The Republic of Uganda

In the High Court of Uganda at Soroti

Civil Appeal No. 0051 of 2022

(Arising from Ngora Civil Suit No. 0009 of 2016)

Okitoi Moses :: Appellant

Versus

1. Okitoi James
2. Opungule David ::: Respondents

(Appeal from the judgement and orders of the Chief Magistrates Court of Kumi at Ngora delivered on the 10th of June 2020 by H/W Tibagonzeka Jane Magistrate Grade 1)

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement on Appeal

1. Background:

The appellant filed Civil Suit no. 009 of 2016 against the respondents jointly and severally for trespass, recovery of 4 gardens situate in Adukar village, Ajeluk parish, Mukura sub county in Ngora District, eviction order, general damages, permanent injunction and costs of the suit.

His claim was that the appellant is the grandson of the late Geresemu who was the lawful owner of the suit land before his death. The appellant is the rightful owner of the suit land having inherited it from the late Geresemu; the late Okitoi

Geresemu before his death appointed the appellant as the caretaker of his wife Aulo Jennifer Rose in 1999 and gave the appellant 4 gardens as his own share. The wife of the late Okitoi upon his death in 1999 convened a clan meeting to confirm that the appellant was appointed as heir and that he should be the administrator of the estate to which there was no objection from members present whereof he got letters of administration in 2015.

That the appellant left for studies in Wakiso in 2000 leaving the wife of the late Okitoi on the suit land but she also left the home in 2001 leaving the 1st respondent her son on the suit land. The appellant returned in 2010 only to find when the 2nd respondent cultivating the suit land, he convened a clan meeting which led to the discovery that the 1st respondent had sold the suit land to the late Okiring Filbert father to the 2nd respondent in 2002 in exchange for three heads of cattle. When the 1st respondent was questioned he stated that he only mortgaged the suit land to Okiring Filbert.

The 1st respondent in his written statement of defence stated that he knew that the suit land belonged to the appellant having been given the same by Okitoi Geresemu before his death which appointment was confirmed by the clan of Irarak Ingeseba. That in 2009 the 2nd respondent trespassed onto the suit land claiming it belonged to him because at one time his father Okiring Gilbert had cultivated the land for a brief period. That he informed the 2nd respondent that it was him that authorised Okiring to use the suit land from 2002-2007 that was when the appellant was temporarily away studying in Wakiso. That he gave Okiring the land to cultivate for a period of 5 years but not to own and he denied entering any transactions with the 2nd respondent at all.

The 2nd respondent in his amended written statement of defence denied the contents of the plaint contending that at all material times he was the

lawful/beneficial owner of the suit land measuring 3½ gardens having inherited them from his father Okiring Gilbert. That before his demise in 2009, Okiring had lawfully and for value purchased the suit land measuring 3½ gardens in 2002 from one Okitoi James who claimed to be and was indeed the lawful owner thereof. This was done in three transactions and written agreements were executed to that effect and the appellant and his family appended their signatures thereto. Upon purchase of the respective portions the late Okiring immediately commenced cultivation and use of the land interrupted until the appellant undue and unwarranted interference in 2014.

The 2nd respondent in the alternative without prejudice to the above claimed indemnity as against the 1st respondent upon the fact that before his death, Okiring said that he lawfully bought the land from the 1st respondent who claimed and represented himself as the lawful owner. That upon the strength of these representations and assurances from the 1st respondent that Okiring bought the suit land.

The trial Magistrate having heard the matter entered judgement in favour of the 2nd respondent. She found that the Okiring Gilbert was a bonafide purchaser for value without notice and the 2nd respondent his son having inherited the land benefits from the purchase. She further found that the appellant should recover from his father the loss suffered.

The appellant dissatisfied with this judgment appealed to this court on the following grounds;

a) The learned trial Magistrate erred in law and fact when she failed to properly evaluate evidence on record thus reaching an erroneous decision that there was a valid sale between Okitoi James and Okiring Gilbert.

b) The learned trial Magistrate erred in law and fact when she came to a conclusion that Enume Moses and Okitoi Moses are one and the same person which occasioned a miscarriage of justice.

2. Duty of the 1st appellate court:

This court is the first appellate court in respect of the dispute between the parties.

An appellate court is a higher court that reviews the decision of a lower court. It does so by hearing an appeal from a lower court. The primary function of an appellate court is to review and correct errors made by a trial court. In addition, an appellate court may deal with the development and application of law. In carrying out its duty, the appellate court can review decisions made by lower trial court; affirm the decision of the trial court, in which case the verdict at trial stands; reverse the decision to the trial court, in which case a new trial may be ordered; modify an order or a decree; remand the case back to the lower court for further proceedings and dismiss the case.

This Honourable Court is the first appellate court in respect of the dispute between the parties herein and is obligated to re-hear the case which was before the lower trial court by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and to re-appraise the same before coming to its own conclusion as was held in ***Father Nanensio Begumisa and Three Others v. Eric Tiberaga scca 17 of 2000; [2004] KALR 236.***

The duty of the first appellate court was well stated by the Supreme Court of Uganda in its landmark decision of ***Kifamunte Henry Vs Uganda, SC, (Cr) Appeal No. 10 of 2007*** where it 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 rehearing afresh, a case which was before a lower trial court, this appellate court is required to make due allowance for the fact that it has neither seen nor heard the witnesses and where it finds conflicting evidence, then it must weigh such evidence accordingly, draw its inferences and make its own conclusions. See: ***Lovinsa Nakya vs. Nsibambi [1980] HCB 81.***

In considering this appeal, the above legal provisions are taken into account.

3. Representation:

The appellant was represented by M/s Legal Aid Project of the ULS while the 2nd respondent was represented by M/s Otee Associated Advocates. The 1st respondent was not represented.

This matter proceeded by way of written submissions filed by the appellant and 2nd respondent and the same will be considered in the determination of this appeal.

4. Determination:

a) Ground 1:

The learned trial Magistrate erred in law and fact when she failed to properly evaluate evidence on record thus reaching an erroneous decision that there was a valid sale between Okitoi James and Okiring Gilbert.

Counsel for the appellant highlighted both the parties evidence, submitting that the 1st respondent who allegedly sold the suit land to the 2nd respondent's father

denies selling the land but gave it out for cultivation on a friendly basis but instead the trial magistrate held there was a valid sale whereas not. Counsel added that the 2nd respondent forged sale agreements, the 1st respondent's signature and the witnesses.

Counsel for the appellant further submitted that the act of the 1st respondent selling the appellant's land well knowing that the appellant is an administrator of the estate of the Late Okiror Geresom was illegal and fraudulent hence an illegality.

Counsel for the 2nd respondent in reply submitted that the Appellant testified that he Inherited the land from his grandfather, the late Okitoi Geresemu but it should be noted that the 1st Respondent is the father of the Appellant and the son of the said Okitoi Geresemu. Throughout the trial, and in his pleadings, the 1st Respondent, rather than defend himself, instead supported the position of his son, the Appellant, leading to collusion in the litigation.

Counsel further submitted that the Appellant denied witnessing the sale agreement between his father, the 1st Respondent and the 2nd Respondent's father, the late Okiring Gilbert. He added that the 1st Respondent testified that he mortgaged the land to the father of the 2nd Respondent, Okiring Gilbert, and the transaction was not a sale, he insisted that when he "gave" the 2nd Respondent's father the land to use and no agreement was written. That the 1st respondent added that although the sale agreement bore his name, and were witnessed by his son, (the Appellant) and also witnessed by his wife, as well as some LC 1 Committee members, complete with a stamp, he continued to maintain that the agreement was forged. These sale agreements were admitted in evidence as D. Exh. 1(a) & (b); D. EXh2 (a)&(b), D. Exh3 (a) & (b) and were witnessed by the Appellant and his mother and several neighbours.

Counsel added that if the Appellant and the 1st Respondent wanted to prove that the said agreement were forged, they should have led evidence to that effect, but they did not. The burden of proof lies on he who alleges under S. 101 Evidence Act. This burden was not discharged. There was no evidence of forgery bought to Court.

Counsel for the 2nd respondent further submitted relying on Sections 91 and 92 of the Evidence Act, that the agreement of sale clearly stated that the transaction was a sale not a mortgage. He added that the Appellant, and his mother PW3-Atai Christine having witnessed and therefore acquiesced to the transaction of sale between the 1st Respondent and the 2nd Respondent's father, cannot turn around and deny the transaction. They are estopped under S. 114 of the Evidence Act which section provides that when one person has, by his declaration, act or omission intentionally caused another person to believe a thing to be true and to act upon that belief, neither he nor his representatives shall be allowed, in any suit or proceeding to deny the truth of that thing.

i. Court analysis:

The main issue for determination in this appeal is whether there was a valid sale between the 1st respondent and 2nd respondent. The appellant's evidence regarding his grandfather Okitoi Geresemu giving him the land before he died is consistent. I agree with the finding of the trial magistrate that although there is no document to prove that the late Okitoi Geresemu gave the land to the appellant in 1999 before his death, the evidence by his witnesses is sufficient to prove this assertion on the balance of probabilities.

Regarding the validity of the sale of the land by the 1st respondent to the 2nd respondent's father, the appellant in his evidence testified that his father gave the land to the 2nd respondent's father (Okiring) for cultivating as a friend but not

as a sale. He did not authorise anyone to use the land, not even his father and during cross-examination he stated that he did not know whether his father sold the suit land to Okiring and he is not aware of any document made. When shown the various agreements he identified his mother's, sister's, grandfather's and brother's names thereon indicating they were present during the sale. He denied signing the document marked 'E' and did not believe that his mother, sisters and father could conspire to steal his land. During re-examination he denied being present during the transaction and he added that he was never consulted about the same.

PW2 Ongwen Yefusa testified that there was no sale of land between the 1st respondent and Okiring and in any land transaction elders like him would be present as the 1st respondent cannot sale land without knowledge of the clan and even when Okiring died they were never shown any document concerning the suit land. During cross-examination he stated he was not aware of a sale agreement signed and stamped by the LC1, the 1st respondent had no power to sell land and he did so without PW2's presence or knowledge. He is aware that the 1st respondent gave Okiring land to use but not sale though there was no document to that effect.

PW3 Atai Christine the mother to the appellant testified that the suit land was not sold by the 1st respondent or anyone. During cross-examination she stated that no single document was written about the 1st respondent giving Okiring land, the 2nd respondent forged the documents he claims are sale agreements between Okitoi James and Okiring Gilbert. she was not cross-examined on the sale agreements.

The 1st respondent Okitoi James in his evidence as DW1 stated that he did not sale the suit land, Mr. Okiring came to him and requested for those gardens to

cultivate in 2002 and since his son (the appellant) was not there he gave him the land and he did not pay for it, no document was written but his uncle Ongwen and his wife Atai were present as well as Opolot Justine and Amoding Mary. Okiring cultivated the land till his death in 2009 and their friendship ended there. When the appellant the owner of the land came back he informed the 2nd respondent refused, they went to LEMU where the 2nd respondent presented forged documents showing it was a sale of land. During cross-examination he stated that the appellant was not present when he gave out his land and he did not seek his consent. When cross-examined on the three agreements he recognised his name, that of his wife and Emune Moses but he maintained that they were forged.

DW2 Opungule David testified that the appellant was present the day the 1st respondent sold the land to Okiring. That on the 16/03/2002 Okitoi James came to his father that he had land he wanted to sell and his father accepted and bought that garden. The LC1 was called and other people were present, after showing them the garden his father paid 2 cows and an agreement was written which the appellant and his father signed. Later the 1st respondent sold 1½ gardens and Okiring inquired about other children but the 1st respondent stated that he was alone and could sell the land, they then went to check the land and paid a cow and goat and an agreement was written on 31/05/2002 with both he and the appellant present. That again after a few months the 1st respondent came back saying he wanted to sell his garden so that all the land can be one block and this was on the 27/10/2002, his father paid one bull, some goats and shs. 5,000/= and the appellant was present. These agreements were admitted in evidence as Dexh 1(a)&(b), 2(a) &(b) and 3(a) & (b).

During cross-examination he stated that at the time of the transactions the 1st respondent, mother to the appellant, the appellant, Echwa Enos the appellant's clan chairperson and others from the appellant's family were present.

DW3 Imongit Robert the LC1 at the time of the transactions testified that he witnessed the sale of the suit land and he wrote all the three agreements, signed and stamped them. That Okiring Gilbert in the company of the 1st respondent invited him to witness the three sale transactions. He inquired from the neighbours whether the suit land was for the 1st respondent and they said it was He does not remember if the appellant was present for the last transaction. He further stated that after all these transactions and before Okiring died in 2002 he did not receive any complaints from the appellant or any family member over the land.

DW4 Omoding Michael testified that the land in dispute belonged to the 1st respondent and he sold it to Okiring. He was present in one transaction when one garden which borders him was sold.

DEX1 (a) & (b) is a sale agreement dated 16/03/2002 for one garden between Okitoi James and Okiring Gilbert. It indicates that Okitoi James sold his one garden to Okiring Gilbert to own forever at the price of two cows.

This transaction was witnessed by 8 witnesses on the part of Okitoi James including Aulo J. Rose his mother and wife to the late Okitoi Geresom and Atai Christine a sister to the appellant.

DEX2 (a) & (b) is a second sale agreement between Okitoi James and Okiring Gilbert dated 31/05/2002 for Okitoi James' one and a half gardens at the price of one cow and three goats.

This transaction was witnessed by 8 witnesses for each party including Aulo J Rose mother to 1st respondent and the appellant's mother Atai Christine.

DEX3 (a) & (b) is the third sale agreement between the Okitoi James and Okiring Gilbert dated 28th October 2002 indicating that Okitoi sold his one garden to Okiring on the 27th October 2002 for one bull, one goat and five thousand shillings.

This transaction was witnessed by 6 witnesses on the part of the seller including PW3 and PW2 while the buyer had 5 witnesses.

All these agreements bear the signatures of the parties and their witnesses and while there are inconsistencies in the some of the witnesses' signatures, the signatures of the 1st respondent as well as the thumbprint of Okiring Gilbert are consistent in all three agreements. These three agreements also bear the name and signature of Ecwa Enos as a witness on the side of the seller and he signed as a clan leader in DEX3. I also note that the signature of Ecwa Enos in DEX1,2 and 3 is similar to his signature in DEX4 dated 7/05/2014 wherein the 1st respondent agreed to replant boundaries between the 2nd respondent and Omoding Michael which had been uprooted by his son Okitoi Moses.

From the above, it is clear to me that the 1st respondent did sell the suit land to the late Okiring Gilbert and his claim that he gave the land to Okiring on a temporary basis is not substantiated by any evidence at all with the 2nd respondent proving that his father actually purchased the suit land.

It is worth noting that though the 1st respondent together with the appellant and his witnesses all agreed that the 1st respondent did give land to Okiring Gilbert but only temporarily; the burden was therefore on them to prove that the

transaction between the 1st respondent and Okiring was not a sale but a loan but they did not discharge this burden.

This is all because the wording of the agreements above show that the 1st respondent represented to the late Okiring that the land which was being sold was his own with no indication in the evidence on record that the 1st respondent or anyone from his family or clan informed the late Okiring that he was buying land from the wrong person.

ii. Conclusion:

Arising from my findings above, I do conclude that the trial magistrate was therefore right to find that the 2nd respondent was the owner of the suit land and that there was a valid sale between Okitoi James (1st respondent) and the late Okiring Gilbert. I therefore agree with the trial magistrate that Okiring was a bonafide purchaser for value. The 1st ground of this appeal therefore fails.

b) Ground 2:

The learned trial Magistrate erred in law and fact when she came to a conclusion that Enume Moses and Okitoi Moses are one and the same person which occasioned a miscarriage of justice.

Counsel for the appellant submitted that the appellant testified that he is Okitoi Moses and not Emune Moses which name appears on the sale agreements and is claimed to be his by the 2nd respondent.

Counsel for the 2nd respondent submitted that the trial magistrate properly navigated the fraud and trickery which the appellant tried to use to distance himself from the transactions. He further submitted that the transactions were in 2002 and the appellant used the names Emune Moses which name he is commonly known by. He further submitted that DEX4 and 5 which regarded

replanting of removed boundary marks indicate the appellant's name as Emune Moses.

i. Court's analysis:

This ground is based entirely on the finding by the trial magistrate that the appellant Okitoi Moses is also known as Emune Moses who appears as a witness in the three sale transactions.

The appellant testified that his father knows him as Okitoi Moses and that it is his son who is called Emune Moses. PW2 testified that the true name of the appellant is Okitoi Moses and that this was the only name he is and has been using and that he had never heard of the name Emune. Like as was stated by DW1 he told court that there is no other person in the village called Okitoi Moses save for the appellant.

The appellant's mother PW3 testified that Emune is a nickname that other children called the appellant's son Okello Emmanuel at school but home people do not use that nick name. She added that it is not a name in their family. DW1 also stated that his son's name is Okitoi Moses and not called Emune.

Emune Moses is a name introduced by the 2nd respondent in his evidence, he claimed that it was the appellant's name from his childhood while they studied together in Ajeluk Primary school and the entire village knows him as Emune. That the appellant was now using the names Okitoi Moses which was that for his neighbour in order to grab his land.

The rest of the 2nd respondent's witnesses all testified that the appellant was present for all the 3 sales and that his name Emune appears on all the three (3) agreements.

The three sale agreements DEx1(a), DEx2(a) and DEx3(a) indicate Emune Moses as a witness on the side of Okitoi James and he signs on both DEx1 and DEx2. DW3 claimed that he was in hurry to go back to where he was studying from and that it is why he did not sign DEX3. The appellant and his witnesses deny that the appellant has ever used or gone by the name Emune Moses and that he did not witnesses any of the sale agreements presented by the 2nd respondent.

DEx4 dated 7/05/2014 is a document wherein the 1st respondent agreed to replant boundaries between the 2nd respondent and Omoding Michael which had been uprooted by his son Okitoi Moses and beside the appellant's name in brackets was indicated as Emune.

The same goes for DEx5 dated 17th/05/2014 wherein the 1st respondent agreed to plant boundary marks which his son Emune Moses Okitoi uprooted on the 7/05/2014.

This document further indicates that Emune Moses Okitoi stated that he would not repeat it again and this agreement was written by the 1st respondent.

ii. <u>Conclusion:</u>

I find it unnecessary to determine this issue firstly because there is no documentary proof that the appellant was called Emune Moses and even though the 2nd respondent and all his witnesses claim that this was i his name I cannot rely on their oral testimonies alone.

Secondly the land sale transactions which were tendered in court were between the 1st respondent and the late Okiring Gilbert and not the appellant, having found that the sales actually occurred and the suit land belongs to the 2nd respondent, a finding on whether or not the appellant is Emune Moses, who was merely a witness to the sale agreements does change the fact that the sales has

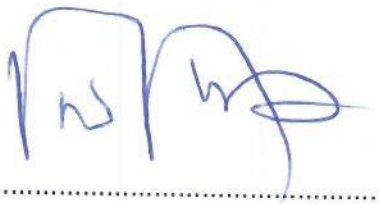
been proved and the suit land belongs to the 2nd respondent. In my opinion this issue would arise between the appellant and the 1st respondent, should he choose to recover the loss suffered over the suit land from his father. This ground accordingly fails.

Arising from my findings above, this appeal would found to have no merit and thus would fail. It is thus accordingly dismissed with orders as below.

5. Orders:

- This appeal is found to lack merits and it is thus dismissed.
- The judgment and orders of the lower court are accordingly upheld.
- Costs to the 2nd respondent.

I so order.



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Hon. Justice Dr Henry Peter Adonyo

Judge

20th March 2024