correctly directed itself, yet, if the Court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view ***R. Mohamed All Hasham vs R, (1941) 8 E.A.C.A. 93.***

On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probable, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: ***R. vs Hassan Bin Said, (1942) 9 E.A.C.A. 62."***

Before counsel for the Appellant could make submissions on the grounds he prayed that the word "fact" be disregarded in grounds 2,3, and 4 of the memorandum of Appeal in accordance with Rule 43(3) (a) of the Rules of this Court.

Counsel for the Respondent also submitted that Section 72 of the Civil Procedure Act also barred second Appeals from being filed on matters of fact or mixed law and fact. Counsel for the Respondent also argued that granting the prayer of counsel for the Appellant to ignore or disregard or amend the Word "fact" would obscure the fact that the grounds of appeal do not comply with the Rules of this Court. He submitted that the Appellant ought to have sought leave

of court in case they wanted to amend their grounds of Appeal. He relied on Rule 45 of the Rules of this Court.

I agree with the submissions of counsel for the Respondent that Section 72(supra) restricts grounds on which a second Appeal may be preferred. The role of the second Appellate Court was explained by the Supreme Court in the case of **Henry Kifamunte v Uganda, Criminal Appeal No.10/97.** At page 12 of the Judgment the court held:-

"On second appeal, the Court of Appeal is precluded from questioning the findings of fact of the trial court, provided that there was evidence to support those findings, though it may think it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: **R v Hassan bin Said (1942)9 EACA 62**

However, I find that it is in the interest of justice to hear this Appeal on the merits and I shall disregard the word "fact" in grounds 2,3 and 4.

GROUNDS 1 AND 5

The learned Judge as the first Appellate Court erred in law when she failed to properly re-appraise and or re-evaluate the evidence on record, thereby reaching a wrong conclusion that the Respondent was the lawful owner of the entire disputed land.

The decision of the learned trial Judge has occasioned a miscarriage of justice.

Appellant's submissions

Counsel for the Appellant submitted that the Appellant testified that the Respondent was too young to understand what was going on by the time the Appellant's father came and left since he was only four years old. He argued that the Respondent could not have been able to identify the Appellant let alone know anything about ownership of the suit land. He submitted that his evidence was therefore hearsay evidence.

He further submitted that if the Respondent came in Akakaat village in 1970 and the Appellant's family came in the area in 1968 then the implication was that Respondent was not yet even born. He argued that the Respondent could not testify on events that happened before his birth.

Counsel for the Appellant faulted the Appellate Court for not finding that when they came back in 2010 they had come to re-occupy their land and not to reclaim it from anyone. He argued that whoever was on the land was a trespasser.

Counsel for the Appellant submitted that the Respondent did not enjoy quiet possession of the land because they were also affected by the insurgencies that were on the land.

Respondent's submissions

Counsel for the Respondent began his submissions by praying that ground 5 be struck out because it contravenes Rule 86(1) of the Court of Appeal Rules. He argued that it was too general and did not specify the error in the decision of the first Appellate Court which it challenges. He argued that compliance with the relevant provision was mandatory.

Counsel for the Respondent submitted that even though the Respondent was four years old in 1968, he was able to know what was going on in 1976 when Masai Kaputula left for Kacus.

He submitted that the learned Judge was right to find that the evidence that Kaputula had been on the land since 1912 as being false because that evidence was a mere allegation of fact without any proof.

He also submitted that Court regarded the evidence of the departure of the Appellant's father in 1976 due to Karimojong insurgency was accepted by the court. However, he argued that there was no insurgency in Teso that lasted for thirty years. He also argued that other residents who were affected by the insurgency did not take 30 years to come back to the area.

It was counsel for the Respondent's argument that if the Appellant and his family were coming back to re-occupy their land, they did not need to seek authority for Bugiri and Kolir. He submitted that this was not the practice with other natives of the soil who returned to resume occupation of their land after the insurgency.

Counsel for the Respondent submitted that when the Appellant and his father returned in 2000 the Appellant's father showed him land at Kacus and not land at Akakaat that is in dispute.

Counsel for the Respondent also disputed the photocopies of the letters with endorsements of the LC officials. He argued that these endorsements were procured through bribery because the Appellant gave the officials cows. He submitted that the question of bribery was not denied or rebutted in any way.

Counsel for the Respondent submitted that there was no contradiction in the Respondent's evidence as to how Imagoro George had acquired the land and it was not necessary for the Judge to inquire into it. He argued that the question of Masai Kaputulo having two wives and PW3 saying Imagoro George had 10 wives has no relevance to the case. He argued that the alleged contradictions were minor.

COURT'S FINDINGS

I have considered the submissions of all counsel to the Appeal and authorities provided for which I am grateful.

The Appellant in these grounds makes general arguments. I am unable to ascertain from these grounds the Judge's alleged error in law or fact. I am unable to ascertain how the Judge misdirected herself and how she failed to properly evaluate the evidence. The court finds these grounds of Appeal to be too general and offending the provisions of Rule 86(1) of *The Court of Appeal Rules directions* which require a Memorandum of Appeal to set forth

concisely the grounds of the objection to the decision appealed against. Every memorandum of Appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of Appeal should specifically point out errors observed in the course of the trial, including the decision, which the Appellant believes occasioned, a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of Appeal that allow them to go on a general fishing expedition at the hearing of the Appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*).

I am, however, mindful that the key point that the appellant raises in grounds 1 and 5 is that the first appellate Court, in reaching its decision, failed in its duty to re-evaluate the evidence contention. I shall consider this point, while resolving the other grounds that raise specific complaints of the learned trial Judge's failure.

GROUNDS 2 and 4

The learned Judge erred in law and fact when she held that the Respondent had enjoyed quiet possession of the suit land for 30 years and had conferred on him an exclusive title without

considering the occurrence of insurgencies that had forced the Appellant and his family to flee the suit land temporarily.

The learned Judge erred in law and fact when she held that the Respondent had proved that he had a more superior title to the suit land, and that of the Respondent has been extinguished by a thirty year absence.

SUBMISSIONS OF COUNSEL FOR THE APPELLANT

Counsel for the Appellant submitted that the first Appellate court did not properly analyze the circumstances under which the Respondent came to occupy the land in the period when the Appellant and his family were away.

He submitted that the Appellant had testified that he was born on the suit land, stayed on it till 1979 when the Karimojongs displaced them and they came back in 2010.

He further argued that the law of limitation would not operate in circumstances of this case for the Respondent to have acquired title by operation of the law since the Appellant did not vacate the land voluntarily but by occurrence of insurgencies.

Counsel for the Appellant submitted that even though all rights and interest in unregistered land may be lost by abandonment, it requires proof of intent to abandon, non-use of the land alone is not sufficient evidence of intent to abandon and passage of time alone cannot constitute abandonment.

He argued that involuntary abandonment of a customary holding does not terminate one's interest in the land where such interest existed before. He relied on the case of **John Busuulwa v John Kityo and another, Court of Appeal Civil Appeal No.112 of 2003.**

RESPONDENT'S SUBMISSIONS

Counsel for the Respondent submitted that the testimony of Omalla Felix explained that Masai Kaputulo's family left Akakaat for Kocus where they bought land and relocated.

He also submitted that the evidence of the Appellant that he was born on the disputed land is not true because there was a birth Register that showed that he was born in Kacus Village and not Akakaat.

Counsel for the Respondent submitted that there was no insurgency in 1976 or 1979.He argued that the Kaputulo family voluntarily left Akakaat for Kacus in 1976. He submitted that the insurgency referred to was that of the Karimojongs from which Masi Kaputulo fled from Malera and came to seek refuge at Akakaat on Imagoro George's land. He submitted that the insurgency involved cattle rustling and Masai Kapuluto had large heads of cattle so he fled from Malera to Akakaat. He further argued that the second insurgency in the Teso sub region was between1984-1987 and did not affect the Appellant or even his family.

Counsel for the Respondent submitted that the law of limitation applied to this case because the Appellant's father came to the suit land as a Refugee in 1968 and left in 1976 for Kocus. He argued that the family migrated to Bugiri and it was not until 2010 that the Appellant returned to Akakkat. He submitted that this was a period of thirty-four years.

He further argued that the that the Respondent therefore acquired good title to the land by virtue of his inheritance and that he was also protected against claims of the Appellant since he enjoyed quit possession and use of the land uninterrupted.

COURT'S FINDINGS

The complaint in these grounds is that the learned Appellate Judge found that the Respondent had enjoyed quiet possession of the land and thus obtained superior title to the land. He argued that the Appellant did not vacate the land voluntarily but rather because of an insurgency that was in the area.

The learned Appellate Judge found on page 5 of her Judgment in regard to the Appellant's title found as follows;

> *"First by operation of law, even if the Appellant's predecessors and himself entered the land unlawfully, the fact that they were in continuous quiet and undisturbed possession for thirty years conferred on them an exclusive title."*

I shall will now review case law regarding possession of land in regard to title to establish whether the respondent obtained the suit land by virtue of adverse possession.

Possession confers a possessory title upon a holder of land and a recognisable enforceable right to exclude all others but persons with a better title. Possession of land is in itself a good title against anyone who cannot show a prior and therefore better right to possession (see *Asher v. Whitlock (1865) LR 1 QB 1).* Possessory title is not based on a documentary title but on the exclusive occupation of the land (or receipt of rent from the land) for a period of time.

At this stage it is worth considering what constitutes "adverse possession". In the case of ***Jandu v Kirpal & A'nor ,[1975] EA 225 at 323,*** the court relying on the definition adopted in the case of ***Bejoy Chundra v Kally Posonno, [1878] 4 Cal.327 at p. 329*** *stated:*

"By adverse possession I understand to be meant possession by a person holding the land on his own behalf,[or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner."

The spirit of the definition above is similarly captured in provisions of ***Section 16 of the Limitation Act (supra)*** to the effect that ***at***

the expiration of the period of twelve years prescribed under ***Section 5(supra) for*** any person to bring an action to recover land the title of that person to the land shall be extinguished.

In ***AIR 2008 SC 346 Annakili v A. Vedanayagam & Ors,*** the Supreme Court of India gave the essential elements of adverse possession which were considered in light of the Limitation Act of India with provisions similar to the Uganda ***Limitation Act (Cap 80.*** It was held that;

"Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now settled principle of law that that mere possession of land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the prescribed period under the Limitation Act. Mere long possession for a period of more than 12 years without anything more do not ripen into a title."

The type of adverse possession capable of vitiating a title is one that is peaceful, actual, hostile, open, notorious, continuous, uninterrupted and exclusive in respect of the entire land in issue, for more than twelve years (see *Kintu Nambalu v. Efulaimu Kamira [1975] HCB 222* and *Buckinghamshire County Council v. Moran [1990] Ch. 623*). The concept of adverse possession contemplates a hostile possession i.e. possession which is expressly or impliedly in denial of the title of the true owner to the knowledge of the true owner that the adverse possessor claiming the title as an owner in himself. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. In other words, the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under *The Limitation Act*. The owner of the land must have actual knowledge of the adverse possession. Non-use of the land by the owner, even for a long time, won't affect his or her title, but the position will be altered when another person takes possession of the land and asserts rights over it and the person having title omits or neglects to take legal action against such person for more than twelve years.

After re-evaluating the evidence, I am unable to fault the learned appellate Judge's conclusion that the respondent acquired ownership of the suit land through adverse possession. The respondent occupied the suit land for more than 30 years before the appellant and his family started claiming it. I therefore agree with

the learned appellate Judge's findings and would disallow grounds 2 and 4.

GROUND 3

The learned Judge erred in law and fact when she held that the Appellant's evidence and that of his witnesses was full of untruthfulness and contradictions regarding the L.C letters and ownership of the toll tax receipts tendered in without examining the relevance of the same about the ownership of the suit land.

APPELLANT'S SUBMISSIONS

Counsel for the Appellant submitted that the first Appellate court canvassed unnecessary issues when she over relied on minor discrepancies in regard to the L.C letter and ownership of the toll tax receipts which were not relevant in proving the ownership of land.

The learned Appellate Judge had found the Appellant was untruthful since he said that he was given a letter by LC III chairman to re-enter the land yet the letter was from the LC1 chairman instead.

In regard to the evidence of the L.C letters counsel for the Appellant submitted that it was the LC1 official who advised his father to obtain letters from Bugiri LC officials before they could start staying on the land. He submitted that it was the LCI of Akakat Village who forwarded him to the L.CIII who endorsed the letter and allowed the Appellant to come back to his ancestral land.

Counsel for the Appellant further explained that these mistakes were bound to happen since the evidence was being given by illiterate litigants.

With regard to the toll tax receipts, counsel for the Appellant submitted that the first Appellate court did not state in its Judgment the relevance of the toll receipts in regard to proving the ownership of the suit land. Secondly, counsel for the Appellant submitted that witness Juma Kaputulo explained that he was the one who paid the toll tax personally and that the receipts were made in his names," Juma *Joseph*" since the name Kaputulo was for his father.

RESPONDENT'S SUBMISSIONS

Counsel for the Respondent submitted that the letter from the LC1 Bufunda were tendered in evidence to prove that the Appellant had returned to his rightful land and the tax tickets were meant to prove that the Appellants were in occupation of the land at the time the taxes were paid. He argued that they were therefore intended to prove ownership of the suit land.

He further submitted that the learned Appellate Judge was correct to find that there were glaring discrepancies which discredited the appellant's evidence. He also submitted that the fact that it was L.C1 endorsing and signing the letter from Bugiri was based on corruption by the Appellant because they had not even been to the suit land to inspect it.

He further argued that there was a clear contradiction in the evidence of the witness who presented the tax tickets because he was purporting the same to be his yet the tax tickets were in the names of *Joseph Juma* and yet his name was *Juma Kaputulo.*

COURT'S FINDINGS

The contention in this ground is that the learned Appellate Judge erred in law when she held that the Appellant's evidence regarding L.C letters and ownership of the toll tax receipts was full of contradictions.

With regard to the L.C letters the learned Appellate Judge held as follows;

"According to the Respondent, he returned to the suit land in 2010 and was received by Oroma the sub-county chief. The Respondent contradicts himself when he states that he was given a letter by the LCIII of Kolir to re-enter the suit land yet the said letter marked IDD1 is a letter from the LC1 Chairman of Bufunda in Bugiri dated 18.1.2010 introducing the respondent to the LC1 of Akakat village. Clearly, this was being untruthful."

The trial Judge found that the LC1, LC11 and LC111 gave the Appellant documentation authorizing him to stay on the disputed land (IDD1).

1DD1 is letter written by the LC1 Bufunda LC1 introducing the Appellant and his brothers as people who were pressurized by the Karimojongs to leave the village of Akakaat and had now come back

to the village. It is also endorsed with the stamps of LCII and LCIII. Its import is that it is introducing the Appellant and his brothers to the villagers and also gives them permission to come back to the land because when they left they had not sold off their land. I find that this piece of evidence does not outweigh the fact that the Appellant took over 30 years to come back and claim his land. I find that the contradiction between who actually gave the letter was a minor contradiction since the LCIII chairman also endorsed the letter.

With regard to the toll tax receipts, I agree with the learned Appellate Judge that the tickets that were presented belonged to someone else since they were in the names of Joseph Juma and were not useful to the appellant's case that his family used to pay toll tax for land in Akakaati village. Ground 3 must also fail.

In conclusion, having disallowed all grounds of appeal, I would find no merit in the appeal and would dismiss it with costs.

Dated at Kampala this 22nd **day of** Nov **2022.**

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Christopher Gashirabake

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Elizabeth Musoke, Muzamiru M. Kibeedi & Christopher Gashirabake, JJA]

CIVIL APPEAL NO.239 OF 2016

BOITI BONNY:: APPELLANT

VERSUS

IMALINGAT LAWRENCE:: RESPONDENT

[Appeal from the Judgment of the High Court of Uganda at Soroti (Hon. Lady Justice H. Wolayo) dated 12th July 2016 in Civil Appeal No.3 of 2013)

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the advantage of reading in draft the Judgment prepared by my brother, Hon. Justice Christopher Gashirabake, JA. I agree and have nothing useful to add.

Dated at Kampala this 22nd day of Nov 2022

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0239 OF 2016

BOITI BONNY::APPELLANT

VERSUS

IMALINGAT LAWRENCE::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Soroti before Wolayo, J. dated 12th July, 2016 in Civil Appeal No. 003 of 2013)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA
HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the Judgment of my learned brother Gashirabake, JA. I agree with it and, for the reasons he has given, I too would dismiss the appeal with the order on costs he proposes.

As Kibeedi, JA also agrees, the Court unanimously dismisses the appeal with costs to the respondent.

It is so ordered.

Dated at Kampala this ..... 22nd day of..... Nov .....2022.

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Elizabeth Musoke

Justice of Appeal