THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL 8 OF 2009

ARISING FROM AMURIA CLAIM 2 OF 2008

ENOMUT EMMANUEL & EJORU JOHN PETER

V

AROGAI MUSA

JUDGMENT

Through their advocates Ogire & Co, the appellants appealed the decision of grade one magistrate Komakech William dated 20.1.2009 on the following grounds:

1. The trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record thereby arriving at a wrong decision.
2. The trial magistrate erred in law when he ignored the limitation period.
3. The trial magistrate erred in law and in fact when he proceeded with the case after the 2nd respondent pointed out that he was wrongly sued.
4. The trial magistrate erred when he introduced foreign parties in his judgment thereby occasioned a miscarriage of justice.

Ms Oyoit notified court on 20th April 2010 that he represented the respondent.

Both counsel were reminded to file written submissions before 5th December, 2013 but none responded.

It is trite law that the duty of an appellate court is to re-evaluate the evidence and arrive at its own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses.

The respondent sued the appellants for recovery of 20 acres of land. The facts constituting the cause of action are that the respondent trespassed on the suit land by selling, cultivation and construction of houses.

In their statement of defence, the appellants dispute the respondent's claim.

I have examined the evidence on record and the following facts are apparent.

The respondent's claim to the land is based on inheritance from late Okello John who died in 2007. The respondent who was 40 years old at the time he testified , informed the court that in March 1950, (although the handwritten record mentions 1940) his late father Auta Petero gave land at Amucu village to Ateru Ekusitati, the father of the 1st appellant Elupu Sipriana , substituted by Enomut Emmanuel in this appeal . Ateru then invited his son, I st appellant (Elupu Sipiriana – deceased) to stay with him. Enomut Emmanuel obtained letters of administration and substituted Elupu Sipiriano who died before the before the appeal was concluded.

Auta Petero then asked Okello John, his brother Sukairo Elasu's son, to look after the land. Later, Okello John, due to advanced age handed the land to the respondent. Okello John died in 2007. The Imageso clan then officially handed over the disputed land to the respondent as heir.

From the testimony of the respondent's witnesses, the relationship of the respondent to the original owner of the disputed land is not clearly brought out. The respondent in his testimony states that Auta Petero was his father, a fact that is highly unlikely because Auta invited his brother Elasu's son by the name Okello John to stay with him. The respondent then goes on to describe Okello John as his step father. The lack of clarity about biological relationship with the original owner Auta Peter affects the credibility of the respondent's case.

By 1940, the respondent was not born, hence his evidence is basically hearsay that needs other supporting evidence. At the time the respondent testified on 28.11.2008, he was aged 40 years which means he was born in 1968. It is note worthy that he admits that Elupu Sipiriano was on the land prior to the time, he, the respondent was born and by the time he inherited from his step father Okello in 2007.

Another piece of evidence from respondent's witness CW5 Edoku aged 83 years which confirms the fact that Ateru Ekusitati father of Elupu was on the land in dispute when Auto Peter was still alive. The two, Auta and Ateru lived peacefully on the land and even Sipriano Elupu lived peacefully on the land until 2007 after the death of Okello John when the respondent became heir to Okello John. Therefore from 1950 to 2007, Auto's descendant Okello John and Ateru's descendant Elupu Sipriano lived peacefully together.

After the death of Okello John in 2007, a dispute erupted.

What seems to have brought conflict was the sale of land by Elupu to Adeke Charles RW 9 in 2002 and later to Akwi Asio RW7 in 2007. In 2002 when Elupu sold land to Odeke RW 9, there was no conflict because Okello John caretaker was alive. Conflict started in 2008 with filing of Claim 2 of 2008, after the death of Okello John.

In view of the above analysis, I find that the respondent made false claims to the 1st appellant's land. The respondent's title to the land is questionable and cannot defeat that of the 1st respondent Elupu who inherited from his own father Ateru who lived peacefully with Okello until the latter's death in 2007. Ateru lived on the land from 1945 to 1968 when he died, according to RW1 Elupu.

The trial magistrate ignored the evidence that was in favour of the 1st appellant and wrongly decided in favour of the respondent. Had he judiciously evaluated the evidence, the magistrate would have found that the respondent's claims are baseless and he failed to prove that he had a better title to the land than the 1st appellant.

With regard to the second appellant, Ejoru John Paul, the claim against him was that he built a house on the land on the instructions of 1st appellant.

As the second appellant derives his title from the 1st appellant, the claim against him cannot succeed as the claim against the 1st appellant failed.

I am mindful of the caution that the trial magistrate had an opportunity to observe the demeanour of the witnesses. However, this court has power to reverse findings of fact. In **Supreme Court Appeal 8 of 2009 Rwakashaija**

Azarious and others v Uganda Revenue Authority, the Supreme court cited with approval a passage from Coghlan v Cumberland 1898 Ch. 704. I re-produce part of the passage,

> ‘ Even where , as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must re-consider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its mind , not disregarding the judgment appealed, but carefully weighing and considering it; and not shrinking form overruling it if on full consideration the court comes to the conclusion that the judgment is wrong.....’

Turning to the grounds of appeal, on the first ground, i find that the magistrate did not judiciously evaluate the evidence and he arrived at a wrong decision, as a result. Ground one succeeds.

Ground two is upheld as the 1st appellant’s interest dates as far back as 1968 when he inherited from his late father Ateru. This ground succeeds.

Ground three succeeds as the second appellant was simply a caretaker appointed by a bona fide purchaser Akwii Asio.

Ground four is that the magistrate erred in law and fact when he introduced foreign parties in his judgment which occasioned a miscarriage of justice. For clarity, i reproduce the orders the trail magistrate made.

1) ‘ 1st respondent, 2nd respondent, Akwii Asio, Okwi Charles to give vacant possession.
2) Permanent injunction be and is hereby issued against the 1st respondent, 2nd respondent, Akwi, OKwi Charles, Odeke James, relatives, in-laws, friends, ... from trespassing on and using the land.

The orders against persons who were not parties to the suit was irregular. It would have been sufficient to refer to them as ‘agents, successors in title’ without naming names. This ground succeeds.

In the result, I allow the appeal, set aside the judgment and orders of the lower court and make the following orders:

1. A permanent injunction will issue retraining the respondent from interfering with the 1st appellant’s quiet enjoyment of the land or that of his successors in title.
2. In view of the time this dispute has been in the courts, each party will bear its own costs.

DATED AT SOROTI THIS 12th DAY OF FEBRUARY 2014.

HON. LADY JUSTICE H. WOLAYO