THE REPUBLIC FO UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL 10 OF 2008

IKULE ERUNAYO .....APPELLANTS

V

1. EROBOT GERALD

2. OPETAILENG CHARLES.....RESPONDENTS.

JUDGMENT BEFORE HON. LADY JUSTICE HENRIETTA WOLAYO

In this appeal, the current respondents replaced original two respondents who have since died. The order to substitute was made by Lady Justice Oguli under MA 56 of 2011.

The appeal was later dismissed on 23.9.2009 by Justice Musota but was subsequently reinstated by consent on 27.10.2013 hence this judgment.

The appeal is against the decision of Magistrate grade one Komakech William dated 27.2.2008 sitting at Katakwi.

Mr. Echipu appeared for the respondents while Mr. Erabu appeared for the appellant.

Both counsel filed written submissions that i have given due consideration.

The appeal is based on three grounds of appeal.

1. The decision of the magistrate grade one was not supported by evidence on record.
2. The magistrate failed to consider the fact that the appellant had lived on the disputed land since birth.
3. The decision occasioned a miscarriage of justice.

The decision appealed is in the following terms:

To be concise, the instant claim is res judicata since it was decided in favour of the respondents in LCIII court of Katakwi Town Council between the same parties , litigating under the same title.'

It is necessary to give the history of this case in order to understand where the magistrate was coming from.

The claim was filed before Katakwi district Land tribunal on 5.5.2003 as claim No. 1 0f 2003 between Erinayo Ikule and Omungetum Robert and Omunga Richard (now deceased) on the other hand. The case was heard by the tribunal with both parties calling witnesses. Unfortunately, the tribunal did not conclude the case as the contracts of the Chairpersons expired. During the proceedings, the defence tendered Exh. D1, minutes of a meeting held on 2.5.2003 and attended by over 47 people including the parties to the claim before the tribunal. The meeting was also attended by LCIII Chairman and an LC1 Chairman. The meeting was called to resolve the land dispute between the appellant and the then respondents which it did with the appellant being asked to resettle the people he had sold land.

It is this document that the magistrate referred to as LCIII decision and based himself to determine that the case was res judicata.

The LC Court in 2003 would have proceeded under the Resistance Committees (Judicial Powers) statute 1 of 1988. Section 2 of that statute provided that the RC court consisted of members of the Resistance Committee of the village, parish or sub-county. The meeting of 2..5.2003 was attended by numerous people . Although the subject of the meeting was to settle land dispute, it was a meeting comprising LC I officials, LCIII officials among numerous other people. This meeting could not have been the equivalent of a court sitting by any stretch of imagination. Secondly, section 5 (3) of the RC Judicial Powers statute provided that a case shall be instituted in the lowest grade, which means the case should have been heard by the LCI committee as the court of first instance. In this case, the dispute was

entertained by a mixture of both LCIII and LC I members with the whole group comprising of 47 people whose attendance was registered.

The meeting of 2.5.2003 was therefore not a court sitting and the decision arrived at that meeting was not a judicial decision. I therefore find that the magistrate grade one erred in law when he held that the case was res judicata.

Turning to the grounds of appeal, the first ground is that the decision of the trial magistrate is not supported by evidence.

I am in agreement with counsel Erabu that the LCIII court of Katakwi could not sit in a case a court of first instance and therefore the trial magistrate erred in declining to hear the suit filed by the appellant. Mr. Ecipu's submission that the decision of the LCIII court was not a nullity unless declared so by a court of competent jurisdiction, has merit. Consequently, as this court has now ruled that the LCIII court did not have jurisdiction to sit as a court of first instance, the decision of the LCIII court cannot stand.

The effect of my finding is that Land Claim 1 of 2003 shall be determined on the merits.

In the memorandum, the appellant prayed that this court enters judgment. However, as an appellate court, the duty of this court is to re-evaluate the evidence and arrive at its own conclusion. The judgment of the trial magistrate does not evaluate evidence but merely picks on the aspect of res judicata and proceeds to dismiss the claimant's claim without discussing the evidence on record. This being the case, the evidence remains intact and unevaluated.

Section 33 of the Judicature Act empowers this court to resolve all matters in controversy between parties to avoid multiplicity of proceedings. Given the unique circumstances of this case where the trial court has failed to evaluate the evidence, section 33 is an appropriate tool to resort to meet the ends of justice. I now proceed to evaluate the evidence on record.

The appellant filed land claim 1 of 2003 for recovery of land situate in Dokomeri , Katakwi. The second defendant denies this claim.

The appellant's case is that his title to the land in dispute dates back to his grandfather Ikule who married Icaarit, sister of Imungat. Imungat is the father of the two respondents, Omugetum Robert and Omunga Richard. Ikule and Icaarit then produced Ezra Oita who is the father of the appellant. The respondents are maternal cousins to the appellant.

That Oita, father of the appellant gave Imungat father of the respondents land to live on is disputed. While the appellant in his evidence says Imungat was given five gardens, DW2 Ocalamo, aged 82 year old, confirms that Imungat was given land but does not state how many gardens. However, DW 4 Okwatum John Francis states that it is Imungat who gave land to Oita, father of the appellant. Given that Okwatum was 46 years old when he testified in 2004, i accept the evidence of DW2 Ocalamo as more credible on account of age.

Accordingly, i find that the appellant's father gave respondents' father land to live on. According to the appellant, this was when he, the appellant was 12 years old. At the time the appellant testified in 2004, he was 70 years old. That means Imungat was given land way back in 1946.

The dispute between the parties is over one garden that the respondents allege the appellant sold to one Ocan Peter yet respondents claim it is their land.

From the testimony of DW 5, Omugetum Robert, 1st respondent, both father of the appellant Oita and his own father Imungat lived peacefully together on the land. Oita then migrated to Kapelebyong but returned to Dokomeri in 1982 when Karamojong commenced raids. Dokomeri is the location of the disputed land.

The first indication of a dispute between the two families was in 2003 when the respondents complained to the LCI chairman of Dokomeri.

The burden of proof in civil cases is on a balance of probabilities. I have examined the evidence on record. The appellant's case clearly maps out how he has dealt with the land he inherited from his father Oita. He says his father owned 50 gardens in all.

In addition to the five gardens given to Imungat, the appellant and his father gave some land to one Ongol , a brother of the respondents. The appellant also sold portions to Okello Mackay in 1997, and gave some land to the Baptist church. Contention started in 2003 when the appellant sold land to Peter Ocan. The 1st respondent, on the other hand, simply allege that the appellant sold their land to Ocan Peter. The 2nd respondent puts up a case that the disputed land was owned by his late father and later, his father and Oita, father of the claimant lived peacefully together.

In view of the fact that i accepted earlier on that it is Oita who gave Imungat father of the respondents, land to live on, i find on a balance of probability that the disputed land belongs to the appellant. I find that the respondents made false claims to this land which is clearly described in a sketch map on record. The land has two distinct boundary marks – two main paths to Katakwi town demarcate the land which clearly neighbours Ikule's home.

In the premises, i allow the appeal and issue a permanent injunction restraining the respondents from interfering with the quiet enjoyment of the disputed land that has been judged to belong to the appellant and his successors in title.

Owing to the length of time this case has been in the system, each party will bear its own costs.

DATED AT SOROTI THIS 12th DAY OF FEBRUARY 2014.

HON. LADY JUSTICE H. WOLAYO