THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL 12 OF 2010

ARISING FROM KABERAMAIDO LAND CLAIM 2 OF 2007

OBWOLO NICHOLAS……APPELLANT

V

EMENYU EMMANUEL ……RESPONDENT

BEFORE HON. LADY JUSTICE H . WOLAYO

JUDGMENT

In this appeal, the appellant appeals the judgment of Grade one magistrate Galiwango Mukuye dated 17.3.2010 sitting at Kaberamaido. The grounds of appeal are contained in contained in a memorandum of appeal, principally that:

1. The trial magistrate failed to apply the Limitation Act.
2. The trial magistrate erred when he held that the dispute was decided in 1985 whereas not.
3. The trial magistrate erred when he failed to properly evaluate the evidence on record .

Madaba, Modoi & Co. Advocates filed written submissions on behalf of the appellant while Ms Omoding, Ojakol, & Okallany advocates filed on behalf of the respondent that I have read and considered.

It is trite law that the duty of an appellate court is to re-appraise 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.

In the lower court, the appellant sued for recovery of approx 20 acres of land .

The defendant in his statement of defence averred that he had been in occupation of the land since birth and that the appellant was a trespasser.

From the evidence on record, the appellant's claim to the disputed land which he drew on a sketch map attached to the claim is based on inheritance from his late father Andrea Emedu who also inherited from Samadali Eboku. The plaintiff confirms that his late father was not buried on this land. CW2 Victor Emeru aged 100 years confirmed that the appellant is his grandson , Samadali Eboku is his father and the grandmother of the respondent is his sister Robinah, who died during Obote 1. This evidence is important because it shows that the respondent , whose mother Achola in 1985 complained of encroachment by the appellant, derives his interest from the maternal side, and through his grandmother .Indeed CW4 Oganga John , brother to the appellant refers to the respondent as a migrant.

DW3 Emayo Celestine confirmed to court that the dispute between the parties started way back in 1985 when the respondent's mother Achola reported the appellant to local authorities who decided the dispute in her favour. He was the author of the final resolution to the dispute which he identified in court as Exh. D 1. This witness stated that a footpath separates the appellant's and respondent's land. Another witness DW 2 Ariana aged 70 years confirmed that the appellant disputed with mother of the respondent in 1985 and that the appellant was instructed to remove his house from the disputed land.

Indeed in the sketch map, the appellant's house is shown as being very close to the boundary but inside disputed area.

From the foregoing , it is apparent that the appellant's claim to the land is not supported by evidence. Indeed, it is apparent that the respondent whose lineage traces back to the sister of the appellant's grandfather , and then his mother is being disturbed because of this background. Yet a dispute over the same land between the respondent's mother Acola and the appellant was resolved in 1985 by local authorities, in favour of the respondent's mother. The respondent's mother settled with the respondent in the area in the 1970s according to CW 3 Egedu Joseph.

I find that the appellant did not ,on a balance of probability prove his claim.

Turning to submissions of counsel for the appellant, his main contention is that the magistrate erred in holding that the subject of the suit was res judicata and that failure to visit the locus was fatal.

With regard to res judicata, I agree with the conditions as articulated by counsel, that must be satisfied before a court rules that a dispute is res judicata. It is true that Dexh. 1 does not represent a judicial decision as Lwala parish chief was not a competent court in 1985. However, the magistrate accepted the evidence of the defence witnesses all who confirmed that the dispute had previously been handled by authorities. This evidence is not evidence of res judicata as held by the trial magistrate, but it is admissible documentary and oral evidence to support the respondent's claim.

While the trial magistrate erred in holding that the dispute was res judicata, he arrived at a correct conclusion.

With regard to the failure to visit the locus, this is not fatal because the appellant himself described the disputed area in a sketch map. The witnesses also confirmed the boundaries as a footpath, and a main road.

Defence witnesses confirmed that the appellant's house is on the land as indicated on the sketch map.

Turning to the grounds of appeal, on ground one, counsel for the appellant did not argue this ground in his submissions and therefore i need not dwell on it.

On ground two, i have found that the magistrate erred in determining that the case was res judicata but there was no miscarriage of justice because he arrived at a correct decision.

On ground three, although the magistrate did not evaluate the evidence , he arrived a t a correct decision. Further, i re-appraised the evidence and found that the decision arrived at by the magistrate is supported by evidence on record although the reasons for the decision were erroneous. Had the magistrate evaluated the evidence , he would have arrived at the decision which he gave.

In the result, i dismiss the appeal and order the appellant to remove his house from the disputed land within three months from the date of this judgment. A permanent injunction will issue restraining the appellant from interfering with the respondent's quiet enjoyment of the land.

DATED AT SOROTI THIS 5TH DAY OF FEBRUARY 2014.

HON. LADY JUSTICE H. WOLAYO