THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL 31 OF 2011

ARISING FROM BUKEDEA KUMI DISTRICT LAND TRIBUNAL CLAIM 32 OF 2004

OLEMUNGOLE JAMES ……APPELLANT

V

OLUKA MOSES……RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

In this appeal, the appellant appeals the judgment of HW Omalla Felix sitting at Bukedea and dated 6.6.2011 on the following grounds:

1. The trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record hence coming to a wrong conclusion.
2. The magistrate who visited the locus had no jurisdiction in land matters n and therefore the report relied on by the trial court is null and void.
3. The decision of the trial court has occasioned a miscarriage of justice.

Mr. Ogire for the appellant and Mr. Oyoit for the respondent filed written submissions that I have studied and given due consideration.

The duty of the appellate court is to re-evaluate the evidence on record and arrive at its own conclusions bearing in mind that the trial court had an opportunity to observe the demeanor of the witnesses.

The appellant's claim filed in 2004 before the tribunal was for recovery of land located at Akero, Bukedea. Description of the land is given in a sketch map that shows a total of 37 acres but does not show the disputed land.

From the evidence on record, the appellant's claim to the land is based on inheritance from three sons of Ogwang, namely, Okodel, Odong and Odeke . these three sons of late Ogwang inherited 12 acres each from their late father Ogwang . The appellant testified that the respondent is claiming Odong's land. From his evidence , the acreage or size of land claimed by the appellant is not clear.

According to the appellant, he was appointed heir of the three brothers Odokel, Odong and Odeke in 1978.

It emerged from the evidence of PW2 Stanley Opolot born in 1945, that the respondent's father was chased from the area in 1978, while PW4 Masse John Charles states that when the appellant was appointed heir in 1978, the respondent's family were not in the area. It seems odd that this witness makes this statement yet the respondent and his witnesses confirm that his father was not chased from the area but was killed in 1989. Indeed the appellant claimed to have been on the land for 32 years which explains why the appellant and his witnesses claim the respondent's father was chased

away from the area in 1978. The reason is so the appellant can claim benefit from long possession.

None of the appellant's witnesses allude to any encroachment on the appellant's land by the respondent's ancestors. Therefore by 1978, when the appellant was appointed heir, there was no dispute over land in the area because there was no encroachment by the respondent's ancestors.

Trouble seems to have started in 1989 when the respondent's father, Silver Elunguru and brother were killed and the family fled the area leaving no one in the land. The respondent returned in 1999 to claim his late father's land and sought assistance of LCs to plant boundary marks. The respondent is supported by his own mother DW 2 Angella Berita Achom who confirms there was no dispute over the land with Okodel their immediate neighbor when her husband was killed and they had to take refuge elsewhere. This position was confirmed by DW 3 Yonason Okudutum aged 71 years who testified that Elunguru father of the respondent and Okodel from whom the appellant gets title had no dispute over land and each had their separate pieces of land.

That a dispute started when the children of Elungurut returned in 2002 to their land and the appellant stopped them from occupying it.

DW 5 Yakobu Opolot Omusu confirmed that when the appellant inherited Okodel's land, the respondent's father was on his own land and he was present when the appellant was handed Okodel's land.

I find inconsistencies in the appellant's case. In his examination in chief, he claims that the respondent claims the land he inherited from Odong yet in

cross examination of the respondent's witnesses, the focus shifts to the land he inherited from Okodel.

Secondly, the appellant does not seem to know the acreage of land he claims and it is the locus visit that revealed that it is about 20 acres.

At the locus visit, the magistrate assigned to conduct the visit found that Odong's land was sold to someone not party to the dispute and that the land in dispute is that of Okodel.

The trial magistrate found that the sisal plants form the boundary between the appellant and the respondent. This sisal was referred to by DW 2 Angela Achom, mother of the respondent and the respondent as the boundary planted by LC officials in 2001 on their return to the land from exile.

I am in agreement with the decision arrived at by the trial magistrate that the appellant failed to prove his case on a balance of probabilities.

I now turn to the grounds of appeal. Ground one is that the trial magistrate erred in law and fact when he failed to properly evaluate the evidence. Mr. Ogire, Counsel for the appellant argued that the boundary planted by LC officials in 2001 was arbitrary and the LC II did not have jurisdiction as court of first instance. The trial magistrate did not rely on any proceedings recorded by the LC official but he considered the action of the LC official as evidence of the boundary bearing in mind the evidence adduced by both the appellant and the respondent.

Mr. Ogire also submitted that the appellant should benefit from the Limitation Act as he had been in possession since 1978. I have found that by 1978, the respondent ‘s father was alive and lived on the land and a dispute erupted in 1999-2001 when the family returned to the land , having fled in 1989 when the respondent’s father was killed. It is during the absence of the respondent’s family between 1989 and 1999 that the appellant laid claim to their land. Section 5 of the Limitation Act does not apply at all. Ground one fails.

Ground two is that the magistrate Grade II who visited the locus had no jurisdiction on land matters and therefore the report relied on by the trial magistrate was a nullity. I am in agreement with the submission of counsel for the respondent, Mr. Oyoit that it is common practice for a senior judicial office delegate the function of visiting a locus provided the instructions are clear and precise.

I examined the report and found that it was sufficiently detailed to be relied on and it was limited to the instruction of the trial magistrate. The trial magistrate did not err in instructing the magistrate grade II to conduct the locus visit. Ground two fails.

Ground three is that the decision of the trial magistrate has occasioned a miscarriage of justice. I am in agreement with counsel for the respondent that the appellant failed to prove his claim on a balance of probabilities and the trial magistrate was correct in finding for the respondent.

In the premises, I dismiss this appeal with costs of the appeal and lower court to the respondent.

Before I take leave of this appeal, at one point the appellant complained about the exorbitant costs awarded by the trial magistrate. On 9.7.2012, Justice Musota found that the costs awarded were contrary to the law. I am entirely in agreement with Justice Musota on this point and I make an order that a fresh bill of costs be drawn leaving out claims for breakfast and lunch and transport refund should be based on public transport rates.

Accordingly, I dismiss this appeal and confirm the orders of the trial magistrate.

The appellant to deliver vacant possession of the disputed land now decreed to the respondent within three months from to date.

DATED AT SOROTI THIS 20TH DAY OF AUGUST 2014.

HON. LADY JUSTICE H. WOLAYO