**THE REPUBLIC OF UGANDA** File copy

**IN THE HIGH COURT OF UGANDA AT TORORO**

**CIVIL APPEAL NO 002 OF 2022**

1. **ASINDE KEVINA**
2. **OCHIENG PETER :::::::::::::::::::::::::::::::::::::::::::::::: APPELLANTS**

**VERSUS**

1. **OKETCHO RAYMOND**
2. **OKETCH DOMINIC**
3. **OCHIWO MICHEAL**
4. **OMOLO KAMBA**
5. **OBBO YOWANA :::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS**

**BEFORE: HON DR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

This appeal arises from the judgment of His Worship Opit Christopher, a Principal Grade One Magistrate at the Chief Magistrate's Court of Tororo at Tororo. The judgment was delivered on the 14th day of September 2022.

The respondents sued the appellants for a declaration that they are the owners of customary land situated at Gule Village in Lyowa Parish, Lyowa Sub-County, Tororo District (hereinafter the suit land), general damages for trespass and inconvenience, a permanent injunction, and costs of the suit.

The 5th respondent is a biological father to the 1st, 2nd, and 3rd respondents, and a grandfather to the 4th respondent. He claimed that he was given the suit land to take care of it sometime in 1964, 1969 and 1982 by its alleged owner, a one Gabriel

Ongwen who thereafter migrated to Buganda. That Gabriel Ongwen authorised him and the other respondents to utilize the suit land, and that they built houses thereon since 1990. That in the year 1999, Gabriel Ongwen sold the suit land to him and has been in full possession of it until he donated part of it in the north to the 1st, 2nd, 3rd, and 4th respondents, and also retained a residue in the south.

The facts are that the 2nd appellant is a son to (the late) Gabriel Ongwen, who according to the 5th respondent, was present when he purchased the whole suit land from Gabriel Ongwen.

The pleadings show that the 1st appellant started to openly claim the portion of the suit land in the north on the 8th of July, 2014; and that the 2nd appellant started doing the same thing on the portion in the south in early September, 2014. It is a fact that the 1st appellant is a daughter to the late Samwili Malilo and Dolotia Nyafwono. She alleged that the portion of the suit land she claims belonged to her father and mother. That when her father died, the said land was left under the care of a one Erukana Opendi and her mother. That after the death of her mother, the said land remained solely under the care of Erukana Opendi who also returned it to her in 1982. That between 1982 and 2002, she entrusted Ochieng John to take care of the said land. Further, that in 2002, Ochieng John informed her that her neighbour, the 5th respondent, wanted land to cultivate hence permitting him to allow him use about 2 acres of her land but that in 2008, the 5th respondent ended up taking exclusive possession of her whole portion of land by constructing houses thereon.

As for the other portion of the suit land, the 2nd appellant pleaded that when his father migrated to Buganda in 1973, he left his land under the care of the 5th respondent but came once in a while to check on his land. That when his father died in 2006, the said land remained under the care of the 5th respondent until 2008 when Ochieng John informed him that the respondents had begun constructing houses thereon.

The appellant counterclaimed against the respondents on a cause of recovery of land and claimed a declaration that they are owners of the respective portions of the suit land, a permanent injunction, general damages, among others.

The dispute was tried inter parties. The appellants and respondents called six ((6) witnesses each. The appellants' witnesses were, Asinde Kevin (DW1), Ochieng Peter (DW2), Opendi Valentino Majode (DW3), Ochieng John (DW4), Donato Opoya (DW5), and Odoi Joseph (DW6); and the respondents' witnesses were, Yowana Obbo (PW1), Omollo Michael (PW2), Ochwo Micheal (PW3), Oketcho Dominic (PW4), Oketcho Raymond (PW5), and Oketcho George William (PW6). The trial Magistrate visited locus in quo, and subsequently rendered a judgment in favour of the respondents hence this appeal.

**Grounds of appeal**

1. That the learned trial Magistrate erred in law and fact when he ruled that the suit land is the property of the respondents.
2. The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence on the court record thereby arriving at a wrong decision/conclusion.
3. The learned trial Magistrate erred in law and fact when he ruled that the 5th plaintiff (Obbo Yowana) rightly acquired interests over the suit land by way of purchase thereby coming to a wrong conclusion.
4. The trial Magistrate erred in law and fact when he ruled that by the plaintiffs' occupation of land, they had acquired ownership of the suit land.

The appellants are represented by **M/S OPIO PATRICK ADVOCATES & LEGAL ASSOCIATES**; and the respondents are represented by **AKETCH & CO.**

**ADVOCATES**. Counsel for the parties filed written submissions which the court has considered.

Counsel argued grounds 1, 2 together; and 3, 4 together. The court shall adopt the same approach.

**RESOLUTION OF APPEAL**

This being a first appellate court has the duty and burden to reappraise the evidence and to reach its own conclusions thereon aware that it neither saw nor heard the witnesses. See cases of Pandya vs R [1957] EA 336; Ruwala vs. Re [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC)

With the above considerations in mind I now resolve the appeal as follows:

**Grounds 1, 2:**

> *That the learned trial Magistrate erred in law and fact when he ruled that the suit land is the property of the respondents.*
>
> *The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence on the court record thereby arriving at a wrong decision/conclusion.*

Counsel for the appellants' submitted referring to PW1 as Oketcho Raymond and argued that his testimony revealed a major inconsistency and contradiction. With due respect, however, Counsel gravely mistook PW1 for Oketcho Raymond, but PW1 is Yowana Obbo according to the record of proceedings. Counsel for the

appellants' submission is unfounded, therefore as rightly put by the respondents' Counsel. Accordingly, the same is disregarded.

It is an undisputed fact that Gabriel Ongwen left land under the care of the 5th respondent in the 1960s and sometime thereafter. The parties also agree to a fact that the portion of the suit land in the south and that is claimed by the 2nd appellant belonged to Gabriel Ongwen. The disagreement concerning those facts is only the land in the north of the suit land, that is being claimed by the 1st appellant.

Accordingly, the 1st appellant asserts that the 5th respondent has never been in care of the said portion of land and that said land has never belonged to Gabriel Ongwen, but her late father and mother. That she only permitted the 5th respondent to cultivate 2 acres of it in 2002 but ended up exclusively possessing the whole of it in 2008.

It is a fact that the respondents are in physical possession of the whole of the suit land.

It is also a principle of law that possession of land is prima facie evidence of ownership. Thus, under **Section 110 of the Evidence Act Cap.6**, it is provided that "*when the question is whether any person is owner of anything of which he or she is shown to be in possession, the burden of proving that he or she is not the owner is on the person who affirms that he or she is not the owner*". In addition to that, the Court of Appeal in **Stanley Beinababo vs. Abaho Tumushabe CACA No.11 of 1997**, rightly observed that in order to succeed, a party out of possession of land must show that he or she has a better title than that of the party in possession (See also **Madina Kibirige & Others vs. John Bosco Muwonge HCCS No.058 of 2014**).

Accordingly, the appellant bear/bore the burden of proving that the respondents, particularly the 5th respondent, is not the owner of the suit land by showing a better title than himself/the respondents.

The appellants only evidence against the respondents is oral. This is unlike the 5th respondent who, in addition to oral evidence, exhibited two documents. One document, PEXH1, shows Gabriel Ongwen entrusting the 5th respondent to take care of his land in 1969 and the land is described as being boarded in the "*east by Erukana Opendi; West by William Ongwen; The Land starts from Ligaga Swamp to Arowa Swamp.*" Similarly, PW1 (the 5th respondent) described the same boarders as forming part of the suit land in his testimony.

The court is aware of the appellants' pleadings and evidence to the effect that the suit land is constituted by two portions, as emphasised by their Counsel. That one piece is in the south and another one in the north.

Nevertheless, the suit land is considered as a one whole by the respondents, going by their pleadings, PEXH1 and PW1's testimony. It suffices to note that the testimonies of DW1, (the 1st appellant), DW2 (the 2nd appellant), DW3, and DW4 indicate that if the boarders of the aforesaid two portions of land are joined, they result into land with boarders similar to those in PEXH1.

Furthermore, the 5th respondent also exhibited PEXH3, a copy of an agreement dated 7th March 1999, as proof a sale of land by Gabriel Ongwen to the 5th respondent. It is stated therein that the subject matter was land which Gabriel Ongwen "*had left under the care*" of the 5th respondent. DW3, the appellants' witness, authenticated PEXH3 by testifying that he wrote it on behalf of the seller and the buyer.

DW3's testimony that the subject matter in PEXH3 is not the suit land is noted, in addition to the appellants' emphasis of the same. However, the fact that none of the

appellants' witnesses identified any other land which PEXH3 could have disposed of, besides the suit land, makes it hard for court to believe the said testimony.

Therefore, it is the court's observation that the land that Gabriel Ongwen sold to the 5th respondent, according to PEXH3, is the one described in PEXH1; and that it is the same land, two pieces of which are separately claimed by the 1st and 2nd appellants. The court respectfully disagrees with the appellants Counsel's submission that one piece of land remained after the sale under PEXH3, and that the learned trial Magistrate ought to have established which land was actually sold and which one remained unsold.

Given the circumstances, the learned trial Magistrate was right to consider the suit land as one despite the appellants' assertion; and he properly did so when he relied on PEXH1 and PEXH3 as argued by the respondents' Counsel.

The appellants did not present satisfactory evidence of a better title to any part of the suit land than the 5th respondent who probably acquired the whole of it under PEXH3. Accordingly, the court finds no fault in the learned trial Magistrate's finding that the suit land belongs to the respondents.

Consequently, ground one and two are found in the negative.

**Ground 3**

> *The learned trial Magistrate erred in law and fact when he ruled that the 5th plaintiff (Obbo Yowana) rightly acquired interests over the suit land by way of purchase thereby coming to a wrong conclusion.*

The court shall start with the 3rd ground of appeal.

It notes that it has considered PEXH1 and PEXH3 already, and noted that there is no satisfactory evidence contradicting PEXH3. For that cause, therefore, it finds no

fault in the learned trial Magistrate's finding that the 5th respondent purchased the suit land under PEXH3.

Accordingly, the 3rd ground fails as well.

**Ground 4**

*The trial Magistrate erred in law and fact when he ruled that by the plaintiffs' occupation of land, they had acquired ownership of the suit land*

Concerning the 4th ground, there is no finding in the lower court's judgment to the effect that the plaintiffs (the respondents now) acquired ownership of the suit land by occupation of it.

In the submissions, Counsel for the appellant was unable to specifically elaborate on the gist of the 4th ground. Nevertheless, it appears that the ground was based on the trial Court's finding that, unlike the 1st appellant, the 2nd appellant's claim over the suit land was caught up by the doctrine of laches/adverse possession.

The evidence shows that the 1st appellant became aware of the respondents' claim over the suit land in 2002 and instituted her cause of action against them in 2014. This is unlike the 2nd appellant who became aware of the same fact in 1999. For that cause, the learned trial Magistrate's finding about the 2nd appellant is correct, given that 15 years had lapsed by the time his cause of action was instituted.

Accordingly, the 4th ground of appeal fails as well.

**Result**

The appeal is dismissed, and the trial court's judgment is upheld accordingly.

The appellants shall bear the costs of the appeal.

It is so ordered.

Delivered at Tororo this ..... 22nd ..... Day of ..... December ..... 2023

**HON. JUDGE**

In the presence of:

1. Counsel Opio Patrick - for the Appellants
2. Asinde Kervin - 1st Appellant ~~respondent~~
3. Ochieng Peter - 2nd Appellant
4. Okecho Raymond - 1st respondent
5. Omolo Kamba - 4th respondent.

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