THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CIVIL APPEAL NO. 52 OF 2021

(ARISING FROM CIVIL SUIT NO. 130 OF 2018, NWOYA CHIEF MAGISTRATES COURT)

AUMA MARY BONGOMIN.....APPELLANT

VERSUS

1. OJUK JIMMY

2. EUGENIO OUMA

3. OBOL NEKIYOM

4. ODOKONYERO FRANCIS.....RESPONDENTS

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

JUDGMENT

Background

This is an appeal from the Judgment and orders of the then Chief Magistrate of Nwoya Chief Magistrate's Court, His Worship Matenga Dawa Francis, delivered in Civil Suit No. 130 of 2018, on 8th July, 2021. The Appellant had sued the Respondents, claiming ownership of a piece of land situate in Bana village, Lujoro Sub-Ward, Pailyech Parish, Amuru Sub-County, Amuru District. She contended that she acquired the

land in 1984 from an uncle who was resident in the area proximate to the former National Game Reserve. She averred she left the land in 1986 due to insecurity and returned in 2007 but found her former homestead burnt down by rebels. That the Respondents and several families had taken over the land. The Respondents denied the claim and contended that the suit land is former public land, part of Game Reserve and was de-gazetted, attracting several persons/ families to randomly settle thereon. The Respondents contended that non-parties have since obtained leasehold certificates of title on portion of the suit land from Amuru District Land Board yet the Appellant was threatening to evict several people from a whole village.

After trial, the Court below dismissed the suit, holding that the suit land was formerly a Game Reserve and the Appellant could not purport to have been given the land by an uncle. Court concluded that, following the degazettment, the land was vested in Amuru District Land Board as a controlling authority. Court held, in the absence of a lease, the Appellant had no *locus* to claim public land from adversaries in actual possession. The trial Court concluded, the Appellant, therefore, lacked cause of action. Parties were to bear their own costs of the suit since, in the trial Court's view, both parties were scrambling for public land. The Appellant was aggrieved and dissatisfied, hence this appeal.

Grounds of Appeal

The Appellant formulated two grounds of appeal, namely;

1. The Learned trial Chief Magistrate erred in law and fact when he failed to properly evaluate evidence on ownership of the appellant thereby coming to a wrong conclusion and occasioning a miscarriage of justice.

2. The Learned trial Chief Magistrate erred in law and fact in deciding that the Appellant has no *locus* to institute the suit against the Respondents thereby coming to a wrong conclusion and occasioning a miscarriage of justice.

The Appellant asked this Court to allow the appeal, set aside the judgment and Decree of the Learned Chief Magistrate and that Judgment be entered for the Appellant, plus costs of the Appeal and costs in the court below.

Representation

The Appellant was represented by Mr. Donge S.D Opar while the Respondents were represented by Mr. Lobo-Akera Stephen and Mr. Kilama Calvin. Court was informed that the third Respondent was deceased and a legal representative had been appointed. Parties filed written submission and supplemented orally. I have considered the submissions for which I am grateful.

Duty of a first appellate Court

The parties are entitled to obtain from this court the court's own decision on issues of fact as well as issues of law. However, in case of conflicting evidence Court has to make due allowance for the fact that it has neither seen nor heard the witnesses testify. Court must however weigh conflicting evidence and draw its own inference and conclusions. See: ***Fr. Narensio Begumisa & 3 others Vs. Eric Tibebaga, Civil Appeal No. 17 of 2002,*** **(Mulenga, JSC).**

Resolution of the Appeal

Ground one is vague. That notwithstanding, I think the Appellant's complaint is with respect to the trial Court's holding that the Appellant does not own the suit land. The finding that the suit land is former public land which had been degazetted and vested in the controlling authority, Amuru Distrcit Land Board, led to the trial Court's conclusion that the Appellant lacked *locus* to sue over it. In this appeal, therefore, because the complaints are intertwined, I will resolve the grounds together.

In the trial Court, the Appellant (PW1) testified and called two additional witnesses. The Respondents called two witnesses. In her witness statement, the Appellant stated she and the late husband Bongomin Alfeo acquired the suit land from her uncle Abuya Sylvano in 1984. The Appellant did not however mention the nature of the acquisition. In cross examination, the

Appellant stated she acquired the suit land in 1986. That, she placed an egg on the land for one week, as per the Acholi culture (custom), and the egg was not eaten (by wild animal). Thereafter, the Appellant took possession of approximately 500 acres of land.

The Respondents disputed the Appellant's claim, asserting the Appellant never lived on the suit land before. The Respondents testified, the suit land was former Game Reserve which was degazetted and made available to whoever wanted to acquire. The Respondents also testified that they settled on the suit land, just as several others, without objection by the controlling authority, Amuru District Land Board.

In my judgment, and with the greatest respect for the alleged custom, I find that the purported mode of land acquisition was not proved through expert witness knowledgeable in the particular Acholi Custom, if at all. A person relying on custom must prove it. Section 46 of the Evidence Act requires that when Court has to form an opinion as to the existence of any general custom or right, the opinions of persons who would be likely to know of its existence if it existed, are relevant. In other words, an expert in a particular custom is required to prove the custom to Court. This was the position stated in **Kampala District Land Board and George Mitala Vs. Venasio Babweyaka & 2Others, Civil Appeal No. 2 of 2007 (SCU), per Odoki, CJ,**

(with whom the rest of the court agreed). See also: **Ennest Kinyanjui Kimani Vs. Muira Gikanga [1965] E.A 735, Duffus J.A, at p.789.**

I should perhaps add that, where a Custom runs counter to the written law, as this particular custom would, it cannot stand and cannot be used as a basis for founding a cause of action. The Appellant's alleged custom whose effect would be to divest the Government or the controlling authority of former public land, without following the due process of the law, would, with respect, be repugnant to written law. It is common ground that with the coming into force of the Constitution of the Republic of Uganda, 1995, and the Land Act, 1998, all land in a District not owned by any person or authority, is now held by the District Land Board. It is the Board with powers to allocate such land. See Article 241(1) (a) of the Constitution, 1995, and section 59 (1) (a) of the Land Act, Cap. 227. It is the Board that would likewise facilitate the registration and transfer of interests in such land. In my view, therefore, the Appellant's custom of placing an egg on Government land and claiming it, simply because an animal did not eat the egg, with respect, would conflict with the written law and would be a recipe for chaos.

The Appellant readily conceded that the land was formerly Game Reserve and was degazetted. She recognized that the suit land is vested in Amuru District Land Board. During the

pendency of the suit, the Appellant and family members applied to Amuru District Land Board for consideration for leasehold interest. This, in my view, was in recognition that the land is held by the controlling authority. Although the Application for leasehold was approved, lease was not granted. The record shows that out of 1500 acres sought by the Appellant, approval was granted for 400 hectares. It appears the Board declined to grant the lease because the area already had several settlers/families. The grant would, therefore, unsettle families.

The Appellant's Learned Counsel argued that the settlers would simply be evicted upon a simple application to this Court for consequential orders, once this Court allows the appeal. He asked Court to ignore the settlers. Counsel saw no wrong with evicting the families even without affording them a hearing. I will address this arguments shortly.

I note that in the trial Court, evidence was adduced to the effect that several persons have since obtained leasehold certificates of title to the suit land from Amuru District Land Board. These include Omony Sunday, Oola Sylvesto, Okeny Geoffrey and Opwonya Richard. Interestingly, the Appellant claimed to own the areas occupied by these title holders as well. The Appellant lacks any document of title. PW2 (Sarafino Okoya Abutgweno) stated that the suit land was former public land and had been degazetted and people have been allowed to settle thereon. PW2

however alleged that the Respondents forcefully entered on the suitland to deprive the Appellant of it. It was also claimed that the Respondents brought in other persons. The Respondents denied these allegations. They supported the decision of the trial Court and argued that the suit land is under the jurisdiction of Amuru District Land Board and yet the Appellant did not sue the District Land Board for non-grant of the lease. The Respondents asserted that the Appellant failed during *locus* visit to show her former homestead. They contended that the families that are settled on the suit land have never been sued by the Appellant and neither did the controlling authority question them.

I have carefully reviewed the rival arguments. In my view, and with respect to Learned Counsel, the arguments that the certificates of title of innocent parties could be revoked by this Court by a simple application and therefore they ought to be evicted first without a hearing, is a dangerous call, which is also fallacious. I cannot accede to it. This is a Court of Justice and justice requires that a party is heard before being condemned. Even God gave Adam (and Eve) a hearing before suffering expulsion in the Garden of Eden, as the Holy Bible asserts, having eaten the forbidden fruit. See: **Kamurasi Vs. Accord Properties Ltd [2000] 1 E.A 90**.

In the instant case, the titleholders to the suit land were not sued in the trial Court and thus not parties to the appeal. Even if the Appellant had valid claims, the interests of many persons now at stake would need to be protected in this proceedings given they are not parties.

Having carefully considered the allegations and submissions, I find the allegation of forceful entry by the Respondents and the settlers not made out. In my respectful view, the only Authority that could place a valid complaint against the Respondents and the settlers, is Amuru District Land Board. There is no evidence that the Board did or now seeks to do. Court notes that there was an upsurge of persons on the suit land who literally scrambled for and partitioned it because Government had made it available to all. Therefore, the Appellant's attempt to lay exclusive claim to the suit land, in my view, lacks legal grounding. The claim that the land was given to the Appellant by an uncle in the year 1985, as claimed by PW3 (Kidega Denis Amin) was incredible, to say the least. PW3 did not rebut the evidence that this was public land, a fact conceded by the Appellant and PW2. The Respondents' witnesses, Opwonya Richard, and the 1st Respondent testified about the status of the suit land, it being a former public land. The Respondents were not challenged in that respect. The *locus* visit did not support the Appellant's claim either.

Given the totality of the evidence, I am in respectful agreement with the then Learned Chief Magistrate that the Appellant failed to prove her claim. I hold that the basis for the Appellant's claim was flawed.

I have noted some belated arguments pressed on appeal that the Appellant is a bonafide occupant. That argument, with respect, is misconceived. The concept of bonafide occupant has no place in this matter. It was not pleaded. Even if it had been, the suit land was not shown to have been registered in the Uganda Land Commission or in the present controlling authority, for the invocation of section 29 of the Land Act. Section 29 of the Land Act applies only to land that is registered in an owner. See: **Kampala District Land Board & another Vs. National Housing and Construction Corporation, Civil Appeal No. 2 of 2004 (SCU), at p.16.** in support of this finding.

The Appellant cannot therefore come within the category of persons (bonafide and lawful occupants) envisaged under section 29 of the Land Act, who are protected by Article 237 (8) of the Constitution, 1995 and section 31(1) of the Land Act.

The other arguments that the Appellant had some 'interests' which the law protects, and ought to have been heard before the alleged interests were taken away, with respect, has no place at law. The Appellant failed to rebut the evidence that the suit land

is former public land that was made available to all. I, therefore, hold that the trial Court was correct in its evaluation of the evidence on record and the conclusions reached. I support those findings and conclusions. Accordingly, I dismiss both grounds of Appeal.

In conclusion the Appeal wholly fails and is hereby dismissed. Regarding costs, I find that the order of the trial Court that each party bears its own costs in that Court, was the proper order to make in the circumstances. Accordingly, each party shall bear their own costs in the trial Court and in this Court.

Before I take leave of this matter, I note that the Appellant has some portion of land said to be occupied by her son and other members of the Appellant's family, with her authority. That land appears not to be claimed or adversely occupied by third parties. The Appellant ought to have diligently pursued the lease of that portion from Amuru District Land Board, as others, other than engaging in fruitless litigation over what is already encumbered by multitude of innocent households. Aware that the suit land was neither legally nor equitably hers, the Appellant ought to have exercised more vigilance if she wished to obtain lease of the suit land. She shouldn't have waited till litigation, to apply for land that was already encumbered. Equity aids the vigilant.

Delivered, dated and signed in court this 24th day of March, 2023.

Hon. Dr. 24/03/2023

George Okello

JUDGE HIGH COURT

Ruling read in Court

12:25pm

Ms. Grace Avola, Court Clerk.

Ms. Gloria Adong, holding brief for Mr. Doii Patrick, for the Appellant.

Mr. Kilama Calvin for the Respondents.

The parties are before court.

Ms. Adong: The matter is for Judgment. We are ready to receive it.

Mr. KIlama: We are ready to receive the Judgment.

Court: Judgment read and signed in open court.

24/03/2023

George Okello

JUDGE HIGH COURT