

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 15 of 2011

ARISING FROM KUMI CLAIM NO. 101 OF 2004

IPUTO GABRIEL.....APPELLANT

VERSUS

REGISTERED TRUSTEES OF SOROTI CATHOLIC DIOCESE.....RESPONDENT

JUDGMENT

The appellant through Mugwana , Nanteza & Co. Advocates , appealed the judgment of HW Belmos Ogwang sitting at Kumi dated 6th April 2011 on the following grounds.

1. The trial magistrate erred in law and fact when he held that the suit land was given to the respondent by the district commissioner by way of temporary license in 1929.
2. The trial magistrate erred in law and fact when he relied and put heavy emphasis on the testimony of Acom Makulata.
3. The trial magistrate erred in law and fact when he failed to consider the contradictions and inconsistencies in the respondent's evidence.
4. The trial magistrate erred when he failed to properly evaluate the evidence.
5. The trial magistrate erred in law and fact when he held that the appellant had never owned the suit land and was a trespasser.

The appellant prayed that the judgment be set aside.

Both counsel Mugwana, Nanteza & Co. for the appellant and Mr. Ogire 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 adduced in the lower court and come to its own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses.

After studying the record and in exercise of powers to call additional evidence under section 80(1)(d) of the CPA, i directed parties to agree on a surveyor to :

1. Determine the acreage of disputed land
2. Determine acreage of land occupied by the respondent.

However, this decision was not well received, as a result, a surveyor was not appointed.

Moving forward, i have decided to determine the appeal without this additional evidence and after discovering a sketch map of the disputed land, on the court record. This sketch map shows location of the church and location of the appellant's home. This map is referred to at page 3 of the typed proceedings. Mr. Mungao appeared for the defendant/appellant and Mr. Malinga appeared for the claimant/respondent on 14.10.2008 when proceedings were recorded.

In its claim filed on 20.6.2005, the respondent claimed for four gardens customary land located at Koolin village, Kapir sub county, Kumi district. The

claim is stated as 'a right to the land' and 'the right has been tampered with' by trespass to land . Particulars of trespass are the planting of eucalyptus trees and applying to survey the said four gardens. The respondent prayed for permanent injunction, vacant possession and general damages for trespass.

In his defence, the appellant denied the claim and added that the disputed land is approximately three gardens . He averred that he inherited the land from his late father Peter Olebe who died in 1992.

At the scheduling on 27.5.2010, Mr.Ogire appeared for the respondent while Mr. Mungao still appeared for the appellant.

It was agreed at the scheduling that the disputed land was four gardens situate at Koloin Kafir sub county and that the respondent church held a certificate of occupation No. 938 issued on 26.6.1929 by the district commissioner.

When the hearing commenced, PW1 Okurut Vigil, chairman of the Parish council Catholic church Koloin and had been in leadership since 2004, testified that the disputed land was in fact six gardens and not four as previously indicated. The trial magistrate allowed the claim to be amended accordingly.

Evaluation of evidence

The issues for determination before the lower court were framed as

1. Who owns the suit land
2. Remedies

I have examined the evidence on record and found that a resolution of this dispute depends on ascertaining the nature of the respondent's claim to the land. The statement of claim in the pleadings before the land tribunal is

instructive. The claim is stated to be a 'a right to the land which right has been tampered with'. This means the respondent was seeking to assert the notion that the church had a right over the disputed land. All the respondent's witnesses give evidence tending to show that it was an accepted fact that the disputed land belonged to the church.

PW1 Okurut testified that he was a pupil of Koloin primary school from 1951-1957 and on the land where appellant planted eucalyptus trees, there was previously a house for the headmaster and teachers' houses. That the land was known as church land by the community.

Other oral evidence of the church's interest is that of PW 2 Opejo Boniface who was appointed a catechist in 1987. He was taken round the church land at the time and shown six gardens in the presence of the parents of the appellant. According to this witness, opposition to the respondent's control began in 1995 when he was stopped from using the land by the LC1 Chairman, Ekom Juventine.

PW4 Okello Anthony aged 62 years and PW 6 Ateka Basil aged 78 grew up knowing the disputed land belonged to the church. PW6 Ateka was a teacher Koloin primary school from 1955 to 1956. In 1978, he was appointed head teacher of Koloin primary school and throughout this period, him and others utilised the land with permission of the Catholic church.

PW5 Acom, step mother to the appellant does not recollect the family using the land in dispute during her stay with the late Peter Olebe. She asserts the disputed land belongs to the Catholic church.

It is noteworthy that PW5 was not cross examined by the appellant's advocate, a fact that tends to show that her testimony remained unchallenged.

The above oral evidence tends to show that from the time the church existed, the disputed land was commonly known as belonging to the church for use by the church members.

This finding is supported by documentary evidence of PExh. A, the certificate of occupancy issued in 1929 by the then district commissioner which shows that not more than five acres were allocated to the church. While this is a significant fact that tends to show the extent of the church's land, over a period of time until 1995, there was no dispute over the land until the appellant began adverse possession through planting of trees and crops and through seeking to secure a registered interest. Indeed PW 5 Acom, and widow of Peter Olebe father of the appellant as well as PW2 Opejo Boneface did not witness any dispute over the land when the late Olebe was still alive and it is after his death that the appellant started claiming the land.

The appellant claims the land in dispute on the basis that he inherited it from his late father Peter Olebe who died in 1992; that the church had never occupied the land; that he planted groundnuts and trees between 1996 and 1997 without opposition; that he is not aware of PExhA, the allocation by the district commissioner; and finally that he applied for registration of the land in 1995.

It is not in dispute that the appellant's claim to the land is based on inheritance from his father late Olebe and all his witnesses all agree that the appellant inherited the land from his father.

However, an evaluation of the evidence shows that the disputed land was enjoyed by the church during the lifetime of the appellant's father. Indeed his witness DW3 Ebolu Rashid, a nephew to the appellant, brings another aspect

to the appellant's case when he states that the appellant's father Peter Olebe gave two gardens to the church and two gardens to Koloin primary school.

This seems to suggest that while the land might have originally belonged to the appellant's father, the land has now vested in the church by passage of time and by acquiescence of the appellant's forefathers. The church's existence dates back to 26.6.1929 when the Mill Hill Mission was allocated five acres of land in Koloin in Mukura gombolola. The use of its land by the community with permission of the church dates as far back as 1951 when PW1 Okurut was in Kolin primary school, and 1955 when PW6 Ateka was posted as a teacher to the same school. PW6 testified that himself and other teachers used to cultivate the land with permission of the church authorities. This remained the position during the lifetime of the appellant's father who died in 1992.

The legal principle applicable to this situation where the respondent claims a right enjoyed over a long period of time and which enjoyment is the control over who uses the land implies possession. **Halsbury's laws of England , 4th edition at page 636** states that possession is of two elements. Intention to possess the land and the exercise of control over it to the exclusion of other persons.

In **Buckinghamshire County Council v Moran [1990] Ch.623, CA**, where the defendant was in adverse possession of the disputed land, the court held that

'factual possession signifies an appropriate degree of physical control....the question what constitutes a sufficient degree of exclusive control must depend on the circumstances , in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.'

The respondent having been in control of the disputed land from as far back as 1951 until the appellant laid claim to the land in 1995/1996 is entitled to recover the disputed land now in possession of the appellant.

The trial magistrate therefore arrived at a correct conclusion when he found that the respondent had proved the claim on a balance of probabilities.

With regard to the size of the disputed land, originally, the respondent had claimed four gardens in the pleadings then later changed to six gardens when PW1 Okurut testified. It is on record that HW Ajiji visited the disputed land when the respondent was claiming four gardens.

For the respondent to claim an additional two gardens after filing its claim demonstrates lack of uncertainty on the latter two pieces of land. I therefore find that the respondent is entitled to control only the original four gardens claimed in the pleadings.

Grounds of appeal.

Ground one is that the trial magistrate erred when he held that the suit land was given to the respondent by the district commissioner by way of licence.

Counsel for the appellant submitted that the licence is a temporary document and that the licence was not authentic. A licence is indeed temporary authority but the respondent enjoyed possession uninterrupted long after 1929 until 1995. Therefore the basis of its claim is not just the licence issued in 1929 but also the long quiet enjoyment that vested an equitable interest in the respondent as submitted by counsel for the respondent.

With regard to the size of the land in acres, the respondent's claim was for four gardens and not acres.

I have found above that although the license was for five acres, the respondent showed that it had control over the disputed land for a long period until 1995.

Ground one therefore fails.

Ground two is that the learned magistrate erred in placing heavy reliance on the evidence of Acom PW5. I found that the witness gave evidence that tended to show that she and her family never utilised the land and she was not cross examined by the appellant's advocate. I found no contradiction in her testimony. Ground two fails.

Ground three is that the trial magistrate erred when he failed to consider the contradictions and inconsistencies in the respondent's evidence. Ground four is that the magistrate failed to properly evaluate the evidence. I will consider both grounds together. I found no contradictions in the testimony of respondents' witnesses. What their testimony showed was that it was an accepted fact that the church controlled the land and gave permission to members of the community to utilise. Both grounds fail

Ground five is that the trial magistrate erred when he held that the respondent had never owned the suit land . I think the appellant means to say 'appellant'. I evaluated the evidence and found that the trial magistrate arrived at the correct conclusion that the appellant was a trespasser. Ground five fails.

In the premises, i dismiss the appeal and vary the orders of the lower court as follows:

1. The respondent is the rightful owner of four gardens ascertained in the sketch map presented to court on 14.10.2008.
2. The appellant is directed to vacate the four gardens within two months from date of this judgment.
3. Permanent injunction shall issue restraining the appellant from carrying out any activity on the four gardens.
4. Costs of this appeal and the trial court to the respondent.

DATED AT SOROTI THIS 28TH DAY OF MAY 2014.

HON. LADY JUSTICE. H. WOLAYO