THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT GULU

CIVIL APPEAL NO. HCT – 02 – CV – CA – 001 – 2008

(Arising from Moyo Civil Suit No. 0016 of 2007)

MARIETA DIYA AKILE ::::::::::::::::::::::::::::::::APPELLANT

=VERSUS=

1. MAWADRI GEOFREY
2. UNZIGA ANDREW
3. ALLI OSUBIGA
4. GAUDENSIO VUNI
5. AMOKO CHARLES
6. SAFI AYEKO
7. FRED IJJO
8. FLORENCE MANIA
9. ONDOA MARY
10. ONDOA MADRAMA ::::::::::::::::::::::::::::RESPONDENTS

BEFORE: HONOURABLE JUSTICE REMMY K. KASULE

JUDGMENT

The appellant, dissatisfied with the judgment and decree given by the Magistrate Grade I, Moyo, dated 25.01.2008, appealed to this court against the said judgment and decree. In the court below appellant was plaintiff and respondents defendants.

The appeal is premised on four grounds:

1. The trial Magistrate erred in law and in fact in holding that the Respondents are in lawful occupation of the suit land having adversely possessed the same, yet in fact they are trespassers on the appellant's land and do not possess certificate of title to that effect.
2. The trial Magistrate erred in law and in fact when he failed to address himself to the law that the certificate of Title is conclusive evidence of ownership.

3. The trial Magistrate erred in law and fact in reaching his judgment in total disregard of the evidence adduced by the appellant and her witnesses, reflecting an element of bias and that occasioned a miscarriage of justice.
4. The trial Magistrate erred in law and in fact when he failed to address himself as to the correct procedure to be followed during locus in quo.

As to the first ground of appeal, the appellant sued the respondents in the court below asserting that each of the respondents had trespassed on her land starting in the 1990s. The land is situate at CELECELEA, Moyo Township, Moyo District. Plaintiff prayed court to issue a declaration that she is the lawful owner of the suit land and that the respondents are trespassers.

That each of the respondents be evicted and their structures on the land be demolished. A permanent injunction be issued against the respondents, their agents, servants or employees to restrain them from harassing, intimidating and threatening the appellant and her family members.

Appellant also claimed general damages.

The appellant's case at trial was that she had acquired the suit land by inheriting the same from her parents who had acquired and occupied the same since 1941. They had owned the same through customary tenure. During 1980- 83, as a result of civil strife in the area, those displaced from their home areas came and occupied this land. Appellant after the civil strife talked to these people and they left the suit land.

In 1990, other people, including the respondents started occupying the land again. Appellant resisted their trespassing on her land by asking them to leave the same, but the respondents refused to do so. A number would hide from her, wherever she was around.

In 1999, in order to protect the suit land, appellant decided to lease the same.

She applied for a lease from Moyo Town Council. In 2000 the land was surveyed, and in 2005 she was granted the lease over the suit land. She obtained the certificate of Title in 2006: It is Leasehold Register Volume 3712 Folio 2 Plots 2-8 CELECELEA ROAD and 1-7 and 2-8 Clement Road, Moyo Town, Moyo District.

After being issued with a certificate of Title, appellant demanded of the respondents to vacate her land. They refused. Hence the suit.

In cross examination appellant stated that she stays on the part of the suit land that is not disputed. She admitted to have found second respondent on the suit land; and third respondent to have come on the same land in 1981; fourth respondent, to have been on the land in 1996/97. Appellant had not compensated any of the respondents, as being trespassers, she had no cause to.

The respondents testified individually in their defence. They also called witnesses: DW2, Deba Lasuwa, and DW12: Owonzi Rigobert, to support their defence.

The essence of the respondents' defence being that the suit land originally belonged to the Moipi clan, and through succession over a number of generations, the said land came to be owned in portions by several families within the Moipi clan namely (1) Ayile, (2) Israel, (3) Ruberto Madrama (4) Alesiyo Wiri, (5) Anjella Izama and (6) Akilo Igu, the father of the appellant. The distribution of the land to the six families was made in the 1960s by Lasuwa Guma, father of PW2 and DW2.

Akilo Igu's land comprised only a part of the suit land: it measured about 1½ acres and this part of the land is being occupied by the appellant undisturbed.

The respondents, over time, settled on the rest of the land, other than that of appellant's portion of 1½ acres, through succession or donation or outright purchase during the period 1984 to 2004, without any one claiming to them that they were on the land unlawfully. Indeed in respect of first respondent, Mawadri Draga Geoffrey, appellant offered to

compensate him so that appellant could use his part of the land for purpose of setting up a Nursing school. After agreeing in writing to compensate, appellant failed to pay the agreed upon sum of money of compensation.

All respondents contended that none of them ever consented about the surveying of the land upon which they are settled and none consented to the said land being leased to the appellant.

The trial Magistrate, framed the issue, whether the respondents were lawfully on the suit land, and evaluate evidence before him from both the plaintiff's and defence sides. He particularly noted that the respondents and their predecessors-in-title- had, over along time 1981-1998, been offered renewable leases by Moyo Town Council, to which council the respondents paid annual ground rent. Further, trial court also noted that all respondents had put developments on the suit land by way of houses, planted trees, developed gardens, and some had fenced their plots. Court also considered the evidence of PW2, DW2 and DW12, showing the original customary owners of the suit land, the Moipi clan, and concluded that given their years at the time of testifying in court, PW2, must have been an infant, while DW2 was 15 years, and for that reason, DW2 was aware of what took place as to the distribution of the suit land while PW2 could not have been aware as he was too young. Indeed the acreage of 1½ acres of land given to the appellant's father, matched well with the acreage of the undisturbed land, the appellant was occupying. The trial magistrate thus preferred to believe the evidence of DW2 and DW12 to that of PW2. After evaluating the whole evidence the trial magistrate held that the respondents had acquired and were lawfully on the suit land.

This court has also reviewed and subjected the evidence on record to a re-evaluation and notes that there was no explanation as to why Moyo Town Council granted renewal leases, and accepted ground rent from respondents, if, all along, the appellant was the owner of the land occupied by respondents. The lack of any evidence by way of explanation of this tends to show that Moyo Town Council did not know and did not regard the appellant as owner of the suit land.

Further, this court, received no explanation of appellant as to how she came to have the land surveyed and to have a lease on the suit land granted to her, without both the appellant and controlling authority, first contacting the respondents, who were already on the suit land together with their developments. Yet the appellant agreed that the majority of respondents were already on the suit land in 1996 when she started the process of acquiring a lease. In the considered view of court, there was unlawful suppression of the interests of the respondents in the suit land in granting a lease to respondents.

Therefore this court, on reviewing the evidence adduced before the trial court, comes to the same conclusion, as the trial court, that the respondents established, on a balance of probabilities, that each one of them was lawfully on the suit land.

The first ground of appeal fails.

As to the second ground of appeal, that the trial magistrate failed to address himself to the law that the certificate of title is conclusive evidence of ownership, the law is section 59 of the Registration of Titles Act, Cap 230.

A certificate of title is conclusive evidence of ownership of the suit property, unless its being obtained is due to proved fraud, lack of consideration or illegality: see HARIPRASAD RAMABAI PATEL VS. BABUBHAI KALIDAS PATEL (1992 – 1993) HCB 137.

On the evidence adduced at trial, the lease was granted and a lease hold title was issued to appellant, without in any way affording any hearing to the respondents as tenants in occupancy of the suit land. This was illegal and fraudulent. The appellant procured registration to defeat the unregistered interests of the respondents which interests she had knowledge of: see KATARIKAWE V KATWIREMU AND ANOTHER: HC.C.S. NO. 02 OF 1973: SEE ALSO: MARKO MATOVU & OTHERS V. MUHAMED SSEVIRI AND ANOTHER: CIVIL APPEAL NO. 7 OF 1978

Therefore for purposes of this appeal for the reasons given, it cannot be said that the appellant's leasehold certificate of title is free of fraud and illegality. This court therefore declines to hold that the said certificate of title extinguishes the rights of the respondents as tenants in occupancy of the suit land. It is up to the respondents whether they take further court action to have the said certificate of title quashed by reason of the said fraud and illegality.

The second ground of appeal fails.
The third ground faults the trial magistrate as having disregarded the evidence adduced by the appellant and her witnesses and thus being biased against the appellant.

This court has studied the record of evidence and submitted it to a fresh re-appraisal, as already indicated in this judgment.

It is the finding of this court that the trial court properly dealt with the evidence adduced and gave logical reasons for the conclusions reached on the evidence. This court is unable to find that the trial magistrate was biased against the appellant.

There is no merit in the third ground of appeal.

The fourth ground of appeal is to the effect that the trial magistrate failed to address himself as to the correct procedure to be followed during the locus in quo.

The procedure at the locus in quo is that parties and witnesses should be present, and the evidence taken there together with any other observations by court should be written as part of the court record: see: ROZA MUWANGALA VS ROZA NABIRYE: HC.C.C.A. 63 OF 1987 at Jinja, Mpagi J, 05/07/1989.

According to the original hand written record of trial court, the locus in quo was visited on 19/12/2007 in the afternoon. All parties were present, counsel for appellant was also present.

The court drew a map of the suit land and indicated in it the housing structures, sanitation structures, plants and the borders of the suit land.
Witnesses PW2: Vura Marcellino and DW2: Diba Lasuwe showed court the boundaries of the land of appellant and that occupied by respondents. They did so following what each one of them had testified to in court earlier.

At the locus in quo there was no communication to court from the appellant or her counsel as to any matter that appellant or her counsel may have wanted court to note or do something about. Thus appellant and her counsel must be taken to have been satisfied with what went on at the locus in quo.

In the considered judgment of this court, there was substantial compliance with what a trial court is required to do at the locus in quo. Appellant has not shown that any miscarriage of justice occurred to her prejudice while at the locus in quo. Indeed even if the evidence of the locus in quo is excluded the trial court had sufficient other evidence upon which it could have come to the said conclusion. This court having re-appraised that other evidence finds that the trial court reached the right decision.

The fourth ground of appeal also fails.

All grounds of appeal having failed, this appeal stands dismissed.
The appellant is to pay the respondents the costs of the dismissed appeal.

Remmy K. Kasule
Judge
30th April, 2009