

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-CA-0035-2007
(From Tororo Civil Suit No. 0030/2005)**

**OPOLI PATRICK.....APPELLANT
VERSUS
OKITELA JOSEPH.....RESPONDENT**

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

The appellant **Opoli Patrick** was aggrieved by the judgment and orders of the learned Magistrate Tororo dated 18.2.2007 in which he adjudged the disputed land to the respondent **Okitela Joseph** and awarded compensation of 1,500,000/=.

According to the lower court record, the respondent sued the appellant for recovery of land which he said was their customary land he inherited from his late father. That the appellant entered the land and started constructing with the respondent's consent. The suit land is located at Maliri Centre 'A', Merikit sub-county, Tororo District.

In his memorandum of appeal, the appellant represented by M/s Musiiho & Co. Advocates complained that;

1. The trial Magistrate erred in law when he ignored the appellant's documentary evidence and wrongly decided the case against the appellant.

2. The trial Magistrate erred in law when he decided the case when the plaintiff had no locus standi.
3. The trial Court erred in law when it entertained the suit when there was no cause of action.
4. The trial court erred in law by ignoring the testimony of the witnesses and reached a wrong decision.

The appellant prayed that;

- (i) The appeal be allowed.
- (ii) The lower court judgment be set aside.
- (iii) The disputed land be decreed to the appellant.
- (iv) Costs be provided.

As a first appellate court I am enjoined to re-evaluate the evidence on record and reach any own conclusion if the decision of the lower court can stand. In doing so, it is important to state what the witnesses testified in the trial court.

In addition to what the respondent told court, his witness **PW.2. Zeuchria Oello** 60 years then told court that he knew the suit land as that of **Yakobo Owori**. That he saw the appellant construct on the land in 2003 but did not know who sold the land to him. That **Yakobo Owor** died and the respondent inherited the land. That PW.2 attended the ceremony of inheritance at Maliri near the church. Further that Maliri primary school borders the disputed land.

PW.3 Omwinyi Patrick is brother to the respondent but he did not know the appellant. He only saw the appellant when he constructed on the suit land. That

the late Yakobo Owori left the suit land to his son Okitela when he died in 1995 but the respondent claims to have been given the land by one **Okowu Stephen**. However, PW.3 was shocked to learn from court that it was Maliri primary school which sold the land to him.

PW.4 Stephen Okowu 64, testified that the respondent is a clanmate while the appellant is a neighbour's son. He knows the suit land to belong to **Okitela** the appellant because he inherited it from his father **Yakobo Owori**.

PW.4 denied ever selling the suit land to the appellant. That the suit land was litigated upon in court in 1982-1991 and it was demarcated by the Magistrate's Court.

In his defence, the appellant testified that he bought the suit land from Maliri primary school on the 29.7.1997 at 2 million as per Exhibit P.1A and started constructing on it and donated part of it for construction of a Health Centre which is operational. That the respondent started claiming the land in 2003. That he was allowed to buy the school land through minutes of the board in Exhibits DTAA & D1A which the respondent challenged as forgeries. DW.1 further explained that the land was donated to the school by elders including the respondent's father in 1983. That the school owed the appellant money for building materials but had no money to pay. That he was given land in lieu of money owed.

DW.2 was **Okongo Livingstone**. He is one of the 7 elders who donated land to the church. That the elders included the respondent's father. That the land was for building a primary school. The land was intended to expand the primary school.

That because the school had no money for building materials, the appellant supplied materials worth 2 million. The school could not pay so they gave the appellant land in lieu.

DW.3 was **Omoit Wilberforce** 50 years. This witness testified that when the school, Maliri primary school wanted to expand, elders donated 11 ½ acres of land. That the father to the respondent donated 1 ½ acres. That boundary marks were planted to demarcate the school land. That in 1997, plan international offered to construct at least 3 classrooms if parents raised building materials but the school had no money. A meeting was called and they resolved to sell part of the land to raise money for building materials worth 2 million.

DW.3 further testified that the meeting resolved to give the appellant land near the trading centre which the respondent's father donated to the school. At the time DW.2 was part of school management and he signed on the agreement as No.2. That nobody complained about the transaction until 2005 when the respondent opened a case against the defendant. That the appellant developed the land and part of the land was donated to local government and has a Health Centre built on it by the local government.

DW.4 was **Osiru Obbo Yesero** 60 years. He told court that in 1982 Maliri School Management Committee called a meeting of its elders, leaders and church leaders as well as neighbours in which it revealed that it wanted to expand the school but had no land. Elders including the respondent's father offered land. That boundary marks were planted in 1983. That later in 1997, Plan International offered to build a school if the parents provided building materials. The parents had no money and

the appellant offered the materials worth 2 million. In lieu of cash it as resolved to pay the appellant in kind by land worth 2 million. That a sale agreement was made and DW.4 witnessed as No.1. He was chairman PTA.

It is the above evidence upon which the learned trial Magistrate based to enter judgment for the respondent herein.

During the trial of this appeal, I allowed both **Mr. Musiiho** for the appellant and Justice Centres for the respondent to file written submissions.

I have considered the appeal as a whole and the submissions by respective counsel. I have also re-evaluated the evidence as outlined above. I will go ahead and deal with the grounds of appeal as listed.

Ground 1:

Before I delve into this ground, I would like to agree with learned counsel for the respondent that the advocate for appellant filed incomprehensive submissions which were substantially unhelpful to the appellant's case. He paid very little attention to the text and appears not to have paid attention to what he was doing. In other words he failed in his duty. However, since submissions are not evidence, I will decide this appeal substantially basing myself on the evidence on record.

According to learned counsel for the respondent, the trial Magistrate considered all documentary evidence that was adduced by the appellant. He bases his argument on the fact that the same were admitted in evidence and marked as exhibits. That

the said documents formed part of the record which was considered by the trial Magistrate.

With due respect, I do not agree with the submission by learned counsel for the respondent on this point. Nowhere in the rudimentary judgments of the trial court was the authenticity of the agreements discussed or the contents of the said documentary exhibits analyzed. There is also no indication that the trial Magistrate evaluated the evidence on both sides before he summarily decided this case. He simply wrote that:

“I hold that there was no donation to the school by the plaintiff’s father of the disputed land 1 ½ acres and the defendant’s purported buying is unlawful (sic). On a balance of probability I enter judgment in favour of the plaintiff.....”

If the learned Magistrate had carefully analyzed the evidence of both parties he would have come to the conclusion that the appellant’s evidence was more credible than that of the respondent on a balance of probabilities. The respondent’s witnesses simply said they knew the land in dispute belonged to the late **Yakobo Owori** but they did not know if the said land was ever sold to the appellant. They then say they saw the appellant construct on the disputed land in 2003.

Since the witnesses for the respondent did not know how the appellant came to acquire the disputed land, the answer ought to have been found in the consistent and credible evidence adduced by the defence (appellant).

The testimony by the appellant was minutely corroborated by that of his witnesses on how he came to acquire the suit land. **DW.2 Okong Livingstone** then 84 years, **DW.3 Omoit Wilberforce** then 50 years and **DW.4 Osiru Obbo Yesero** then 60 years clearly explained how the land in dispute was acquired by the appellant. They all agree that the said land belonged to the father to the respondent. That in 1982 the parents of Maliri Primary school which borders the disputed land sat and resolved that they should expand the school. They did not have enough land. Then the elders neighbouring the school agreed to donate land for the purpose. Seven elders agreed to donate land as follows:

1. Yokono Othieno, 2 acres.
2. Omusolo Ayelo, 1 acre
3. Okello Obbenerik 1 ½ acres
4. Besweri Omalla 2 acres
5. Okong Livingstone 2 acres
6. Okware Gedion 2 acres
7. Owori Yakoo 1 ½ acres

No.7 was the late father to the respondent. Boundary marks to this land were fixed in 1983. The evidence also had it that since the school wanted to expand they got an offer from Plan International to construct a school to add on at least 3 classroom blocks provided the parents contributed building materials. At the time the school had no money and parents were apparently men of straw. The appellant herein came in handy and supplied building materials worth 2,000,000/=. Since the school had no money, it called a meeting of the management committee and parents and it was resolved that part of the donated land be sold to raise money to pay for the building materials. The meeting resolved to pay off the debt in kind

thus offering the land which happened to have been the portion offered by the respondent's father and was nearer to the trading centre as full payment to the appellant. An agreement Exhibit P.1.A was made to that effect. DW.2, DW.3 who is son to **Omalla**, were part of those who donated the land.

DW.4 witnessed Exhibit P.1.A as No.1 and was the chairman PTA of the school. DW.3 signed Exhibit P.1.A as No.2 and was part of the management committee. Evidence has it that during his lifetime the father to the respondent never complained about what was happening yet it all happened during his life time.

From the above straightforward evidence had the learned trial Magistrate properly evaluated the evidence he would have found that on a balance of probabilities the appellant had successfully defended his ownership of the suit land. The respondent simply emerged in 2003 to lay claim to the disputed land which has fully been developed by the appellant and partly donated to the local government to construct a Health Centre.

It is my considered view that given the overwhelming evidence by appellant, the learned trial Magistrate reached a wrong decision.

Grounds 2 and 3:

Whether the respondent had a *locus standi* or lacked a cause of action ought to have been raised as preliminary points of law before trial commenced. It is futile to raise these points on appeal when they were not raised in the trial court in the first place. When I perused the record and evidence adduced, the suit raised triable

issues and the respondent had a *locus standi* to institute the suit since he claimed under inheritance.

Ground 4:

I touched this ground when I was dealing with ground 1 above. It is apparent that the trial Magistrate did not critically analyze the appellant's evidence and as such reached a wrong decision to the detriment of the appellant.

Consequently I will find that the appellant has proved both ground 1 and 4 but failed to prove grounds 2 and 3 of this appeal. Grounds 2 and 3 were a waste of time.

In the final result I will allow this appeal and set aside the judgment and orders of the lower court. I will find that the suit land belongs to the appellant having properly acquired it from Maliri primary school as a trade off for materials he supplied to the school worth 2 million.

The appellant shall get the taxed costs of this appeal and the court below.

Stephen Musota

JUDGE

28.03.2013