



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Appeal No. 035 of 2017

In the matter between

KAMLEGA S. TWODWONG

APPELLANT

And

ONGOM MARKO TUDA

RESPONDENT

Heard: 25 September, 2019.

Delivered: 26 November, 2019.

Civil Procedure — Execution — When a judgment debtor dies before execution is effected, the judgment creditor ought to bring an application to substitute the judgment debtor's name with that of his or her successor-in-title and serve the successor-in-title with all the processes in the suit failure of which execution is illegal — Objector proceedings — The question to be determined in objector proceedings is whether at the date of attachment, the Judgment Debtor or Objector was in possession of the property.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The appellant sued a one Onen Cliff Richard and another seeking recovery of two acres of land situated Iriaga Central sub-ward, Laroo Division, in Gulu Municipality, a declaration that he is the rightful owner of the land in dispute, a permanent injunction restraining the Onen Cliff Richard from further acts of trespass onto the land, and the costs of the suit. The appellant's claim was that the land originally belonged to his father's uncle Orai Onen Raimondo. During the

1970s, Orai Onen Raimondo invited the appellant's father Kamlega Rudolfo to settle onto part of the land and help him look after his son Ongom who had a mental health problem and his wife who was weak and sickly. The portion given by Orai Onen Raimondo to Kamlega Rudolfo had a well demarcated boundary. Subsequently Orai Onen Raimondo, his wife and Kamlega Rudolfo passed away whereupon the appellant retained the responsibility of caring for Ongom. Later the Onen Cliff Richard took Ongom away and left the appellant in occupation of the land. Onen Cliff Richard and others then during the year 2000 crossed the boundary stating that they were reclaiming Orai Onen Raimondo's land from the appellant. They began making bricks for sale, planting sugar cane, eucalyptus trees, rice and construction of a grass-thatched house on the land. They now occupy two acres of the land that formerly belonged to his father Kamlega Rudolfo.

- [2] In their joint written statement of defence, Onen Cliff Richard and his co-defendant refuted the appellant's claim. They averred that the land belonged to their father, the late Orai Onen Raimondo. The appellant is a nephew of the late Orai Onen Raimondo. The appellant belongs to the Paicho Clan while the late Orai Onen Raimondo belonged to the Patuda Clan. The appellant was given a small portion of the land in 1977 following the death of Orai Onen Raimondo, upon which he constructed two huts. The rest of the land is vested in them and is under their control. It is during the year 2002 when they undertook a survey of the land, intending to obtain a title to it, that the appellant claimed they had trespassed onto his land. They prayed that the suit be dismissed.

The respondent's evidence in the court below:

- [3] D.W.1 Onen Cliff Richard testified that his grandfather, the late Orai Onen Raimondo, acquired the land in dispute, measuring approximately six to seven acres, from the Municipal authorities during the 1960s. He invited the appellant's father Rudolfo Kamlega from Paicho to live together with him on the land in

dispute. In the year 2000 they initiated a process of titling the land and engaged a surveyor and that is when the dispute sprouted. The appellant claimed the entire land as his and attempts to settle the dispute in the year 2004 failed. It is thereafter that the appellant began construction of a house on the land and sold parts of it to about four other people. The appellant has since returned to Paicho.

- [4] D.W.2 Zekeriya Oyima testified that by 1965 the land in dispute was occupied by Onen Cliff Richard's father Orai Onen Raimondo. When he came from Anaka in 1965 to work in Gulu, Orai Onen Raimondo gave him the portion of the land now in dispute to occupy. When he vacated the land in 1969, Orai Onen Raimondo gave it to the appellant's father Rudolfo Kamlega's wife, a teacher, who was later joined by her husband. It was enough space for a house and they constructed a house thereon. They were later joined by their son the appellant. Upon their demise, the appellant retained occupancy of that portion of the land. Onen Cliff Richard's father was Omona Adyang whose elder brother was Orai Onen Raimondo.
- [5] D.W.3 Ocaya Vincent, a neighbour to the land in dispute, testified that Orai Onen Raimondo was Onen Cliff Richard's grandfather. The portion now in dispute was first given to D.W.2 Zekeriya Oyima. When he later vacated, it was given to Rudolfo Kamlega's wife Gilda. Upon their death, their children retained possession of that portion but are now laying claim to the entire land. The dispute began when Orai Onen Raimondo grandchildren left Anaka to occupy the land, after the appellant had begun selling off portions of it. At a clan meeting convened to resolve the dispute, it was proposed that due to his long stay on the land, the appellant be given a portion of it but the appellant rejected the proposal.
- [6] Lastly D.W.4 Ocen Florence Okumu, a granddaughter of Orai Onen Raimondo, testified that it is the appellant's step-mother Gilda who asked for a house then situate on the land to live in and was permitted to occupy it. She was later joined by the appellant's father and they constructed another hut on that portion.

Rudolfo Kamlega had three wives who included the appellant's mother resident at Paicho. Later the appellant came to live with his father on the land. Onen Cliff Richard's father was Odong Adyeng, younger brother to Orai Onen Raimondo. The dispute began when the appellant began selling ff parts of the land. At a clan meeting convened to resolve the dispute, it was proposed that due to his long stay on the land, the appellant be given a portion of it but the appellant rejected the proposal.

The appellant's evidence in the court below:

- [7] Testifying as P.W.1 the appellant, Kamlega Stephen Todwong, stated that he is the son of Kamlega Rudolfo. The late Orai Onen Raimondo was his father's uncle, both of whom lived in harmony on the land in dispute. The late Orai Onen Raimondo lived with his wife and son Ongom. The Onen Cliff Richard never lived on the land until, the death of Orai Onen Raimondo. Later Kamlega Rudolfo too died in 1998. In the year 2000 he found the Onen Cliff Richard and others surveying the land claiming it belonged to their father Orai Onen Raimondo yet they had never lived on the land. He sued them before the L.C.1 Court which stopped their activities on the land but they ignored the orders. The Onen Cliff Richard had since made bricks for sale, planted sugar cane, eucalyptus trees, rice and constructed a grass-thatched house on the land which is now occupied.
- [8] P.W.2 Onen Lujilo, the former L.C1 Chairman of the area, testified that he came to know the family of the late Rudolfo Kamlega in 1997 before his death which occurred in 1998. That family had lived peacefully on the land until the year 2004 when Onen Cliff Richard and others came claiming the land to have belonged to their late father Orai Onen Raimondo. The appellant produced proof of payments for a Temporary Occupation Permit that had been issued by the Municipal Council to the late Rudolfo Kamlega in respect of that land. Onen Cliff Richard and the rest were therefore directed to cease their activities on the land. Onen

Cliff Richard persisted and planted eucalyptus trees on the land. The rest of the land is vacant and there are no buildings on it.

- [9] P.W.3 Ajok Christine the appellant's mother testified that she married the late Rudolfo Kamlega in 1970. The land in dispute was given to the appellant's father Rudolfo Kamlega by his uncle Orai Onen Raimondo in 1976. They lived on the land until the year 2007 when they were told to vacate it.

Judgment of the court below:

- [10] The trial Magistrate did not visit the *locus in quo* but in his judgment delivered on 19th April, 2011 found that the evidence led by both parties established that the land in dispute originally belonged to Orai Onen Raimondo. It was also not disputed that the appellant's father Rudolfo Kamlega and his wife were given a portion of the land. Upon grant of letters of administration to the estate of the late Rudolfo Kamlega, the appellant was entitled to inherit that portion. Upon the death of Orai Onen Raimondo, the appellant's father occupied the rest of the land, thereby becoming an adverse possessor until his death in 1978. Onen Cliff Richard only attempted to assert his claim in the year 2000. Upon expiry of the limitation period, the appellant became the owner of the land. It does not matter therefore whether the land is only two acres as stated by the appellant or six acres as claimed by Onen Cliff Richard. The appellant was declared owner of the land and a permanent injunction issue restraining the appellant from further acts of trespass onto the land. Each party was directed to bear their own costs of the suit.

- [11] The 1st judgment debtor, Onen Cliff Richard, died on 9th May, 2012 and a legal representative to his estate had not been appointed yet. However, on basis of that decree, the appellant applied for its execution by way of vacant possession. A warrant for giving vacant possession of the land to the appellant was issued on 30th June, 2016 and was executed in October, 2016. The respondent filed an

objector application on 1st December, 2016 on grounds that he was not party to the proceedings that resulted in the decree executed, yet he is the son of the late Orai Onen Raimondo and had been in possession of the land in issue since his birth. He contended that the suit against the late Onen Cliff Richard was in error since that defendant was a mere licensee on the land. On 24th March, 2017 the application was allowed. The land was released from attachment with an order that the appellant meets the costs of the application.

The grounds of appeal:

[12] The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely;

1. The Chief Magistrate erred in law and fact when he released the suit property from attachment.
2. The Chief Magistrate erred in law and fact when he did not find that the respondent was stopped from claiming the suit land on the principle of *res judicata*.
3. The Chief Magistrate failed to evaluate the evidence on record thereby leading to a miscarriage of justice.
4. The Chief Magistrate erred in law and fact when he found that the respondent was in possession of the suit land and that locus was not visited.

Arguments of Counsel for the appellant:

[13] In his submissions, counsel for the appellant, argued that at the time the respondent filed the objector application, the decree had already been executed and he had been evicted from the land. He therefore was no longer in possession of the land. The respondent should have proceeded under section 34 of *The Civil Procedure Act*. Whereas in the judgment the trial Magistrate indicated that she had visited the locus in quo and gave a description of the land

in dispute, in the ruling regarding the objector application the court erroneously stated that the *locus in quo* had not been visited. This was because the Chief Magistrate did not properly evaluate the evidence on record. The respondent is a cousin to the defendant in the main suite and the decision that was made was binding on him as well. The court should have found that the matter was *res judicata*. He prayed that the appeal be allowed

Arguments of Counsel for the respondent:

[14] In response, counsel for the respondent, submitted that the respondent was in possession of the land at the time of attachment. The fact that the respondent was evicted from the land is a clear indication that he was in possession at the time of that execution. Execution of a decree does not bar an objector application. The issue of *res judicata* does not arise since the person sued in the main suit was a mere licensee on the land. They prayed that the appeal be dismissed.

Duties of a first appellate court:

[15] It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (*see Father Nanensio Begumisa and three others v. Eric Tiberaga, S.C. C A No. 17 of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions (*see Lovinsa Nankya v. Nsibambi [1980] HCB 81*).

[16] In exercise of its appellate jurisdiction, this court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the

witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he or she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

All grounds of appeal considered concurrently

[17] For convenience, all the grounds of appeal will be considered concurrently. It is trite that the nature of the suit determines how decree should be implemented. A court may order for execution of decree on the application of decree holder, by;- (a) delivery of any property which was in possession of judgment-debtor and decree has been specifically passed concerning such property (b) by attachment and sell of the property of the judgment-debtor (c) by arrest and detention (d) by appointing a receiver (e) in such other manner which depends upon nature of relief granted by the court (see section 38 of *The Civil Procedure Act*). Under section 38 (a) *The Civil Procedure Act* and Order 22 rule 32 of *The Civil Procedure Rules*, the judgment debtor has the option of execution by way of delivery of the immovable property specifically decreed, "by removing any person bound by the decree who refuses to vacate the property." Under this rule, the executing Court delivers actual physical possession of the disputed property to the decree-holder and, if necessary, by removing any person bound by the decree who refuses to vacate the said property.

[18] The appellant objected to execution of the decree on ground that he could not be dispossessed in terms of the said decree, as he was not a party to the suit nor does he derive any right and title through the Judgement debtor. According to Order 22 rule 19 (1) (a) and (b) of *The Civil Procedure Rules*, where an application for execution is made more than one year after the date of the decree; or against the legal representative of a party to the decree the court

executing the decree must issue a notice to the person against whom execution is applied for requiring him or her to show cause, on a date to be fixed, why the decree should not be executed against him or her. Where the mode of execution sought is by way of by delivery of any property specifically decreed, taking this step enables the court verify that the property is in the possession of a person or persons bound by the decree or held on behalf of one of those persons, and that they have been required to vacate the property.

[19] Secondly, upon the death of party, during the continuation of the suit, it is mandatory that the legal representatives of that deceased Judgment- debtor should be brought on. This is because of one of the cardinal principles of natural justice that both the parties must be heard (*audi alterum partem*). In case of death of a party the Court cannot arrive at a conclusion because there can be no order or decree against a dead person, for a dead person cannot be heard. Section 37 (1) of *The Civil Procedure Act*, provides that where a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the decree against the legal representative of the deceased, or against any person who has intermeddled with the estate of the deceased.

[20] It follows that when the judgment debtor dies before execution is effected, the judgment creditor ought to bring an application to substitute the judgment debtor's name with that of his or her successor-in-title and serve the successor-in-title with all the processes in the suit. The legal representative should come on record to continue the suit within the time allowed by law. It will not be possible for the Court to do anything in the way of execution until and unless the legal representatives have been brought on the record.

[21] The question to be determined in objector proceedings is whether at the date of attachment, the Judgment Debtor or Objector was in possession of the property. If the Judgment Debtor was in possession, the inquiry will proceed no further, but

if not, it has also to be determined whether the Objector held the property on his / her own account or in trust for some other person. Questions of legal right and title are not relevant except in so far as they may affect the decision whether the possession is in trust of the Judgment Debtor or some other person. Under Order 22 rule 60 of *The Civil Procedure Rules*, where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right to which he or she claims to the property in dispute, but subject to the result of the suit, if any the order shall be conclusive. Since no enquiry into the title of an objector is contemplated, questions of *res judicata* do not arise.

[22] The appellant in this case sought execution by removal of the respondent. The significant words contained in Order 22 rule 32 of *The Civil Procedure Rules*, are "by removing any person bound by the decree." The rule conceives of immovable property in occupancy of a person bound by the decree or a person claiming title through the judgment debtor. When the property is in occupancy of a person not bound by the decree or claiming an independent right of his or her own, the Court delivers possession by fixing a copy of the warrant in some conspicuous place of the said property. In other words, the decree-holder gets the symbolic possession. Where objection is by a person resisting delivery of possession to the decree-holder, claiming in good faith to be in possession of the property on his or her own right, the Court has to set aside the execution. On the other hand, if for any reason an objector is already dispossessed of the suit property relating to which he or she claims any right, title or interest before getting an opportunity to oppose it, then his or her remedy would lie in claiming that his dispossession was illegal and that possession deserves to be restored to him or her.

[23] In the instant case execution was illegal because it proceeded in respect of a deceased judgment debtor yet no legal representative had been appointed. It was not preceded by a notice to show cause yet execution was sought several years after the decree. The respondent, Ongom Marko was in possession at the

time of execution and claimed as a beneficiary of the estate of the late Rudolfo Kamlega, which estate was not represented in interest by the judgment debtor Onen Cliff Richard. The issue of *res judicata* did not arise.

Order :

[24] In the final result, the court below was therefore correct in setting aside execution of that decree. In the final result, there is no merit in the appeal. It is dismissed with costs to the respondent.

Stephen Mubiru
Resident Judge, Gulu

Appearances

For the appellant : M/s Ocorobiya and Co. Advocates

For the respondent : M/s Okwi and Co. Advocates