

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL 52 OF 2010.

ARISING FORM BUKEDEA CS 46 OF 2010

OKASIAK MICHAELAPPELLANT

V

SIMON PETER OBONGOTUMRESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

In this appeal, the appellant appealed the decision of the senior principal magistrate grade one Felix Omalla dated 8.12.2010 on the grounds outlined in the memorandum of appeal, but which briefly are:

1. The trial magistrate wrote the judgment without visiting the locus in quo.
2. The trial magistrate by not visiting the locus failed to appreciate the issues before him .
3. The trial magistrate erred when he accepted the evidence of the respondent without appraising the evidence as a whole.

Counsel for the appellant, Ms Gyabi & Co. Advocates filed written submissions and a rejoinder. The respondent made written a response in person.

I have carefully read the submissions of counsel for the appellant and also the response by the respondent.

I have also studied the lower court proceedings.

In the plaint, the respondent claimed for recovery of nine acres of land .

In the plaint, the plaintiff avers that in 1994, the appellant moved from the other side of the road and started construction at the boundary of the respondent's land.

The appellant in his statement of defence averred that the respondent only owns four acres and that the appellant has encroached on his one garden (one acre) .

At variance with his pleadings, the respondent in his evidence, claims the appellant has encroached on five acres and that the encroachment started in 2009 contrary to the pleadings which cite 1994 as the date of encroachment on appellant's boundary.

The appellant in his evidence, maintains the position that he claims one acre and maintains that the respondent owns 4 acres.

The issue before the trial court was :

1. Whether the respondent (plaintiff) proved on a balance of probabilities that the appellant encroached on his five acres of land
2. Who is the rightful owner of the five acres?
3. What is the acreage of the area in dispute?
4. Who is the rightful owner of the area in dispute?

These issues could have been resolved conclusively if the trial magistrate had visited the locus himself or given clear guidance for the grade two magistrate who visited the locus on behalf of the trial magistrate.

The locus on quo proceedings are very brief and the sketch map does not disclose clearly the area in dispute .

I agree with counsel for the appellant that the purpose of the visit to the locus is to compare findings at the locus with evidence of the witnesses. Practice direction 1 of 2007, para 3, reproduced below, gives guidance on the conduct of locus in quo proceedings.

- (a) Ensure that all the parties, their witnesses, and advocates (if any) are present.
- (b) Allow the parties and their witnesses to adduce evidence at the locus in quo.
- (c) Allow cross-examination by either party, or his/her counsel.
- (d) Record all the proceedings at the locus in quo.
- (e) Record any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.

The two page write up by the grade two magistrate indicates that none of the above was followed.

In the result, the trial magistrate did not have a holistic perspective of the facts to enable him arrive at an informed decision.

In the premises, I allow the appeal and order a retrial. The case to be heard as speedily as possible without losing sight of the need for parties to adduce evidence that addresses the issues and the need to visit the locus.

The lower court record will be returned to Bukedea grade one court along with a copy of this judgment for compliance.

DATED AT SOROTI THIS 8TH DAY OF NOVEMBER 2013.

HON. LADY JUSTICE H. WOLAYO

