IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL. 5 OF 2012

ARISING FROM KUMI LAND CASE 14 OF 2011

NYANYA STEPHEN .....APPELLANT

VERSUS

ASIO JESCA FLORENCE.....RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant through his advocates, Oyoit & co. Advocates appealed the decision of HW Opio Belmos Ogwang dated 6th February, 20112 at Kumi . Counsel formulated seven grounds of appeal which are reproduced below.

1. The respondent had no locus standi to sue as she did not possess letters of administration.
2. The trial magistrate failed to visit the locus in quo.
3. The trial magistrate erred to hold that Nyangatum Joseph father of the respondent was buried on the suit land.
4. The trial magistrate erred to hold that Adeke Tabisa was concubine of the appellant.
5. The award of 600,000/ general damages awarded to respondent was arbitrary.
6. The decision of the lower court occasioned a miscarriage of justice.
7. There are fundamental errors on the face of the record.

Both counsel filed written submissions that i have given due consideration. Ms Mbale Law chambers represented the respondent.

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

The respondent in this appeal sued the appellant for recovery of four gardens . Her case in the lower court is that her late father Nyangatum Joseph owned the four gardens and when he died in 1990, the appellant inherited his widow Adeke Tabitha who died in 1998. Thereafter, the appellant remained on the land forcefully. She was supported by PW2 Opila Marlon , brother to the late Nyangatum, PW3 Omonding Charles, and PW4 Oricom Nespole. These witnesses confirmed that the respondent was the only child of the late Nyangatum.

The respondent's case is that he inherited the suit land from his late father Ochola Sirah who died in 1988 and that in 1995 , his father had chased away the appellant's father from the suit land. The appellant also denied inheriting Adeke Tabisa, widow of Nyangatum as the said Adeke was his sister. The appellant was supported by his witnesses .DW2 Dikan Emmanuel testified that Nyangatum was invited to live on the suit land by Sirah Ochola and later, Nynagatum failed to buy the land so he was sent away.

As further evidence that Nyangatum had no interest in the suit land, DW 3 Okiria testified that Nyangtum was buried some 30 meters away from the suit land, on Nyangatum's father's land.

The trial magistrate believed the respondent's case and gave judgment in her favour. I have no reason to upset the findings of fact by the trial magistrate.

The appellant's denial that he inherited the widow of Nyangatum is not believable in light of the evidence of the respondent and her witnesses. The appellant's claim that Nyangutum was chased from the suit land is not credible . It is an attempt to justify his baseless claim to the suit land

All in all, the trial magistrate properly evaluated the evidence and arrived at the correct conclusion.

Turning to the grounds of appeal, the gist of ground one is that the respondent had no locus standis she did not hold letters of administration. Counsel for the appellant laboured this point at length citing section 191 of the Succession Act which counsel submits is mandatory**. He cited John Rwankutahi v Tukahirwa CA 5 of 1990(unreported).** .
The gist of the precedent is that a party cannot bring an action in respect of the estate of a deceased person unless he has obtained letters of administration. With due respect to counsel, the authority cited is no longer good law in light of the Supreme Court decision **Isreal Kamya v Martin Banoba Masiga CA 52 of 1995** , cited by counsel for the respondent. In that decision, the respondent did not hold letters of administration and on appeal to the Supreme Court, it was held that the respondent had an interest in the estate of the deceased and therefore he could bring an action even without a grant of letters of administration.

In the instant appeal, the respondent is a child of Nyangatum and potentially, she is entitled to inherit from the estate of her father. The respondent has an equitable interest in the suit land which she is entitled to protect . I accordingly find that the respondent had a locus standi to bring an action to recover the suit land. Ground one of appeal fails.

Ground two is that the trial magistrate failed to visit the locus . Counsel for the appellant submitted that the visit would have enabled the magistrate view the grave of Nyangatum which might have led to a different conclusion.

While it is true that a visit to the locus is good practice, it is not mandatory. I am in agreement with the authority cited by counsel for the respondent, **Alice Namisango v Galiwango1986 HCB 37,** where Odoki J, as he then was, held that 'a visit to the locus is intended to enable the court to understand and follow evidence adduced by the parties with regard to the disputed boundary or other subject matter.'

In the instant appeal, the parties litigated over four gardens . The subject of litigation as clear. In any case, Nyangatum was buried some 30 metres away from the disputed land on his own father's land. To me, this is further evidence that Nyangatum had roots in the suit land as he was buried not far off, according to DW3 Okira, a witness for the respondent.

I therefore find that failure to visit the locus could not have materially affected the outcome of the case and it did not occasion a miscarriage of justice. Ground two fails. Ground three has been dealt with by ground two.

Ground four is that is that the trial magistrate erred in holding that Adeke Tabisa was a concubine of the appellant when the said Adeke was his sister. This was a finding of fact based on evidence and i have no reason to disturb this finding. Even if it were not true that Adeke was a concubine, the relationship would not have made a difference to the fact that the appellant made false claims to the suit land. Ground four fails.

Ground five is that the trial magistrate erred to award general damages of 600,000/ without proof of injury. I am in agreement with counsel for the respondent that proof of damage suffered is not necessary in an action for trespass. Both counsel the same authority Viram Bhat & Karsan Vs Bhatt 1965 EA 789, in support. The principle is that a plaintiff is entitled to recover some reasonable remuneration for the use of the land. The sum of 600,000/ awarded by the trial magistrate was reasonable. Ground five fails.

Ground six and seven have been dealt with by the rest of the grounds.

In the result, i dismiss the appeal and confirm the orders of the trial magistrate with costs to the respondent.

In the event that the appellant has not vacated the suit land, an order for vacant possession will issue within one month from to date.

DATED THIS 19TH DAY OF MARCH 2014.

HON. LADY JUSTICE H. WOLAYO