THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT ARUA

CIVIL APPEAL NO. 0021 OF 2008

WARR MUSLIM COMMUNITY _____ APPELLANT

=VERSUS=

OKELLO SAMSON _____ RESPONDENT

JUDGMNET

BEFORE HON. JUSTICE NYANZI YASIN

1. In my ruling of 17th October 2012 where I ruled that additional evidence be taken, I gave a detailed background to this appeal. I need not repeat it here. Suffice to mention that on the 19th December 2012, this court took additional documentary evidence. The reason for so doing was also clearly stated in the 17th /10/2012 ruling

2. During the hearing of additional evidence, this court received from and marked for the appellant the following exhibits. AE1, AE2, AE3, AE4, AE5, AE6 and AE7. From the respondent court received one Exhibit and marked it RE1. Where and whenever relevant in this

judgment, the above exhibits shall be referred to and relied on by this court to the full extent of their relevance.

GROUND OF APPEAL

3. As I stated earlier in the ruling after Her Worship CATHERINE AGWERO's judgment delivered on 18/04/2008, the appellant was dissatisfied and elected to appeal to this court. In its memorandum of appeal the appellant raised (6) six grounds of appeal. I will reproduce the abridged form of those grounds below.

4. (1). Ground one complained of the trial court's
Hearing of the case which was REJUDICATA.

2. Ground two complained of want of jurisdiction by the trial Magistrate Grade I to hear a matter that was already before the Chief Magistrate for administration and judicial action.

3. Ground three is a complainant of an error in law for the trial Magistrate to have considered matters which were extraneous and not supported by evidence particularly the accusation of PW1 Sheikh Nuru as a liar whose greed for money drove him to give hear say evidence.

4. Ground four criticized the trial court's failure to make a finding that KASAMBA OKELLO was an agent of his father SAMSON OKELLO who had not appealed against the decision of the Grade II Magistrate passed on 19/03/2004.

5. The 5th ground in ordinary wording of grounds of appeal is interpreted to be a complainant that the trial Magistrate reached a conclusion that was contrary to the evidence before court. Although worded in a different language, the ground

complaining about wrongful or non-evaluation of evidence, to me seems to be the most important ground in an appeal taking a next place to grounds which are based on points of law.

6. The 6th ground criticized the trial court's judgment to be contrary to public policy and the law applicable.

5. I will answer the grounds in the order they were framed in the memorandum of appeal. I do believe that at the conclusion of answering the grounds the issuing which were framed by the trial Magistrate will have been answered. For purposes of clarity I will restate the issues the trial Court framed below;-

   1. Whether the land in dispute was part of the land given to HAJI HAMISI in 1954 by RWOTH JALUSIGA.
   2. The remedies available to the successful party.

6. At the hearing of the appeal the appellant was represented by Prof. OBOTH OKUMO while the respondent had DAISY BANDARU PATIENCE as his advocate. The two learned advocates presented oral arguments to court to which this court listened and benefited from.

7. GROUND ONE.

   The complainant in ground one can be reduced to the issue below, namely;-

   Whether **Land civil suit No. 0078/2006** was heard by her Worship ANGWERO when the same had been conclusively heard in 2004 before HW GEORGE KOMAKECH as NEBB. CIVIL SUIT NO. 0012/2004.

8. The learned advocate for the appellant prof. Oboth Okumu argued that the original suit from which this appeal arose was resjudicata that is to say already conclusively heard and determined by a competent court.

9. That the case was heard by H/W GEORGE KUMAKECH and decided it in 19/3/2004. That the subject matter was the same piece of land which constitute the suit land in this appeal.

10. That further, the issue before both the Grade II and Grade I Magistrate Court was the same. Lastly that the parties were the same as Kasamba Okello claimed the interest under his father Samson Okello. He was his agent. He put emphasis on the fact that PW1 RASHID NURU had in the Court below stated that the first suit existed and was decided in the appellant's favour a fact court ignored. He referred court to the record of proceedings of the Grade II Magistrate's trial in evidence of PW1 at page 4 paragraphs 3 and 6.

11. That having been so told it was the duty of the trial court to verify the claims and take the right course which would in the present case have been to end the case and advise the parties accordingly, more so since at that time none of the parties had the service of a legal advisor.

12. In reply learned Counsel Daisy Bandaru disagreed with Prof. Oboth. In so doing the relied on S.7 Civil Procedure Act and section 95 (7) of the land Act 1998. the gist of her submission was that S.7 CPA states that for the principle of resjudicata to apply the first court to hear and determine a matter must have been a court of competent jurisdiction.

13. From that point she cited S.95 (7) of the Land Act 1998. On this provision her point was the following;-

"The section under subsection (7) provided that until land tribunals were established and commenced to operate, Magistrate courts continued to have jurisdiction over land matters. The inference is that the moment land tribunals were established and they became operational, the Magistrate courts ceased to have jurisdiction over land matters. Eventually in 2003 by a practice direction from His Lordship the C.J. the jurisdiction was removed from the Magistrate courts to the District Land Tribunals.....the proceedings of Grade II Magistrate therefore were a null and void"

8. The above are the arguments I have put into consideration before arriving at the conclusion.

   From the records availed to this court civil suit no. 0012/2004 that was heard by the Grade II Magistrate was filed on 15th Jan. 2004. Its hearing commenced on the 23/01/2004. It ended on the 19th March 2004 by court issuing a decree.

9. The above sequence of events show and prove that civil suit no. 0012/2004 was filed and heard after the issuance by the Hon. the C.J. of Practice Direction No. 1 of 2003. The inference drawn by learned counsel for the respondent is the inescapable one that can be done. From the provisions of S.95 (7) of the Land Act 1998, it would be inferred that after the creation and starting operation of the District Land Tribunals the Magistrate courts at what ever level ceased to have jurisdiction over all land matters.

10. That situation remained the same until 1st December 2006 when the Hon. The Chief Justice issued Practice Direction No. 1 of 2006. This followed the expiry of contracts of Chairpersons and Members of the

District Land Tribunals who had been permitted to commence hearing of cases of land nature under Practice Direction No. 1 of 2003. So it was only with effect from 1st December 2006 that Magistrate courts resumed having jurisdiction over land matters.

It would follow that a trial conducted in 2004 after the issuance of P.D. No. 1 of 2003 by the Hon. the Chief Justice was conducted without jurisdiction. That fact alone removes the present case from the ambit of the provisions of S.7 of the CPA.

11. For the doctrine of resjudicata to apply to any case the first court to try and determine the suit must have been a court of competent jurisdiction. See the decision of **TSEKOOKO JSC in KARIA =VS= A.G. [2003] EA 84.**

In the result having found that the grade II Magistrate had no jurisdiction, ground one fails.

GROUND 2 & 4

12. The two grounds very closely related to ground one. They would only have been relevant if this court's holding in ground one had been the otherwise.

However, since the civil suit from which this appeal came never stated against OKELLO KASAMBA but OPENJTHO SALIM and SABAN SALIM it is important to explain how the suits came into his name. It was Okello the son who claimed to have acquired the land from his father.

The subject matter of the dispute remained the same. I am of the view that whether as agent or acquisition of land by donation, there was no

difference between the interest of Okello Kasamba the father and Okello Samson the son.

13. For emphasis purpose the record can be relied on to support the above conclusion. On oath the respondent told court

> *"I am Okello Samson the son of ZAKARIA Angia who is the son of Kasamba Wondemeli"*

14. It must be noted that initially original Civil suit No. 0078/2006 had not been instituted against the current respondent. It was a suit between WARR MUSLIM COMMUNITY and OPENTHO SALIM with SABAN SALIM.

15. The events of 28th/06/2007 in Court clearly explain beyond any dispute the status of the respondent. I need not do more than reproducing it. It runs as follows (After stating his names the respondent added;

> *"My father worked for an Indian called Abas in Warr for some time and later he was transferred to Hoima.....this was in 1950 when he left the defendant to live on the area in dispute. When I was getting mature in 1957 my father brought me home to study. I am therefore confirming to court that the defendant is a caretaker....."*.

16. Upon that statement being made by the respondent to the trial Magistrate she proceeded to make the ruling below

> *"The defendant told court that he is not the rightful party to this suit further that it is Mr. Okello who is the heir to Angua who is the owner of the land. Following the confirmation from Mr. Okello that the land actually belong to him, I find that the suit against the defendant is misdirected and.....dismissed.*

OPENTHO SALIM is hereby struck off as defendant and replaced by Mr. Okello who will.....file his defence.....”

17. The above is how the respondent came to be a party to this case. To that extent Prof. Oboth Okumu was right to argue that he was an agent whom I prefer to describe as successor to his father. That means that had it not been this court’s finding on ground one, grounds 2 and 4 would have merit. However that merit now is of no consequence.

GROUND 3

18. Ground 3 arose from the trial Magistrate’s use of the following words

“I find PW1 Nuru a liar ***whose greed for money is making him rely on hearsay*** *evidence given the fact that he just became the Chairman of recent and now wants to grab the defendant’s land”*.

19. The use of the above language aggrieved the appellant, Prof. Oboth Okumu for the appellant argued that with that kind of conviction that the plaintiff is a liar the trial court would not do anything in the favour of a liar. That the opinion of court was not backed by evidence on record.

20. In reply counsel Daisy Bandaru interpreted the complaint in ground 3 to mean failure to properly evaluate evidence. She justified that trial court with reasons that since PW7 Nuru Rashid was only 7 years when the land was being donated/given. It was on that basis that the trial Magistrate called him a liar.

21. in the first place I do not agree with the respondent's advocate that ground 3 related to valuation of evidence. It did not. I understood it to be a complaint of the trial court being influenced by extraneous consideration and rejecting to consider evidence of a witness before court.

22. I have reviewed the record and found no defence witness be it Mr. Okello to have said that PW1 Rashid Nuru had agreed for money. The suit itself never concerned any monetary involvement but proprietory interest in a piece of land PW1 believed belonged to the institution he headed. Accusing him to be greedy for money without any evidence, amounted to relying on an extraneous consideration.

23. Secondly for court to conclude whether PW1 was a liar or not would be a matter of a difference between his evidence in-chief and cross-examination. PW1 was cross-examined by the respondent in the court below. The cross-examination only related to the issues before court and he answered them the way he did. The trial Magistrate did not make any remarks or observation on to the demeanor which she was entitled to do. In absence of evidence of contradiction pointing to lies or remarks/observation of the court to the effect that PW1 lied, It was unfair and uncalled for, for the trial court to have labeled RASHID NURU a liar on a permanent court record.

24. Thirdly all the above would have been treated as mere over emphasis if the trial court had not proceeded to act on its unfounded believe that PW1 was a greedy for money liar. Unfortunately court acted on that belief. The emphasis she put on it in her judgment was not in vain. She mostly likely for that reason neglected or refused to put into consideration all the evidence of a person she described to be driven

by greed for money when none of his accusers called him so. For those reasons ground 3 succeeds.

25. Before I take leave of this ground I am forced to comment on the current trend of judicial officers on the lower bench of being influenced by factors which are not part of the case or evidence before court. That kind of behaviour has resulted into increased number of Revision applications in the HIGH COURT. Usually the complaints of the applicants related to error which is caused by pre-judgment of the case, utter bias or consideration of extraneous matters. Such conduct should be avoided by all judicial officers whose oath is to do justice to all manner of people without ill will, fear or favour.

26. GROUND 5

Ground five (5) to me appeared to be and I take it to be a complaint to the effect that the trial court did not evaluate the evidence before it and where it did, it reached a decision that was contrary to the evidence. It was partially for that reason that this court directed additional evidence to be taken.

27. Where a complaint of that nature arises in an appeal the appellate court treats the appeal more or less like a re-trial. See ***SELLE and ANOR. =VS= ASSOCIATED MOTOR BOAT COMPANY LTD [1968] EA 123 and FREDRICK J.K. ZAABWE =VS= ORIENT BANK 7 ORS C.A. NO. 0004/2006*** where Katureebe JSC applied the statement below

> *"The duty of this court as the first appellate court is well settled. It is to evaluate all the evidence that was adduced before the trial court and arrive at its own conclusions as to*

whether the findings of the trial court can be supported.....”

28. The above is what I am duty bound to do. The evidence of PW1 related to how the land in dispute was acquired by the appellant’s community. True it was not evidence of personal knowledge but the appellant seemed to have operated more as a body then an individual. That means that it was its current leadership that had to be its witnesses. It is not hearsay evidence for a current head of a firm, partnership or company to give evidence of its historical existence or how it acquired property it owns now.

29. PW2 SADA OGWIDI was aged 67 years as on August 2007. He was a born of 1940. He must have about 17 years in 1957. He gave evidence to the effect that the paramount chief gave land to Moslems, that after the allocation a school, a mosque, a dispensary and a hotel were all constructed on the land without any challenge from any body. That the conflict started when the respondent imposed himself on a part of this land.

30. In cross-examination he denied that it was the respondent’s grandfather who gave land to the Moslem community but the paramount chief. He also confirmed that Salim never disputed the appellant’s occupation of the land and the constructions they carried out.

31. PW3 HAJI MUHAMMED JALAWURE was ago 80 years. He was present at the time when the land in dispute is claimed to have been allocated. He told court that the allocated land was initially 25 acres which were reduced to 15 acres. Like PW2 he said this piece of land initially belonged to Angua with other 3 persons namely Yusuf

Oyoma and Dison Okaba. He added that Angua is the father of Okello. That after the chief gave away the land they went to the land across. He described the area of 15 acres given to the community to ran to the valley and then to Zeu.

32. He also confirmed that development of a school, dispensary and two mosques were done on the land. In cross-examination he answered the respondent that when his father left he already knew that land had been given away by the chief. Another important piece of evidence of PW3 can be quoted as below in cross examination.

> "*Your grandfather is the one who gave my father land where I am staying now because they were brothers when it was found out that the first market was given to the Muslim community and that is why the market was shifted to where it is now.....*"

33. The above piece of evidence has 3 elements that cannot be ignored they are;-

a) PW3 is a relative of respondent who was present at the time of giving away of the land.

b) He confirmed that the giving of the land by the chief to the appellants cause the shifting of the market from its original place to a new location.

c) The fact that he agrees that it is the respondent's grandfather who gave his father land where himself now stays strikes me that he is telling the facts in their true form as they occurred in his presence.

34. It was unfortunate on the part of the trial court not to have given PW3's the weight it deserved. Before her court she had no better

witness than PW3 who was mature by 1950's and saw the disputed events unfold.

35. The trial Court failed to distinguish between land given to a person and its use by occupation or construction. If the appellant was given 15 acres and constructed only in a small area a Mosque or school it does not rebut the fact that the whole area of 15 acres were given to it. In my view there is a difference between area owned and area used as far as land is concerned.

36. There is some corroborative evidence from the conduct of Angua's family. Since the allocation of the land to the appellant by the Chief in 1950s to 2004 no member of that family had ever claimed the land. Not even the respondent's father. The absence of any challenge from 1950's to 2004 about 47 to 50 years would force one looking at the evidence that was given to conclude that the family knew they had withdrawn their interest in the land. It must be a surprise that the respondent through his son started reclaiming this land in 2004 almost 50 years after.

37. I will now evaluate the evidence in the documents before evaluating the respondent's evidence.

1) Exhibit AE – 1 is an application for a land title by the appellant. It is addressed to the District Commissioner of Nebbi. It is dated 21/11/1984. For clarity I will reproduce a part of this exhibit below

"The office of the county Khadh Okoro WARR branch hereby submit an application for land title for WARR Mosque and school (Maderaga) already acquired traditionally in 1954 with assistance of local authority".

2) Exhibit AE – 1 is stamped in recommendation by OKORO county Administration (on 28.11.1984) the Chief Atyak division Okoro county and U.P.C Nebbi East constituency. It is signed in its recommendation by the following;-

- The Secretary District Land Committee – Nebbi.
- The Chairman WARR trading centre.
- The traditional chief of Okoro Rwoth V.K. OYOMA.
- Jalawale Ucungi – elder and Ibrahim Amatho – elder.

38. Exhibit AE- 5 is another relevant piece of evidence that can not be ignored. It is a notice of land inspection from the District Executive Secretary to the JOAGO Atyak division and Chairman Traders Warr Trading centre. It is copied to several persons in authority including police and survey department and the county chief of Okoro. It is dated 21/01/1987.

39. The DES in AE5 asked the recipient of the letter to mobilize the concerned people to attend the inspection.

It would have been most appropriately at this point that the interest of the respondent in the land would have been made known to the appellant and others in authority but nothing occurred until 17 years later in 2004.

40. The effect of Exhibits AE1 and AE5 is to show that;-

a) Long before the dispute the appellant had attempted to lease the land and its application received support and recommendation of both administration, local chiefs and traditional leaders and elders.

b) It was made in the open and a notice of inspection was given to the public.

41. Exhibit AE7 is another application for lease of the land. It is more recent than Exh. AE1. It was made 12 years ago on 6th December 2001. It is of interest to note that all the committee members of the area land committee signed the application in its support.

42. Exhibit A-2 is a lease offer for 15 acres of land at Warr trading centre – Nebbi District. After payment this was followed by exhibit DE-4 dated 1/9/2005 being the instruction to survey. However by tat time there was already a dispute and the land could not be surveyed until the dispute is resolved. That is what clause 8 of EA – 2 stated.

43. I have also studied the contents of exhibit RE-1, tendered by the respondent this exhibit contain minutes of the meeting held on **12/12/2006**. It is headed "MEETING OF ARYEM'S FAMILIES ON LAND DISPUTE AND DEMARCATION WITH WARR MOSLEM COMMUNITY HELD ON 12/12/2006 AT MZEE PACUTHO RESIDENCE".

44. It is a document authored in the year 2006 that was 52 years since the land was given to the community by the chief. The document contains information which is relevant to the facts before court. However being mere minutes where the person recording writes whatever the person talking says, there is no way of cross checking the authenticity of the information.

45. I have also compared exhibit RE -1 to AE- 1 and AE-5. AE – 1 is an application that was recommended by both the traditional and local chiefs of Okoro County. They would have not so recommended it if they knew that what they were doing was not the truth. That recommendation dates back to 1984 since that time one wonders why a meeting like the one that passed the minutes had never convened.

46. I would also question the status of ORYEM'S FAMILIES to make declaratory orders like the one they made that the disputed land belonged to the claimants. Did they act as a council of elders or family? What ever the capacity they convened in, they had no powers to make such declaration even without offering a hearing to all the parties involved.

47. The last point of discomfort I have with RE1 are the signatories to it. The document is signed by several persons whose physical address do not relate to the location of the land. From Exh. AE – 7 the location of the land is WARR trading centre, JULOKA parish, Atyak sub county/division, Okoro County, Nebbi District.

48. I have carefully reviewed the physical locations of the signatories who were close 150 in number. I have not been able to see names of persons from WARR trading centre, Atyak Sub County, Okoro County. I was able to see the list name **No. 73** of one **WATHUM MOSES** who stated his address to be **Warr trading centre**. Otherwise I noticed several other locations which I failed to relate to the subject land. They included places like Meo, Japakerniga, Karuga, Juparmeo. Paryema, Pamach and others. The question would be how competent were the attendants to give relevant information to the issue outside their area of residence and why did the list have names of residents.

49. I have reviewed evidence of the respondent in the court below. DW1 Okello Samson was 57 years in 2007 when he gave evidence. That means he was born in 1950. By the time the events surrounding the land occurred he was 3 – 4 years old. Much of what he said was not

within his personal knowledge. He admitted there was land given to the appellants but given his age at the time of the giving he was not competent to describe the area the way he did in his evidence. That was hearsay evidence contrary to S.59 (a) and (b) Evidence Act.

50. The evidence of Dw2 has to be compared to PW3's evidence. While DW2 admits the appellant was given land by the traditional chief he omits to give the information about the actual size of the land the chief gave out. It is the evidence of PW3 that gives the size of the land that was allocated.

51. It is not true for DW3 to say that the claim of the appellant's over the land started in 2000 when the area local and traditional chiefs recommended the appellants to lease the land in 1984 and its notice of its inspection was given by District Executive Secretary in 1981 as exhibits AE1 and AE5 prove.

52. The evidence of DW3 and DW4 contradict other witnesses who say that the land was given by the paramount chief to the Muslim community. These two witnesses claim that it was Anglia who donated the land.

53. If DW5 wanted he would have been the most relevant witness in the whole trial. That is because he was present and both sides claimed that either of them brought on the land. He however chose to give one sided evidence and never even agreed that he was associated with KHAMIS – the Indian trader. I do not agree that mere marriage to Angalu's daughter would lead Angua to entrust the whole of his land in a son in law. My understanding is that there is total absence of any claim over this land by Angua family do that long simply because he knew the land did not belong to him. The first claim was caused by

his grandson, born to the respondent but not him (Angua). Without proof of any challenge by Anglia to the existence of the appellant on the suit land, I am unable to agree that DW5 came on the land in the manner he alleged. It is also note worthy that Angua's family never used this land from 1954 to 2004 when a grandson claimed it was his father's land.

54. I would have considered the evidence of DW6 HASSAN KASAMBA if the agreement in which he said he sold a portion of land to the appellant to construct a health centre had been produced. A document speaks for itself. I can not infer its terms without looking at it. **See S.91 and 92 of the Evidence Act URA –Vs- MABOSI C.A. No. 26 of 1995 as KAROKORA JSC.**

55. Having re-evaluated the evidence as I have done I find that the trial court erred when it refused to admit documents which contained relevant facts that would guide it to reach a just finding.

The court also improperly looked the evidence before it and reached a wrong finding.

56. **Save** that the decision of the Grade II court was reached with want of jurisdiction, I must mention that it had reached a just decision. I will not consider ground 6 having made the above finding.

In the result I allow the appeal and set aside the orders of the court below. I substitute them with a declaratory order that the suit land belongs to the appellants.

57. The respondent having won on ground 1, 2 and 4 only a ½ of the taxed costs of this appeal will be paid to the appellant. Costs of the lower court taxed at a level of proceedings with no advocates that is to say excluding instruction fees, shall be born by the respondent.

NYANZI YASIN

JUDGE

20/02/2013

20/2/2013

Prof. Oboth Okumu for the appellant

Rashid for the appellant

Bandaru Daisy for the respondent.

Respondent in court.

Canrach Emmanuel for court clerk/interpreter.

Oboth Okumu: This matter is coming up for judgment, we are ready to receive it.

Bandaru Daisy: We are also ready to receive.

Court: Judgment delivered in open in the presence of Prof. Oboth Okumu for the appellants, Daisy Patience Bandaru for the respondent. Representative of appellant and respondent present.

Delivered by

LONDOLI MATTEW

G.I MAGISTRATE

R/A EXPLAINED.