The Republic of Uganda

In The High Court of Uganda Holden at Soroti

Civil Appeal No. 0030 of 2020

(Arising from Kumi Chief Magistrates Court Civil Suit No. 010 of 2018)

Auruku James :: Appellant

Versus

Icuka Majeri :: Respondent

Before: Hon Justice Dr Henry Peter Adonyo

Judgement on Appeal

1. Introduction:

This appeal arises from the judgment and orders of the Chief Magistrates Court of Kumi delivered on the 19th day of August 2020 by H/W Emmanuel Pirimba.

The appellant, Auruku James filed Civil Suit No. 010 of 2018 in Kumi Chief Magistrates Court against Icuka Manjeri, the respondent for a declaration that he is the rightful owner of 3 gardens which the respondent denied him use.

Auruku's case was that on 28thAugust, 1997 he entered into an agreement for sale of 3 gardens with one Ononge Washington at a consideration of eighty thousand shillings only and he immediately took possession of the suit land and utilised it.

That he enjoyed quiet possession of the suit land till August 2017 when the Icuka Manjeri, respondent went to the LC. II Court of Kobukol Parish claiming ownership of the suit land.

That the chairperson LC1 heard the case in his absence and gave his land to the respondent. Being dissatisfied, he then filed a suit in the Chief Magistrates Court.

The respondent in her Written Statement of Defence denied the appellant's claim contending that the appellant had never bought the suit land and that his transaction with Ononge was illegal.

She averred that her son Simon Peter Okwaja mortgaged one garden to Ononge Washington some time in 1987 at a consideration of one cow and that she redeemed the one garden on 6th September, 2017.

The trial magistrate after considering all the evidence declared that one garden belonged to the respondent and the other two to the appellant.

The appellant being dissatisfied with that judgement appealed to this Honourable Court citing the following reasons;

1. *The learned trial magistrate erred in law and fact when he failed to consider and find that the Respondent is barred by statute to recover or claim ownership of the suit land thereby reaching a wrong decision which occasioned miscarriage of justice.*
2. *The learned trial magistrate erred in law and fact when he failed to adequately evaluate and scrutinize all the evidence on court record as a whole and reached a wrong conclusion that the suit land belongs to the Respondent whereas not, thereby occasioning a miscarriage of justice.*
3. *The learned trial magistrate erred in law and fact when he failed to consider the inconsistencies and contradictions in the respondent's evidence, thereby reaching a wrong decision.*
4. *That the learned trial magistrate erred in law and fact by basing his decision on the evidence of Ononge Washington, who was*

declared by court as a hostile witness for the Appellant and thereby occasioning a miscarriage of Justice.

2. Duty of the 1st appellate court:

In ***Kifamunte Henry vs Uganda SCCA No. 10/1997***, it was held that;

> ***"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."***

In ***Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236,*** it was held that;

> ***"This being a first appeal, this court is under an obligation 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."***

3. Evidence:

Auruku James, the appellant testifying as PW1 stated that he is claiming three gardens which he bought from Ononge Washington for I bull and on 28/08/1997 but the sales agreement got burnt. The sale was witnessed by Onapito John Michael, Okiria John, Aanyu, Ojilong, Itipe Hellen and Washington. He is in possession of the 3 gardens but the respondent took possession of one in 2017.

PW2, Okiria John, corroborated the sale and added that it was in the presence of clan leaders and that he was present and signed a sale document.

PW3 Ononge Washington testified that he sold one garden to the respondent who had mortgaged one garden to him and he sold to the appellant his own garden which he had bought. That in 2014 the respondent gave him mortgage consideration, that he went to Mukongoro in 1980 and settled there in 1985 when peter mortgaged him one garden. That he sold to the appellant his own land and not the mortgaged land. The respondent redeemed her land in 2017 and she is in possession of the same. The appellant applied to have PW3 declared a hostile witness because he lied that he gave him two gardens to care take. When cross-examined by the appellant the he stated that he did not know if other witnesses knew that the appellant was caretaking the land. He stated that it is true he came to testify in the appellant's favour but it was in respect of removing boundary marks not a transaction between them, the appellant crossed the boundary.

PW4 Aguu Joyce corroborated PW1 on the sale and stated that she was present when it happened and signed the agreement.

PW5 Ojulun Robert also stated that he was present when during the sale. During cross-examination by the respondent she maintained that there was a sale and the respondent was not present.

Icuka Manjeri, the respondent testifying as DW1 told the lower court that while the appellant claimed 3 gardens she only has knowledge of one garden which she is claiming. That she inherited it from her husband and before his death they were using it together.

That this garden is in Kabukole village and she did not know the location of the other gardens the appellant was claiming.

She further told court that she had mortgaged the one suit garden to a one Washington at one cow but later redeemed it. She denied that in 1997 she was at the place in dispute.

DW2 Amulamu Odong testified that during the insurgency in 1984, Ononge came to settle as a refugee in their village and he wanted to buy one garden which he got it from Odeke.

That the respondent later had a problem and borrowed a calf from Ononge, she mortgaged one garden to the said Ononge to use till she gets the calf.

That later after the insurgency Ononge wanted to go back to his ancestral home but the respondent had no money to refund him (this was around 1990), Ononge then sold the one garden he bought from Odeke to the appellant and asked him to take care of the land mortgaged by the respondent.

Later when the respondent got the calf she went to the appellant who told her that the he had bought all the land from Ononge, however when Ononge was called, he clarified that the land he sold to the appellant was only the one he had bought from Odeke and not the one mortgaged by the respondent.

He told court that he was not present when the sale took place but that he witnessed Ononge handing over the respondent's garden for the appellant to care take.

Ononge when recalled by court as a witness for the defendant/respondent, corroborated what Amulamu Odong (DW2) said that he did in fact hand over the respondent's garden to the appellant to take care of.

During locus court established that there were three gardens, the respondent claimed the first one was hers and so were the potatoes growing on the land. Ononge stated that the first garden was mortgaged by the respondent. That the 2nd garden is still his and the appellant is only caretaking it.

4. Submissions:

The record shows that only the appellant filed submissions. The respondent was served with a copy of the same but made no reply.

With regard to ground 1 Counsel for the appellant M/s Okanyum Namusana & Co. Advocates submitted that the plaintiff at page 3 of the record of proceedings clearly stated that he bought the 3 gardens on the 28th day of August 1997 and has since lived on the suit land undisturbed until 2017 when the defendant/respondent trespassed on his land. This stay, it was argued was a difference of 20 years of quiet possession and that this fact was corroborated by the evidence of PW1 at page 3, PW2 and PW3 page 4, PW4 and PW5 at page 7 & DW1 at page 9 who confirmed the appellant's said occupation and PW1. PW2, PW4 & PW5 proved ownership of the same.

That under **Section 5 and 16 of the Limitation Act** a person dispossessed of land cannot bring an action to recover land after the expiration of 12 years from the date on which the right of action accrued which is the date of dispossession.

Counsel further submitted that whereas in this case it is the appellant who instituted a suit against the respondent for trespass on his land where he had lived for over 20 years undisturbed, the law on limitation was in his favor save for the fact that he was in this case the one who instituted the suit against the respondent, the law on limitation as above cited would

have acted as a guide to the trial magistrate coupled with the overwhelming evidence on record to establish the appellant's ownership and plea of declaration of the respondent's redemption of the suit land as trespass. Counsel prayed that the court finds the acts of the respondent to constitute trespass and therefore confirm the appellant as the rightful owner of the disputed one garden.

On ground 2 counsel submitted that the trial Magistrate in the judgement stated that the evidence of PW3 Ononge Washington was consistent and true and solely relied on his evidence to establish ownership of the disputed one garden.

Counsel submitted that the evidence of PW1 (the appellant), PW2 (Okiria John), PW4 (Aanyu Joyce) & PW5 (Ojulun Robert) confirmed that the transaction between Ononge Washington and the plaintiff/appellant was a sale not a mortgage nor one to care take the suit land as alleged by the said Ononge and a sale agreement to that effect was on the 28th day of August 1997 signed in confirmation of full payment of 1 bull and 80,000/- (eighty thousand shillings) for all the 3 gardens.

This is substantiated by the evidence of DW2 Amulamu Odong at page 11 of the proceedings who confirmed that Okiria John and Onapito were present during the sale in between the plaintiff and Ononge. This evidence of PW1, PW2, PW4 & PW5 remained unchallenged.

Counsel additionally submitted that in ***Habre International Co. Ltd Vs Ebrahim Alarakia Kassam SCCA No. 4 of 1999;*** Justice Karokora while citing the case of ***Kabenge v. Uganda U/CA Cr. App. No. 19 of 1997*** where court noted that;

> ***"Whenever an opponent has declined to avail himself of the opportunity to put his essential and material case in***

cross examination, it must follow that he believed that the testimony given could not be disputed at all. Therefore, an omission or neglect to challenge the evidence in chief on any material or essential point by cross examination would lead to inference that the evidence is accepted subject to it being assailed as inherently incredible."

Counsel further submitted that when the said Ononge testified as defence witness having been declared a hostile witness by court, he confirmed that there was no agreement to the alleged mortgage transaction but that the transaction was a mortgage.

The plaintiff in his reaction to Ononge's assertion confirmed that the sale of land was witnessed by Onapito who was a close neighbor, Onyakol who was the secretary and the clan leaders among others and Ononge failed to challenge this.

Furthermore, that the defendant/respondent clearly stated that in 1997, she was not present during the transaction in between Ononge and the appellant of the suit land which she had mortgaged to Ononge, she therefore had nothing of value to offer to court in regards to the instant matter and whatever she had to tell court in this regard was hearsay evidence as was the case with DW2. Counsel relying on section 59 of the Evidence Act and State V Medley Court invited court to disregard this evidence.

On ground 3 counsel submitted that PW3 Ononge Washington told court that;

"...I sold one garden to the defendant who had mortgaged one garden to me. I sold to plaintiff my own garden which I had bought" which clearly contradicts the evidence of

the defendant who confirmed that she is the owner of the suit land but had only mortgaged it to Ononge Washington (PW3). That the said Ononge Washington at page 6 of the record of proceedings stated that "...I did not want to give you the bull, it was Icuka defendant who gave me a cow...".

That the defendant told Court that she had used the garden since she was married and did not sell any land to anybody, however, the witness Ononge Washington at page 5 of the record of proceedings informed court that the defendant redeemed her land in 2007 and it is not what he sold to the plaintiff.

Counsel submitted that the contradictions in the respondent's evidence were not explained and as such it was erroneous for the trial magistrate to ignore these contradictions and find the evidence of Ononge consistent.

On ground 4 counsel submitted that PW3 Ononge Washington at was declared a hostile witness who by definition is an adverse witness who willfully refuses to testify truthfully on behalf of the party who called him. **See: Oxford Law Dictionary at page 233.**

Counsel submitted that a court relying on the evidence of a hostile witness must do so with caution. Counsel relied on ***K. Anbazaghan v Superintendent of Police AIR 2004 SC 524,*** where court noted that;

"If the judge finds that in the process, the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution and care, accept in the light of other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it."

Counsel submitted that the evidence of PW1 (the appellant), PW2 (Okiria John), PW4 (Aanyu Joyce) & PW5 (Ojulun Robert was completely ignored by the trial magistrate which evidence remained unchallenged by the defendant and the trial magistrate solely relied on the evidence of PW3 Ononge Washington.

5. Determination of the Appeal:

Counsel for the appellant sought to use the law of limitation under section 5 of the Limitation Act even though it was the appellant that instituted the matter in the lower court.

Section 5 provides for limitation of actions to recover land; specifically it states that;

> ***" No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person."***

The interpretation of this section is that it applies as a defence to a party against whom an action to recover land has been filed.

In the instant case the appellant was the plaintiff in the lower court and this provision cannot be applied to him. Ground 1 accordingly fails.

I will consider ground 2 to 4 concurrently as they all focus on the evidence adduced in the lower court.

The appellant's discontent with the lower court judgment is the award of one garden to the respondent yet he claimed to have bought all three from Ononge Washington in 1997.

From the evidence on record, it is clear that there are three gardens and the same was confirmed at locus, what is in contention is the ownership of these gardens, especially the first garden.

The appellant claims that all three gardens were his, having bought the same from PW3 Ononge and his assertion is confirmed by PW2, PW4 and PW5 who told court that they were present during the sale.

Ononge does not dispute the sale, what he disputes is the land sold. He testified that the land he sold to the appellant is different from the land mortgaged by the respondent. He told court that land mortgaged to him and land he bought from Odeke were different.

Ononge further told court that he only sold the land to the appellant was the one bought from Odeke and it was different from the land mortgaged by the respondent. Upon making that statement after being called by the appellant as his witness, Ononge was declared a hostile witness but when cross-examined he stated that the appellant crossed the boundary of his land and trespassed into that of the respondent which land the appellant had been given to take care of.

When recalled by the court and during locus he maintained that the mortgaged land and the one he bought from Odeke were different. This statement was corroborated by DW1 and DW1.

In resolving this dispute, I do find that find that Ononge is central for he features in two separate transactions involving the appellant and the respondent.

In the first instance he entered into a loose mortgage with the respondent for her land which the respondent later redeemed in 2017. As for the 2nd instance he bought land from Odeke and later sold it to the appellant.

I agree with the trial Magistrate that Ononge was is the key witness in the impugned transactions. He was also consistent in his evidence for he clearly maintained that the land he sold to the appellant was different from that which was mortgaged by the respondent.

No wonder that the respondent only knew the one garden of the three she was sued for and was not aware of the sale involving three gardens as that did not involve her one garden.

The trial magistrate in his judgment noted that during the *locus in quo* that the 1st garden was a distance away from the other two and it was being used by the respondent not the appellant.

In my considered opinion, Ononge Washington was obviously a key witness to both parties his testimony was believable and consistent. NI am satisfied that the trial Magistrate find this so and based his judgment on Ononge's truthful evidence.

The claim by the appellant that the trial Magistrate ignored his evidence is not borne out of any fact and truthfulness because while the appellant and his witnesses all testified to the sale of three gardens, none of them gave sufficient information on the same with even the so called agreement which they claimed to have signed never produced in court for verification and scrutiny. They alleged that it got burnt.

Also the findings of court at locus does not favour the appellant's case given the fact that the trial court properly established that the sold land and the one occupied by the respondent were different and a distance apart.

I am convinced that the trial court properly evaluated the evidence before it given by both parties and came to the proper conclusion that the respondent had proved her case on a balance of probability.

I also agree with the finding of the trial Magistrate that the appellant failed to prove that the suit garden occupied by the respondent was bought from Ononge Washington, a contention which Ononge himself denied.

Counsel for the appellant in his submissions faults the trial magistrate for relying on the evidence of Ononge who had been declared a hostile witness. This was an exercise in futility for the trial Magistrate in his judgment relied on ***Hans Besigye vs Charles Ndyahikayo CA No. 44 of 2008*** where it was held that

> ***"It is not every witness that gives evidence against the party that calls him that can be treated as a hostile witness. If the witness is telling the truth that it not favourable to the party that calls him, like it is the case now, that evidence must be weighed like any other witnesses' evidence and accorded its due weight and credibility depending on the evidence as a whole."***

In the instant case the appellant applied to have Ononge (PW3) declared a hostile witness when he testified that the mortgaged land and the land sold to the appellant were different.

The trial Magistrate while exercising his powers under **section 100 of the Magistrates Court Act** and bearing in mind the decision in ***Hans Besigye*** (above) recalled Ononge to testify with still maintaining his testimony that the land occupied by the respondent was not sold to the appellant by him. That the appellant only was its caretaker while the respondent was away during the insurgencies in the early 1980's and 1990's.

It was for this reason that when the trial magistrate evaluated the evidence as a whole he found Ononge's testimony to be reliable and truthful and thus declared that the 1st garden belonged to the respondent.

I would entirely agree with the trial Magistrate in his evaluation of the evidence adduced before him and I am certain that he must have properly cautioned himself before relying on the evidence of a witness who was declared hostile.

Furthermore, I note that the alleged inconsistencies and contradictions as pointed out by counsel for the appellant are such that are not futile to the overall final assessment and the decision made by the lower trial court. When one considers the fact that there were two transactions to which Ononge was a witness, that is, a mortgage with the respondent and a sale the appellant, then it is clear that there were two separate transactions which involved Ononge.

His separation of the two, in my view, does not prove that there were any discrepancies or contradictions in the evidence of the respondent but goes on to prove the reality of the situation on the ground.

Conclusively therefore, I would find that the trial magistrate duly evaluated all the evidence adduced before him and came to the right conclusion that one garden belonged to the respondent, Grounds 2 to 4 of this appeal accordingly fail.

It is not necessary to discuss the other grounds as they are covered under the above and so consequently this appeal would be found to have no merit and it is thus dismissed with costs to the respondent with the judgement and orders of lower court in Civil Suit No. 010 of 2018 upheld.

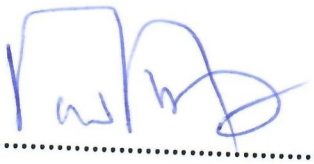
6. Orders:

a. This appeal is found to have no merit.

b. The appeal is dismissed with costs to the respondent in this court and the lower court.

c. The judgement and orders of the lower court in Civil Suit No. 010 of 2018 upheld.

I do so order.



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Hon. Justice Dr Henry Peter Adonyo

Judge

19th January, 2023