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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT TORORO

CIVIL APPEAL NO. 0008 OF 2023

[FORMERLY MBALE CS NO.028 OF 2015]

EGESA ODERO::APPELLANT

VERSUS

1. **MANGENI JOHNSON OBOKOLI**
2. **WAFULA FRANCIS OBOKOLI::::::::::::::::::::RESPONDENTS**

JUDGMENT

BEFORE: HON. DR. JUSTICE HENRY 1. KAWESA

The Appellant brought this appeal against the judgment of Her Worship Adelo Suzan, a Grade One Magistrate delivered at Busia on the 5th day of June, 2023, in the Respondents' favour.

The brief background of the appeal is that the Appellant filed Civil Suit No.028 of 2015, in the capacity of a beneficiary of the estate of the late Zerubaber Odero, at the Chief Magistrate's Court of Busia at Busia against the Respondent. He claimed ownership of land, and trespass to land situated at Bukanga Village, Bumba Parish, Dabani Sub-County, Busia District measuring approximately 3 acres (hereinafter the suit land).

He alleged that the suit land formed part of land owned by his late father, Zerubaber Odero. That upon his father's death, the said land was distributed amongst his family members and left the suit land for cultivation and grazing animals since it was near a swamp and stream. That the Respondents, who were

neighbours of the suit land, started trespassing on it in 2014 bit by bit, by planting maize, and eventually on whole of it.

In response, the Respondents claimed ownership of the suit land. It was their allegation that they inherited the suit land from their late father having purchased it from the Appellant's late father.

The suit proceeded on trial, with the Appellant calling three witness, and the Respondents calling five witnesses. The Appellant's witnesses were: Egesa Odero (PW 1), Alexander Panyako; (PW2), and Juma Wycliffe; (PW3); and the Respondents' witnesses were Mangeni Johnson Obokere; (DWI), Wafula Francis (DW2); Kefa Hamuli; (DW3), Alex Wanyama; (DW4) and Hamuli Abuneri; (DW5). The Court also visited the locus in quo at the end of the trial.

In the end, the learned trial Magistrate dismissed the suit for lack of proof hence this appeal.

The grounds of the appeal are;

l. That the learned trial Magistrate erred in law and faci when she grossly failed to properly evaluate the evidence on Court record hence reaching an erroneous decision.

2. ***That the learned trial Magistrate erred in law and fact when she failed to interpret properly the land sales agreement brought to Court as evidence by the Respondents.***
3. ***That the learned trial Magistrate erred in law and fact when she failed to establish the irregularities and contradictions in both the primary and secondary evidence adduced by the Respondents concerning the boundaries and neighbourhood to the suit land and instead based her decision on hearsay evidence told by the Respondents and witnesses.***

4. ***That the decision of the learned trial Magistrate has occasioned a miscarriage of justice.***

Duty of Court

The Court is aware of its duty to subject the evidence received by the trial Court to a fresh scrutiny and come up with its own decision (***Sulaiti Dunqu versus Kateera G. Akugizibwe Court of Appeal Civil Appeal No.44 of 2015***).

Representation

The Appellant is represented by M/S Xander Advocates; and the Respondents are represented by M/S Whitegold Advocates. Counsel for the parties filed written submissions which shall be considered in resolving the above grounds of appeal.

In the submissions, Counsel for the Appellant argued grounds 1 and 4 together, and ground 2 and 3 separately; and Counsel for the Respondents argued ground I, 2, 3 ,and 4 separately.

However, this Court notes that ground 1 and 4 are too broad and general. O.43 R. 1 (2) of the Civil Procedure Rules SI 71-1 envisages grounds of an appeal which are concise and set out the error in the judgment or decree appeal from. For that cause, in ***Lanek Kenneth versus Akena Fred HCCA No. 016 of 2018***, it was rightly observed that:

> '*Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the Appellant believes occasioned a miscarriage of justice. Appellate Courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example Katumba Byaruhanga vs. Edward Kyewalabye*

Musoke, C.A. Civil Appeal No. 2 of' 1998; (1999) KALI? 621; Attorney General vs. Florence Baliraine, CA. Civil Appeal 79 of 2003).

Notable is that the Court of Appeal, in ***Attorney General vs Florence Baliraine CACA No. 79 of 2003***, struck out a ground similar to grounds 1 and 4 in this appeal.

In this case also, the Court is constrained and hereby strikes out ground 1 and 4 of the appeal for offending O.43 R.1 & 2 of the **Civil Procedure Rules SI 71-I**. It shall, therefore, not deliberate on them.

Even if the Court had allowed both grounds to stand, it would still have dismissed them on account that they were not proved.

The Court has read the pleadings, the parties' evidence, the record of proceedings, and the judgment of the lower Court. In addition, it has also read the submissions of Counsel for the Appellant in this Court; and found nothing to suggest that the learned trial Magistrate grossly failed to evaluate the evidence and hence made a decision which occasioned a miscarriage of justice.

Evaluation of evidence entails Court looking at the evidence as adduced by both sides as a whole and contrasting it with the law (***Attorney General vs Florence Baliraine, supra***).

In this case, the Appellant's evidence was the same as what is stated in his pleadings as reproduced in the introductory part above, save for the acreage of the suit land which the pleadings indicate as approximately 3 acres but the evidence shows it as 8 acres.

The Appellant's evidence on his late father's ownership of the suit land was oral.

On the other hand, the Respondents led documentary evidence in form of a sale agreement, DEXI-II, which indicates that the Appellant's late father sold the suit land to their late father. The said agreement was authenticated by DWI who

testified as its author, and DW3 and DW4 who testified as witnesses thereto. No evidence was led to discredit DEXHI.

The Appellant's Counsel questioned the authenticity of DEXHI by submitting that neither the author of DEXHI nor the witnesses thereto signed on it; and that the witnesses' names on DEXHI were simply written thereon by the author. This is true, However, that does not discredit DW5's testimony that he authored DEXI-II as a sale agreement of the suit land, and DW3 and DW4 testimonies that they witnessed DWI author DEXHI as a sale agreement, In the Court's view, those testimonies were sufficient to authenticate DEXHI .

The Appellant's Counsel also argued that the learned trial Magistrate failed to recognise that the land that was evidenced by DEXHI is not the suit land.

It is noted however that the lower Court's findings are based not only on DEXHI but also circumstantial evidence pointing to the fact that DEXHI was made in respect of the suit land. No evidence was led by the Appellant as to the other land to which DEXHI related so as to discredit the Respondents' evidence.

For the above cause, this Court is unable to fault the learned trial Magistrate for finding that DEXHI probably referred to the suit land. She would be on guesswork had she found otherwise.

More detail about DEXHI and its relevancy is made under the next ground.

Accordingly, the Appellant would nevertheless fail on grounds I and 4 had they been accepted as proper.

Ground 2:

That the learned trial Magistrate erred in law and fact when she failed to interpret properly the land sales agreement brought to Court as evidence by the Respondents.

The main point here again, according to Counsel for the Appellant's submissions, is that DEXHI does not refer to the suit land. Counsel argued that under DEXHI, the suit land is not described and that DEXHI states it to be bordered by Mayende Egondi uphill and Hamuli Kefa Odero (DW3/the Appellant's brother). That however, the suit land according to the undisputed evidence of the parties is neighboured by Nasikosi river downhill, not Hamuli Kefa who also never mentioned being a neighbour to the suit land in his witness statement. Further, that according to PW 1 's evidence, the Appellant father's land was distributed in 2003 when DW3/Hamuli Kefa Odero got his share and thus could not have been a neighbour of the suit land in 1985 when DEXHI was made.

Counsel for the Appellant appears to have ignored DW5 's testimony that at the time DEXHI was made, the Appellant father's land had not been distributed, and that the suit land's neighbours then were Mayende Godi on the south and DW3; who had been given a portion by his father near the suit land. This was no longer case When the suit was filed since DW3 was clearly no longer a neighbor to the suit land.

Thus, after identifying the suit land while at the *locus in quo,* DW3 stated that before his father sold the suit land, he had "given me this land but during the distribution I was given another land' (**See. Page 4 second last paragraph of record of proceedings at the *locus in quo***). The land which DW3 was referring to was most probably the land he occupied at the time DEXLII was made hence making him a neighbour to the suit land, the learned trial Magistrate was mindful of this thus noted that:

> ‘*During locus visit Mayende Egondi 's land was neighbouring part of the land not in dispute bought in 1982 (by the Respondents 'father from the Appellant 'S father) from the south up to the second portion of land sold in 1985 (suit land) as you go towards Nasikosi stream which is a slope*

and neighboured by the plaintiff's family though they did not tell Court who in particular was the owner of that portion of land during locus but during hearing, DIV5 stated that Hamuli Kefa Odero was the owner of the land and that could be the reason the author described that Mayende uphill and Hamuli Kefa Odero downhill during the sale (**page 21 of the judgment**)'.

Thus, this Court is unable to agree with Counsel for the Appellant's argument that the learned trial Magistrate erroneously twisted DEXHI to appear like it was referring to the suit land. The evidence supported her findings and this Court does not find any fault in her finding that DEXHI probably than not referred to the suit land.

Accordingly, the Court agrees with Counsel for the Respondents that the learned trial Magistrate properly interpreted DEXHI.

This ground thus fails.

Ground 3:

That the learned trial Magistrate erred in law and fact when she failed to establish the irregularities and contradictions in both the primary and secondary evidence adduced by the Respondents concerning the boundaries and neighbourhood to the suit land and instead based her decision on hearsay evidence told by the Respondents and witnesses.

It is indeed true, as Counsel for the Appellant has put it, that the Respondents and the Appellant described the suit land as one which goes up to Nasikosi stream. It is also true that the DEXIII does not indicate Nasikosi stream as a boundary for the suit land. That said, the Court has indicated the cause for this variance between the borders of the suit land as the time when DEXI-II was

made and when the suit was tried/ time of the locus in quo visit. It is needless to reiterate the same.

Further, the Court respectfully disagrees with Counsel for the Appellant's submission that DW5 testified, during cross examination at page 25 of the record of proceedings, that there were no boundary marks planted to separate land belonging to the Appellant and Respondents' father. DW5's testimony was that there were boundary marks between the said lands.

Furthermore, it is also true, as Counsel for the Appellant argues, that none of the Respondents' witnesses mentioned that a boundary plant existed between the suit land and one undisputedly belonging to the Appellant. Basing on that, Counsel argued that the learned trial Magistrate disregarded the Appellant's explanation advanced to the effect that boundary trees in the suit land were planted to separate the different parcels given to him and his siblings and not as a boundary between the Appellant and Respondents' land.

Be that as it may, at the *locus in quo*, the Respondents showed the learned trial Magistrate boundaries Of the said two lands and she observed existence of "mahoni plants" in between them thus inferring that they constituted boundary plants. The evidence shows that the inference was not only based on her observations at the locus in quo but also the parties' evidence as a whole; and this Court came to the same conclusion upon re-evaluation of the evidence. Accordingly, it finds no fault in the learned trial Magistrate's decision to disregard the Appellant' s explanation and finding as she did.

Lastly, this Court is unable to find any irregularities and contradictions in the Respondents' evidence as alleged by the Appellant. The irregularities and contradictions were instead in the Appellant's evidence as the learned trial Magistrate observed.

Consequently, this ground fails as well.

Result

The appeal fails. It is hereby dismissed with costs to the Respondents. Delivered at Tororo this 20th day of March 2024.

I so order.

HON. DR. JUSTICE HERY I KAWESA
JUDGE
6/03/2024