THE REPUBLIC OF UGANDA

IN THE COURT OF UGANDA HOLDEN AT GULU

HCT – 02 – CV – CA – 008 – 2003

(Arising from GUL – 00- CV – CS – 006 OF 2003)

OKULLU FERDINANDO::::::::::::::::::::::::::::::APPELLANT

VERSUS

ABOK DAVID::RESPONDENT

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

This judgment is in respect of an appeal against the judgment and decree dated 13.04.2003 of the Chief Magistrate's Court, Gulu.

In the court below, appellant was plaintiff and respondent, the defendant.

Appellant, all along, claimed to be owner of the piece of land at Pawel Pudyek, Pawel Parish, Pece Division, Gulu Municipality, Gulu District. He asserted that he had given part of this land to one Victoria Auma, his sister. The giving away of the land had been preceded by the appellant demarcating the land into 14 parts in form of plots. The appellant numbered the same. The one he gave to his said sister being number 12.

The respondent is grandson of Victoria Auma, the appellant's sister. According to appellant, the respondent, on/or about 21.03.2003 without any colour of right, and without the consent of appellant as owner trespassed upon the suit land by putting thereon building materials and started constructing a house thereon. The appellant protested and tried to stop the respondent from trespassing on the suit land, but to no avail.

The appellant thus sued for a declaratory order that he is the owner of the suit land permanent injunction and compensation for trespass.

The respondent denied the claim and a full hearing of the case was heard, including a visit by court to the locus in quo.

In its judgment, court held that the respondent had not committed any trespass and that he was building in the land belonging to Victoria Auma, and not that of the appellant. The appellant's suit was dismissed with costs. Hence this appeal.

The appeal according to the amended Memorandum of Appeal dated 28th May, 2008, is on three grounds.

1. That the trial magistrate erred in law and facts when he rejected, failed to consider and evaluate the documentary evidence on record thereby occasioning a miscarriage of Justice.
2. That the trial court erred in law and facts when he failed to evaluate the evidence of both plaintiff/appellant and defendant/respondent and thereby arriving at wrong conclusions and occasioning a miscarriage of Justice.
3. That the trial Magistrate failed to conduct and record the proceedings at the locus in quo as by law required thereby occasioning a miscarriage of justice.

This court, as an appellate court, has the duty, and has a carried out that duty of submitting all the evidence adduced at trial to a re-appraisal in order to determine whether or not the conclusions reached by the trial court, on that evidence, can or cannot be justified. And if not, what are the correct conclusions.

As to the first ground of appeal, the documentary evidence that was not accepted in evidence was the sketch map, which appellant prayed to tender into evidence. Counsel for respondent objected to the document on the ground that he did not know of the authenticity of the document. Trial court then rejected the document on the ground that the same was not signed by the author.

In the considered view of this court, there was no valid reason for rejecting the tendering in evidence of the sketch map whose source the appellant explained as he clearly stated on page 2 at top of the typed proceedings that:-

" I have demarcated this land into 14 parts to families. This is the sketch map".

Though the trial court was not justified in rejecting of this piece of evidence, this court, on a review of all the evidence adduced and accepted by the trial court, finds that the rejection did not cause any miscarriage of Justice. This is so because there was other overwhelming evidence from other witnesses and source that clearly showed the boundaries of the land in dispute; where the respondent was constructing the house.

This other evidence is: the evidence of the appellant himself when he stated that the respondent had deposited building materials on this area. Appellant's witness, Justin Uma and Augustino Nyeko Onen clearly testified as to the actual piece of land in dispute.

On his part, respondent in his testimony clearly described the area of land he was trying to build on. He had been born there. He had been cultivating the same with the owner, land grandmother, Victoria Auma. There were potatoes, sorgum and cassava gardens. Auma's first house was also there. A big road divided Auma's land and that of the appellant.

Victoria Auma herself, who, according to her evidence, on her land the respondent was building clearly described this land: there was a large path separating her land from that of appellant.

Yovan Gem, another defence witness, brother to appellant and Victoria Auma, acknowledged that he himself, Auma and the appellant lived as neighbours; thus indirectly acknowledging that each one of the three had a separate piece of land.

The last defence witness, Marcellino Oboyoys, also a brother of appellant and Auma, confirmed that a big path separates appellant's land from that of Auma, upon which the respondent was settling. This witness also confirmed that each brother/sister had an own piece of land, each

cultivating and settling on that piece. He had seen where respondent was building on Auma's land.

This court on reviewing all the evidence adduced before the trial court finds that the sketch map that was rejected to be tendered as an exhibit was the work of the appellant himself. There was no evidence that the appellant's brothers and sisters had sat with him and agreed upon the same as showing the true boundaries of each one's land. The evidence on record is to the effect that there had never been an agreed upon survey of the land by the brothers and sisters of the appellant. This being the case, the sketch map, even when admitted in evidence, would have been of hardly any value as evidence establishing ownership of the land.

In his judgment, the trial Chief Magistrate properly identified the issues to be resolved as being: whether or not the defendant is on the suit/disputed land as the owner/trespasser, and, If so, what are the remedies.
The trial magistrate then considered the evidence before him and observed that, though the appellant claimed the land had been surveyed in the 1970s, no document of title had been tendered to show that the suit land was registered and who the registered proprietor was. In absence of such evidence, the court held, rightly, in the view of this court, that the suit land was of customary ownership. It was thus pertinent for the parties to establish how such land was acquired by each one of them.

Therefore the sketch map, as a piece of evidence was of negligible value to court in resolving the dispute between the appellant and the respondent.
Court had other evidence before it which it considered in reaching its decision, the absence of the sketch map, not withstanding.

Having reconsidered all this evidence this court finds that no miscarriage of justice was caused in the case by the rejection of the documentary evidence of the sketch map.

It was submitted from the Bar for the appellant that there was evidence of the existence of a certificate of Title to the suit

land, which title had been lost when the land had been mortgaged. Further, that the appellant presented to court documents of his paying ground rent on the basis of the survey carried out.

With respect to counsel for appellant, no documentary evidence at all was availed to court as to the existence of a certificate of title to the suit land. All that appellant verbally claimed before court was that the land had been surveyed in 1970. But he could not remember those who attended the survey or witnessed it. Then he claimed that the title to the land had got lost by some one who had taken it to acquire a loan; and a copy was present in the land office.

The record of court for trial proceedings does not also show that the appellant presented to that court any documents of his having paid ground rent on the basis of the survey carried out on the suit land.

Given the fact that appellant was represented by an advocate at the trial stage of the case, and further, as this court was informed from the Bar by counsel, that the appellant was a surveyor by profession, the appellant has himself and his counsel at trial, to blame for not having availed to court documentary evidence as to those matters, if the appellant's evidence was to be believed.

For the reasons stated above, the first ground of appeal fails.

The second ground of appeal faults the trial Chief Magistrate for having failed to evaluate the evidence on record, thereby arriving at wrong conclusions and occasioning a miscarriage of justice.

This ground has been partly dealt with while considering the first ground of appeal.

As already stated earlier on in this judgment, the trial Chief Magistrate identified the issues to be resolved. On pages 4 and 5 of the Judgment, the trial Magistrate stated before resolving the two issues, that he had read and perused the evidence of the parties to the suit and their witnesses and given utmost consideration to the evidence of both sides. He then proceeded to resolve the issues.

The trial court, and this court agrees with him, found it of paramount importance, that it was pertinent for the parties to establish how the disputed land was acquired by each of the appellant and respondent.

According to the evidence on record, the trial court found that the appellant, apart form stating that the suit land was his, he adduced no evidence of his own or that of his witnesses as to how he had come to own the piece of land where the respondent had put building materials and was intending to build a house on. The trial court found, on the other hand, that the respondent had adduced evidence of his own and that of his witnesses showing the ownership of the land that he was trying to build on.

This court has on its own subjected the evidence adduced before the trial court as to the ownership of the land in dispute to a fresh re-appraisal and review.

The appellant in his evidence stated that he had a big chunk of land. He had demarcated this land into 14 parts to families. Amongst those members of the family was Victoria Auma, his sister; to whom he had allocated the land in number 12. The trespass to the land was now in number 11. The respondent had gone to him, sent by Victoria Auma, for an area to settle in. Appellant told respondent that he had given Victoria Auma the land in No. 12. He stopped the respondent from settling in any other part of the land. Respondent refused and on 22.01.2003 brought materials and started building, on land, the appellant stated was his.

PW1: Justin Uma, a brother to Appellant and Victoria Auma, stated that he occupied part of the land of the plaintiff. He stated

" We all occupy our given plots well demarcated". His was next to Auma and that of Auma is next to Okullu, and that respondent had trespassed on appellant's land which appellant had given his son Opiyo. This very witness, however also stated that Victoria Auma had insisted, to them, all along that the land was hers (Victoria Auma) as it had belonged to her mother from whom she had got it. Victoria Auma insisted that the matter should be resolved by court. This

witness confirmed that he had known the respondent since childhood. Respondent had been living with his grandmother, Victoria Auma.

PW2 Augustino Nyeko Onen, also brother and sister to Victoria Auma, stated that on 21.01.2003, when respondent brought building materials on site, himself, appellant and PW1 stopped respondent from building because the piece of land he was going to build on had been given to plaintiff's son, and that respondent should go to the portion given to Victoria Auma. Respondent refused. According to this witness, the portion in dispute was not the portion of Auma.

For the defence, respondent stated he had been on the land and all along lived with his grandmother, mother of his father, who too lived on the land until his death in 1988. He and grandmother have all along been cultivating this land, her mother for the last 42 years. A road separates this land from that of the appellant.

DW1 Victoria Auma, a grand mother of respondent, testified she had been on the land since 1956. It belonged to her father and mother. When her marriage failed she returned to her parents in 1961 and lived on the part of the land where her mother who died in late 1980's when president Museveni was in power also lived. Her mother is buried on this land. Her land is separated from that of appellant by a large path. She has 13 huts on the land. The elders had given her this land when her father and mother had died. The appellant had never given her any land.

DW3 Marcelino Oboyoys, brother to appellant and Victoria Auma, knew the land in issue as belonging to Victoria Auma who had occupied the same since 1956. A big path separates appellant's land from that of Victoria Auma. He knew of no survey of the land. Each of the brothers and sisters have an individual piece of land. Respondent was constructing on Auma's land.

It is to be noted from the above evidence that respondent adduced evidence that he had been born on the suit land and that the land in dispute belonged to Victoria Auma, his paternal grandmother;

and that his father had also stayed on this land. Respondent was supported in his evidence by Victoria Auma, his grand mother, and DW3 Marcelino Oboyoys his maternal uncle.

By way of contrast, the appellant as well as his witnesses Justin Uma and Augustino Nyeko Onen, apart from stating that the land belonged to the appellant, did not explain how the appellant, came to own this land. It was also not explained when and by whose authority and agreement was the land demarcated by the appellant, each family member purporting to get a portion. There was also no credible evidence as to whether any survey of the land was done, by whom and with whose agreement.

There is however consistency in the respondent's evidence in that her grandmother, Victoria Auma, from the very beginning insisted that the suit land was hers and that she had allowed the respondent to build thereon; and challenged the appellant, PW1 and PW2 to have the matter resolved by a court of law.

The existence of her huts, gardens of crops cultivated, trees planted and the burial of her mother on the stated piece of
land are all features consistent with occupation, use and ownership of the suit land by Victoria Auma, who has now allowed the respondent to settle thereon.

There was inconsistence in the appellant's case in that while appellant stated that he did not know the respondent and that the respondent was not born, and never lived on that land, his brother witnesses, and maternal uncles to the respondent, PW1, and PW2, stated respondent had been born and grew up on this land under the care and custody of his grand mother, Victoria Auma. The appellant never explained this inconsistency.

This court, therefore, on the review and re-appraisal of the evidence adduced before the trial court, agrees with the holding of that court that the respondent was occupying and constructing his house within the land for which his grandmother Victoria Auma proved ownership and not the land of the appellant.

The second ground of appeal also fails.

The third ground of appeal is that the trial magistrate failed to conduct and record the proceedings at the locus in quo as by law required thereby occasioning a miscarriage of Justice.

The law as to the conduct of the locus in quo by court is for court to give an opportunity to the parties to indicate what each party is claiming. Whoever gives evidence at the locus in quo has to testify on oath and be available for cross examination, if any, by the opposite party. A fresh witness at the locus in quo, may only testify at a request of a party either before or at the locus in quo and court has to judiciously decide whether to allow or not allow the request. The purpose of visiting the locus in quo is for witnesses who have already testified in court to clarify what they already stated in court and to indicate features and boundary marks, if any, to the court. Observations by court are noted and recorded as part of the court record. Observations must not appear in the judgment from no where. See: **ONONGE V OKALLANG (1986) HCB 63**.

According to the hand written record of proceedings, the trial court visited the locus in quo in the presence of both parties as well as that of their respective counsel. Witnesses PW1 Justin Uma of the appellant, and DW1 Victoria Auma and DW3 Marcelino Oboyoys of the respondent were also present. The court drew a sketch plan of the locus in quo. The Appellant's homestead with trees is show to be in the North, while Victoria Auma's land is shown to be in the South of the sketch plan. In the sketch plan the land where appellant's homestead is, is separated from that land where Auma's homestead is, by the road to river Pece.

The court record of proceedings at the locus in quo does not show that any witness testified or that counsel for any of the parties requested, and did cross examine any witness.

This court accepts the criticism of counsel for the appellant that the locus in quo was not properly conducted by the trial court. However, even if the evidence of the locus in quo were to be discarded, there was overwhelming evidence, as already stated, that established that, on a balance of probabilities, the respondent established his case that he was lawfully on the land, and appellant failed to establish that the respondent was a trespasser. This overwhelming evidence establishing the respondent's case is the evidence of grown trees, the existence of crops and

gardens and continued use by Victoria Auma, and the existence of a wide path separating the land of appellant from that of Victoria Auma. Coupled with all this evidence given in testimonies of the respondent and his witnesses, as well as that of some of the appellant's witnesses is the absence of the evidence on record as to how the appellant came to be the owner of the land, to the extent of even claiming to have the power to parcel the same out to other family members, as he wished.

This court therefore holds that, the failure to conduct the locus in quo by the trial court did not result in a miscarriage of justice. The evidence on record from the testimony of witnesses, independent of and apart from that of the locus in quo, justified the finding reached by the trial court that the respondent was not a trespasser on the appellant's land.

The third ground of appeal also fails.
All the grounds of appeal having failed, this appeal stands dismissed.

The respondent is awarded the costs of the dismissed appeal

Remmy K. Kasule
Judge
30th April, 2009