The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Civil Appeal No. 57 of 2022

(Arising from Civil Suit No. 30 of 2012 of the Chief Magistrate's Court of Katakwi at Katakwi)

Ojur Michael :: Appellant

Versus

1. Obetel Silver
2. Ajoko Fediana
3. Onyait Daniel

::: Respondents

Before: <u>Hon. Justice Dr Henry Peter Adonyo</u>

<u>Judgement</u>

(An appeal against the judgment and orders in Civil Suit No. 30 of 2012 of the Chief Magistrate's Court of Katakwi at Katakwi of HW Owino Paul Abdonson -Magistrate Grade - 1 delivered on 7th October 2022)

1. <u>Introduction:</u>

Ojur Michael, the appellant herein was the plaintiff in Civil Suit No. 30 of 2012. He sued the Obetel Silver, Ajoko Fediana and Onyait Daniel, the respondents herein, then defendants

in the Chief Magistrate's Court of Katakwi at Katakwi for a declaration that he is the rightful owner of 17 acres of land situated at Ongatunyo/Agule Village, Ominya Parish, Toroma Sub-County in Katakwi District (suit land), a permanent injunction restraining the defendants or their agents from trespassing on the suit land, general damages, interest and costs.

The 3rd defendant, upon his own admission recorded by the trial magistrate on 16th May 2019 in the record of proceedings was struck off the plaint for having no interest in the suit land.

2. <u>The appellant's /plaintiff's claim:</u>

The appellant claim is that he has been using the suit land (17 acres) which he inherited from his late father, Ojur Simon in 1987. He asserts that he and his father lived on this land until 1986 when insurgency cropped up but vacated the land in order to save their lives and that he and his family members took refuge in Tororo where they lived till 2011. That even grandfather called Salda died during the said insurgency period.

That in 2011 upon returning to the suit land they found three defendants had encroached on the said 17 gardens which were part of their chunk of land using the suit land for settlement and cultivation and had even buried their relatives thereon. That all mechanisms to amicably settle the matter yielded no fruit hence the suit which was filed in the lower trial court.

3. <u>The respondents' / then defendants' claim:</u>

a) <u>1st defendant:</u>

The defendants denied the plaintiff's allegation with Obetel Silver, the first defendant, contending that the land he occupies was given to him by his late father called Kedi Rafael,

in 1974. That his late his late father called Kedi Rafael died in 1983. He maintained that his father was buried in another land and not the one that he had given him.

The first respondent contended that his late father gave him around 35 gardens which he utilised without any disturbance from any person, including the plaintiff, until the year 2011, when the plaintiff came onto it and forcefully built a grass-thatched house on that land. He asserted that the 3rd defendant does not stay or use part of the suit land save for his stepmother, who is also the 1st respondent's mother, with whom they occupy the land. He contended that the 3rd defendant is staying on his privately acquired land.

b) 2nd defendant

The second defendant contends that his late maternal uncle, Lawrence Eilorin (1968), gave him the land measuring 25 gardens which he occupied in 1968. He contended that his late uncle died in 1975. He contended that he cleared the land and built his home thereon and had been in its occupation of the land since then undisturbed until the plaintiff claimed it. He confirmed that the land was in Ongatunyo/Agule Village, Ominya Parish, Toroma Sub-County in Katakwi District.

4. Proceedings at the Lower Trial Court:

At the trial in the lower court, three issues were framed for determination of the dispute, and these are:

a) Who of the parties is the lawful owner of the suit land,
b) Whether the defendants are trespassers on the suit land, and;
c) The remedies are available to the parties.

The trial Magistrate received evidence from the contending parties and even visited the *locus in quo* on 4th July 2022.

Thereafter, the lower trial court entered judgment for the 1st and 2nd defendants. The appellant/then plaintiff was not satisfied with the decision of the lower trial court and thus has now appealed to this court.

5. Grounds of Appeal:

Four grounds of appeal have been raised by the appellant as follows:

a. The learned trial Magistrate erred in law and fact when he based his decision on facts which were not pleaded by the respondents.
b. That learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record, thereby arriving at a wrong decision.
c. That the learned trial Magistrate erred in law and fact when he held that the respondents were not trespassers.
d. The decision of the trial Magistrate has occasioned a grave miscarriage of justice.

The appellant prayed that;

a. The appeal be allowed.
b. The judgment and orders of the lower court be set aside.
c. The suit land be decreed to the appellant.
d. The costs of this appeal and in the lower court be granted to the appellant.

6. Duty of the first appellate court

This is the first appeal from the learned magistrate's decision. The duty of the first appellate court is to scrutinise and re-evaluate all the evidence on record to arrive at a fair and just decision.

This duty was well laid down in the case of ***Kifamunte Henry vs Uganda SCCA No. 10/1997,*** where it was pointed out.

> ***"The first appellate court has a duty to review the evidence of the case and to reconsider the material 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 the case ***Father Nanensio Begumisa and Three Others vs Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236,*** the obligation of a first appellate court is ***"...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."***

See also: ***Baguma Fred vs Uganda SCCA No. 7 of 2004.***

7. Power of the Appellate Court:

Section 80 of the Civil Procedure Act, Cap 71, grants the High Court appellate powers to determine a case to its finality.

The resolution of this appeal involves considering the above legal position regarding the duty and legal obligation of this Honourable Court as a first appellate court.

8. Representation:

Counsel Engulu Philip represented the appellant, while Counsel Opio Philip represented the respondents. The parties filed their submissions, for which I am grateful. The submissions have been considered where necessary in the resolution of this appeal.

Equally, since this appeal originates from a civil suit then the burden of proof still rests on the appellant to prove his case on a balance of probabilities. See: ***Nsubuga vs Kawuma [1978] HCB 307*** and also Sections 101 and 102 of the Evidence Act, Cap 6.

9. Resolution of the Appeal:

The parties' counsel submitted the grounds of appeal as presented above. I have equally determined each in that order.

a. The learned trial Magistrate erred in law and fact when he based his decision on facts which were not pleaded by the respondents.

The appellant's counsel submitted that the appellant who was the plaintiff in the lower court claimed 17 acres of land which the respondents had encroached upon. That the respondents filed a defence that did not dispute the size of the suit land but merely denial the suit brought against them which mere denial has been held by the courts of law to be no defence because such denials do not meet the requirements of Order 6 Rule 8 of the Civil Procedure Rules.

The appellant's counsel also contended that instead of the trial court striking out the respondent's written statement of defence in compliance with the law, the trial magistrate heard the suit to its conclusion and imported facts not pleaded by the defendants in his judgment.

In support to the above assertion, Counsel for the appellant cited, for example, that on page 3 of the lower court judgment, the trial Magistrate observed that the suit land was 30 acres and yet none of the parties pleaded so and that again on page 4, the trial magistrate narrated how the 1st and 2nd defendants allegedly obtained the suit land which was also not pleaded.

On the other hand, the respondent's counsel contended that the learned trial magistrate rightfully based his decision on the evidence on record supported by the law to decide that the 2nd and 3rd respondents owned their respective portions of land.

Counsel for the respondents observed that as laymen, the respondents did their best to respond to the summons served on them by the appellant, whereupon they filed what to them amounted to a defence, and that based on that, the appellant, as the plaintiff, set the suit down for hearing without raising any objection to the said defence.

The respondents' counsel contended that because the appellant was represented, he had the opportunity to present his case to the satisfaction of the court while discrediting the respondent's case through cross-examination or otherwise.

The respondent's counsel further contended that as a general rule of law, evidence and practice, the appellant had the onus to prove his case on the strength of his pleadings and not rely on the weakness of the respondent's case during the course of the trial.

The respondents' counsel again contended that the trial magistrate exercised his discretion in allowing the matter to be heard on the merits and that he followed the principles ably discussed by Hon. Justice Mubiru in ***Olanya Vs Ociti Arua High Court C. A NO. 64/2017*** in which the learned judge opined that substantive justice must prevails over flaws in the procedure and that dong so does not occasion a miscarriage of justice.

The respondent's counsel submitted that given that the appellant did not raise any objection before and during the trial, he also subjected the respondent's evidence to cross-examination, it was incumbent upon him to prove his case to the satisfaction of the trial court and not to belatedly now raise the quality of the Respondents' written statement of defence.

There are two sub issues for determination in ground one and first being whether there was a defective defence presented to the lower trial court as it is alleged the same contained no specific denials and secondly whether the trial magistrate's reliance on an unpleaded defendants' witnesses' testimony to determine the suit in the defendants' favour occasioned a miscarriage of justice.

Firstly, the content of impugned joint written statement of defence filed in the lower court on 30/05/2012 by the defendants was couched in the following content;

1 *Save where expressly admitted the defendants deny each and every allegation contained in the plaint as if the same were set forth verbatim and traversed seriatim.*

2 *Paragraph land 2 are admitted being the correct descriptions of the parties.*

3 *The allegations in Paragraph 3, 4,5, and 6, are denied in toto and the plaintiff shall be put on strict proof thereof.*

4 *The defendants submit to the jurisdiction submits to the jurisdiction of this honourable Court.*

Wherefore: the defendants pray this honourable court to dismiss the plaintiff's suit with costs.

The perusal of the plaint to which the joint written statement of defence shows that there were omnibus general denials which are discouraged by the provisions of Order 6 Rule 8 of the Civil Procedure Rules which provides that;

It shall not be sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the statement of claim, or for the plaintiff in his or her written statement in reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he or she does not admit the truth, except damages.

It is apparent that the joint written statement of defence filed in the lower trial court did not meet the requirements of Order 6 Rule 8 of the Civil Procedure Rules and at the earliest, it was incumbent upon the lower trial court to have the same struck off for not being alive to the contents of the plaint upon which summons had been served to the defendants to reply. This is because in the persuasive holding in ***Nile Bank and Anor Versus***

Thomas Kato and Others HCMA No. 1190 of 1999 by the late Hon Lady Justice M.S. Arach-Amoko, J (as she then was) (RIP), the learned judge made reference Odgers Principles of Pleading and Practice, 22nd Edition at Page 136, in highlighting the proposition of Order 6 Rule 8 of the Civil Procedure Rules where it is stated that;

It is not sufficient for a Defendant in his defence to deny generally the allegations in the statement of claim, or for a Plaintiff in his reply to deny generally the allegations in a Counterclaim, but each party must traverse specifically each allegation of fact which he does not intend to admit. The party pleading must make it quite clear how much of his opponent's case he disputes. Sometimes in order to deny the rule and to deal with every allegation of fact of which he does not admit the truth, it is necessary for him to place on record two or more distinct traverses to one and the same allegation. Merely to deny the allegation in terms will often be ambiguous.

Upon considering the above, the learned judge went on to observed that the object of pleadings is to bring the parties to a clear issue and delimit the same so that both parties know before hand the real issues for determination at the trial as was also pointed out in ***Kahima & Anor v UTC [1978] HCB 318***. The learned judge then went ahead to hold that;

i. **The defence filed by the defendants contained general denials to the plaintiffs' allegations, and did not give clear and specific responses to the plaintiffs' allegations. It thereby offended the provisions of Order 6 rule 7 Civil Procedure Rules, which requires each party to specifically deal with each allegation of fact that is denied;**

iii. **The written statement of defence would be struck out for failure to disclose a reasonable defence, and judgment entered in favour of the plaintiff.**

Reflecting upon and utilising the rationale in the above holding in ***Nile Bank and Anor Versus Thomas Kato and Others HCMA No. 1190 of 1999,*** I would find that the impugned written

statement of defence offends Order 6, rule 8 of the Civil Procedure Rules, meaning that the trial magistrate ought to have struck it out.

Be that as it may, I will not do so on in this appeal given the fact of this matter gone through a full trial with the defendant's testimony then tested for truthfulness through cross-examination with the participation of the plaintiff's counsel during the trial as evidenced by the lower court proceedings, allowed the plaintiff to have the specific defence upon which the defendants' case was premised.

In relation to the above, while I am of the view that the facts of the defendants upon which the trial magistrate relied were not pleaded, they were taken through a full trial which fulfilled the objectives of Order 6 Rule 8 of the CPR by the defendants of having specific denials to the plaintiff as the record of proceedings show that the defendants' witness did give their opinion that the suit land was 30 acres. In the result the reliance on the defendants' evidence by the lower trial court in this respect is not faulted since the plaintiff had an opportunity to cross-examine them on the same. Accordingly, ground one fails on that basis.

b. That learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record, thereby arriving at a wrong decision.

The appellant's counsel submitted that the respondents' case in the lower court was full of inconsistencies and that the trial magistrate did not notice that the defendants and their witnesses were untruthful because they did not know the facts about the suit land.

The appellant's counsel further submitted that the appellant sued the respondents for 17 acres, yet the respondents' witnesses had varying sizes of the suit land, which the trial magistrate relied on.

The appellant's counsel submitted that although all the defendants' witnesses claimed to know the suit land they told the court different sizes of the suit land which contradictions pointed to dishonesty.

To that end the appellant's counsel submitted that this Honourable Court ought to find that the defendants and their witnesses testified in respect unknown pieces of land and not the suit land.

On the other hand, the respondents' counsel submitted that much as the appellant in his submissions essentially concentrated his efforts on the discrepancies in the size of the land as per the respondents' testimonies and proffered the conclusion that the Trail Magistrate did not evaluate the evidence thereby coming to a wrong judgment and that since the law on inconsistencies was summed in ***Kifamunte H Vs Ug (above)*** for the proposition that major contradictions/ discrepancies in evidence will normally lead to the evidence being rejected unless a satisfactory explanation is given and that minor contradictions will not normally have the same effect unless they point to deliberate falsehoods, the respondents' counsel submitted that there was a satisfactory explanation of the inconsistency that whereas the appellant pleaded that he was suing for 17 gardens, the 1st respondent testified that the 8 acres he inherited from Iberut were not part of the suit land but only the 35 acres that his father gave him was in dispute, which explanation to counsel indicated was no contradiction at all.

The respondents' counsel also contended that whereas the appellant argued that the respondents, by having different sizes of the suit land, amounted to a departure from their pleadings, it is important to note that the appellant's suit was for, among others, a declaration of ownership of the suit land which he put at 17 acres/gardens, however, he never specified the size of the land each respective respondent occupied and as earlier stated, the onus is on the appellant to prove his case to the satisfaction of the court and not to shift the burden otherwise.

Before determining this ground of appeal, I must first point out that this ground of appeal was not properly formulated as its wording was not precise.

Under Order 43 Rule 1(2) of the Civil Procedure Rules, it is a requirement that a memorandum should set forth concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative, and the grounds shall be numbered consecutively.

The ground of appeal in this appeal that ***"The learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record, thereby arriving at a wrong decision"*** is evidently not concise.

It is so general and vague for the reason that it does not point to the specific evidence before the lower trial court that the appellant is alluding to fault the trial magistrate on of not having properly evaluated thereby arriving a wrong conclusion. This is because it has since been pointed out by the courts that a ground of appeal should not be narrative.

Also that ground of appeal must challenge a holding, a *ratio decidendi*, and specify points wrongly decided. (see: ***Celtel Uganda Limited t/a Zain Uganda v Karungi (Civil Appeal No 73 of 2013) 2021 UGCA 93,*** and ***Ranchobhai Shivbhai Patel Ltd and Another vs Henry Wambuga and Another Civil Appeal No. 06 of 2017 (unreported).***

I would have struck out ground two altogether but considering that the defendants were unrepresented in the lower trial I will proceed to discuss and make finding on the merits of the appeal premised on the respective lawyers' submissions and on the basis that this Honourable Court being a first appellate court, it is enjoined re-appraise the evidence on record to come to its own conclusion. Accordingly, I will look at the evidence adduced before the lower trial court for that purpose.

In this matter, the appellant's claim against the respondents as deduced from his filed plaint and facts adduced in evidence before the lower trial court was a declaration that he be found as the rightful owner of 17 acres of land at Ongatunyo/Agule Village, Ominya Parish, Toroma Sub-County in Katakwi District which is the suit land.

The appellant/plaintiff while testifying as PW1 confirmed the fact that indeed he was claiming 17 acres of the suit land that the defendants/ respondents had trespassed on by building houses and burying their people thereon.

While PW3 told the court that the suit land measured 14 acres, PW2 was silent on the size of the land.

The plaintiff aligned his testimony to his pleading by claiming and testifying to the fact that his suit land was 17 acres. On the other hand, the defendants' witnesses' testimonies alluded to varying sizes of the land which they stated they were occupying which evidently testimonies led the trial magistrate to determine the matter in the respondents' favour.

DW1 testified that the land he inherited from his late father was about 30 acres. This testimony was corroborated by DW3.

DW3, however, during cross-examination, testified that the suit land was three gardens, not seventeen.

However, DW1 also told the court that he inherited 8 acres from Iberut and then 35 acres from his father, totaling 43 acres whereas the other witness such as DW4 told the court that the suit land was 35 acres.

DW5 told the court that the disputed land was 50 acres but during re-examination, he told the court that the suit land comprised 17 gardens but that the plaintiff was in court for two gardens, which I find confusing to believe as to what size he was actually referring to.

Also confusing is the fact of DW1 later clarified that the 8 acres of land he got from Iberut did not form part of the suit land, leaving his testimony with the 35 acres, which were still different from the 30 acres he had testified about in the examination in chief.

Thus as seen from the assessment of witnesses' testimonies as regard the suit land as above, it can be concluded that the plaintiff was consistent on his claim for 17 acres, whereas the defendants testified inconsistently regarding the size of the suit land, which they claimed to know.

Arising from such finding that there are inconsistencies, then it the court's duty to examine whether such inconsistencies are either major or minor for them to affect the outcome of the resolution of the matter under determination.

In the case of ***Alfred Tajar versus Uganda EACA CR. AP.No.167 of 1969,*** it was held that major inconsistencies in the evidence of a witness will ordinarily lead to the rejection of his/her evidence while minor inconsistencies will not have the same result unless they point to deliberate falsehoods.

In the instant matter, it is evident that there were contradictions regarding the size of the land in dispute, which contradictions do impact on the question of whether the plaintiff and the defendants were testifying on the same land.

The contest here is in regard to unregistered land, which either party claims to be clan land. The inconsistencies also are too varied. While there is evidence of the suit land being between 17 acres, there is also evidence that it is 2 acres, then 30 acres, then three acres, then 50 acres.

Surprisingly, individual witnesses contradicted themselves as to the sizes like DW1 who is the 1st respondent. He first mentioned 30 acres and then 35. DW3 told the trial court that there were three (3) gardens not 17 while DW5 mentioned 50 acres in examination in chief

changed his testimony during re-examination that the suit land comprised seventeen (17) gardens but that the plaintiff was in court for two gardens.

According to the testimonies of the defendants' witnesses above in regards to the size of the suit land, I am convinced that the inconsistencies displayed from their testimonies were major to the determination of the case as the plaintiff only claimed 17 acres.

Surprisingly, as noted by the trial magistrate in the locus report, nothing was done by lower trial court to find out the actual size of the land. The trial court merely pointed out DW2's assertion at the locus that the suit land was 30 acres.

There is no indication at all that at the locus that the trial magistrate tried to reconcile the discrepancy as to the size of the disputed land as testified to in court with the actual size of the land in dispute on the ground.

Thus given the fact that the inconsistencies as regard the varying size of land as shown by the testimonies of the defendants' witnesses, which inconsistencies I do find to be major thus pointing to falsehood or untruthfulness, I would conclude the trial magistrate ought to have been alive to these inconsistencies and should have outrightly rejected the testimonies of the defence in that respect.

With the above in mind, it is vital thus that determination as to the ownership of the suit land is made by this first appellate court. While doing so, I bear in mind the provisions of the law that onus of proof is on the plaintiff to prove his case on a balance of probabilities. This onus is as per Section 101 of the Evidence Act, Cap 6 which provides that;

1) **Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.**

2) **When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.**

Also Section 102 of the Evidence Act states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Moreover, in Section 103 of the Evidence Act it is provided that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

Consequently, the party who alleges the existence of facts bears the burden to prove them.

As to who is the rightful owner of the suit land, I would take cognizance of the holding by Hon Justice Stephen Mubiru, in a decision that I associate with, who in the case of ***Odiya v Lukwiya & 3 Others (CIVIL APPEAL NO. 53 OF 2018) [2019] UGHC 69 (26 November 2019)*** defined ownership of land as

> ***"Ownership of land is acquired by either; purchase, inheritance, gift, transmission by operation of law, prescription or adverse possession."***

In this instant matter, the appellant told the court that he owned the suit land by gift and by inheritance. He also mentioned that the suit land was clan land.

The defendants/respondents also led evidence to the effect that the suit land was inherited by the 1st respondent from his late father who also inherited it from his father. The 1st respondent likewise pleaded that the suit land is customary land.

The plaintiff led evidence that he acquired the suit land by gift for which he did not lead any documentary evidence to that effect. His oral testimony in this respect was not persuasive as it was not corroborated. He neither led evidence to prove the customary practice of inheritance.

Such practice is defined by section 1 (l) together with section 3 of the Land Act as system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons the incidents of which include;

(a) applicable to a specific area of land and a specific description or class of persons;
(b) governed by rules generally accepted as binding and authoritative by the class of persons to which it applies;

(c) applicable to any persons acquiring land in that area in accordance with those rules;
(d) characterised by local customary regulation;

(e) applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land;

(f) providing for communal ownership and use of land;

(g) in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and

(h) which is owned in perpetuity.

See: ***Atunya vs Okeny (Civil Appeal No. 0051 of 2017) [2018] UGHCLD 69***

Similarly, I glean from the 1st defendant's evidence that he inherited the suit land from his late father. However, DW3 and DW4 give different accounts. They told the

court that they were present when the 1st respondent's late father gave the 1st respondent the suit land in 1974. They also told the court that Kedi Rafael who died in either 1982 or 1983 was not buried on the land.

From these testimonies between the 1st defendant and DW3 and DW4, I am left wondering as to who among the 1st defendant and DW3 and DW4 is telling the truth. Further none of the defendants provided or proved the giving documentary to that effect.

In addition, as I have pointed in respect of the plaintiff above, the defendants also did not prove any inheritance though DW4 told the court that the 1st respondent's father also inherited the suit land from his father called Obetel Henry who got the same from Eilor Lawreit, his maternal aunt.

On the other hand, DW3 testified that the land belongs to the 1st respondent who inherited it from his late father in 1974 and that he was present. He did not testify about any clan. He reneged when he said that the land was given to the 1st respondent by his father in 1974. There was also an unanswered question as to whether the 2nd respondent was actually on the suit land because his testimony was otherwise.

Customary tenure in Uganda is recognized by Article 237 (3) (a) of The Constitution of the Republic of Uganda 1995, and section 2 of the Land Act, Cap 227 as one of the four land tenure systems of Uganda.

It is defined by section 1 (I) together with section 3 of the Land Act as system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons.

Similarly, section 54 of Public Lands Act of 1969 (then in force in 1973) defined customary tenure as ***"a system of land tenure regulated by laws or customs which are***

limited in their operation to a particular description or class of persons." Therefore, a person seeking to establish customary ownership of land has the onus of proving that he or she belonged to a specific description or class of persons to whom customary rules limited in their operation, regulating ownership, use, management and occupation of land, apply in respect of a specific area of land or that he or she is a person who acquired a part of that specific land to which such rules apply and that he or she acquired the land in accordance with those rules.

This is in line with Section 46 of the Evidence Act which stipulates that when the court has to form an opinion as to the existence of any general custom or right, the opinion as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Therefore, it is my considered view, while ground two that that learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record, thereby arriving at a wrong decision is determined in the favour of the appellant, I do make the finding that neither the appellant nor the first and second respondents proved ownership of the suit land on a balance of probabilities.

c. That the learned trial Magistrate erred in law and fact when he held that the respondents were not trespassers.
d. That the decision of the trial Magistrate has occasioned a grave miscarriage of justice.

Having resolved that the plaintiff/appellant did not adduce evidence to prove that he owns the suit land on a balance of probabilities; I find that grounds three and four are overtaken by events and, therefore, redundant. Therefore, grounds three and four fail.

10. Conclusion:

In conclusion, therefore, I would find that this appeal only succeeds on Ground 2 that learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record, thereby arriving at a wrong decision. The rest of the grounds are found to lack merit and are thus dismissed accordingly.

Further, my having concluded as above, I would set aside the judgment of the court below and instead dismiss the suit which was instituted in the lower trial court as lacking any merits at all in terms that the allegation that the suit land was gifted or was inherited was never proved by any evidence at all by the plaintiff in the lower trial court.

As regards the costs in this and the lower trial court, I would make no order regarding costs in this appeal but would order the costs in the lower trial court be paid to the respondents by the appellant who erroneously instituted the suit in the lower trial court without any proof at all as to how he was gifted and or how he inherited the same in accordance my assessment of the fact and law above.

11. Orders:

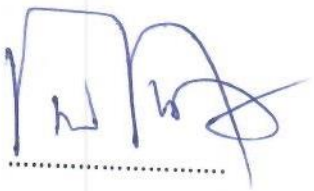
a) This appeal only succeeds on Ground 2 that learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record, thereby arriving at a wrong decision that the suit land belongs to the respondents without any evidence to that effect.

b) The rest of the grounds are found to lack merit and are thus dismissed accordingly.

c) Consequently, the suit in the lower trial court is dismissed in regard to the suit land as no evidence was adduced by the plaintiff to prove his case on a balance of probability that he owned the suit land either by a gift or through inheritance.

d) The costs in the lower trial court is to be paid by the appellant to the respondents.

I so order.



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Hon. Justice Dr Henry Peter Adonyo

Judge

27th June 2024