THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL. 20 OF 2008

OGWANG EMIKAYA.....APPELLANT

VERSUS

OMONGIN RICHARD.....RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant through his advocates, Echipu and Co. Advocates appealed the decision of Grade one Magistrate, HW Komakech William dated 26.8.2008 sitting at Katakwi on the following grounds,

1. The learned magistrate erred in law in defying the Limitation Act as the appellant's lineage had been on the suit land for a long period of time.
2. The decision of the learned magistrate is against the overwhelming weight of evidence in favour of the appellant.
3. The learned magistrate gravely erred in failing to revisit the locus that had already been visited by the Land tribunal and thereby could not arrive a t a just judgment as he had no clear picture of the disputed land.
4. The decision has occasioned a miscarriage of justice.

The appellant was represented by Mr. Echipu of Ehipu & Co. advocates while the respondent was represented by Mr. Wegoye of Wegoye & co. Advocates . Both counsel filed written submission that i have given due consideration.

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

After examining the record, I found that the trial court did not visit the locus so I exercised discretion under section 81 of the CPA and allowed additional evidence in form of a visit to the locus which I conducted in person on 15.5.2014 in the presence of both parties and counsel.

The respondent sued the appellant in the Land tribunal for recovery of land measuring twenty gardens located in Obwapesur, Usuk sub-county, Katakwi district. The appellant appears not to have filed a defence because I failed to see any on the record.

The respondent's claim to the disputed land was based on an alleged gift inter vivo executed by Egwang Matias, his maternal grandfather on an unknown date in March 1995. The contents of this document, exhibited before the tribunal as Exh. P1 is far from what the respondent claims. The document has two important aspects.

The first one is that the RC acknowledges that Mathias Egwang called a meeting of the RC and villagemates to show his grandson the respondent , the boundaries of his land as he was growing weak. This begs the question: was the intention of Egwang to confer a gift of land to his grandson?

While the intention might have been to bestow the land, he did not do so expressly because he knew somebody else had laid claim to the land. All he did was to show the respondent the boundaries of the land.

I reproduce the translated version of Pexh.1:

‘ in the month of March in the above named year (1995) Mzei Mathias Egwang called a meeting of RCs and villagemates to witness him show his grandson called Omongin Richard the boundaries of his land as he had grown old and weak.

The RCs and local people moved round the land together with him and passed through boundary of land between Mathias Egwang and Mikaya Ogwang.

After this, we sat under a mango tree called Ebiong and this was at midday and all people in attendance agreed and endorsed this land as that of Mzei Mathias Egwang in the presence of 60 people.

Mikaya Ogwang immediately rose up before chiefs and walked away in protest. The committee confirmed the land as property of Mathias Egwang after it found out that Mikaya Ogwang had no witnesses’.

The second aspect of Exh. P1 is that it is a decision of the RC committee of Obwapesur village on a dispute between Egwang and Ogwang Mikaya over the land Egwang was gifting the respondent.

The respondent’s case is also based on the evidence of a previous decision by the Resistance Committee one court . PW3 Aalet was LC 1 chairman in 1993 when he received a complaint from Egwang , grandfather of the current respondent that he wanted to reclaim his land from the appellant. PW3 summoned the appellant who showed up for the hearing of the case but left shortly when asked to show the land he claimed. The RC committee went round and noted the boundary between Egwang and Abyang, the predecessors in title to the respondent and appellant respectively. From the evidence of PW3, the appellant continued to lay claim to the disputed land even after the RC committee had determined that he had trespassed on Egwang’s land, neither did he appeal the decision of the RC committee. Although the proceedings of the committee were not produced in

evidence as they were destroyed while in the hands of the respondent, the evidence of the LCI Chairman who presided over the proceedings is secondary evidence that Egwang, predecessor in title to the respondent, litigated over the disputed land with the current appellant and secured a decision in his favour.

The other evidence relied on by the respondent is that after 1995 when he was shown the 20 gardens by Egwang, he began using the land until 2003 when he was prevented by the appellant.

The appellant's claim to the land is not quite clear because he does not state how he acquired the land in his testimony. What I get from his testimony is that by 1947, he was old enough to know that Egwang lived in the same neighbourhood as the appellant's father Abyang.

In 1947, his father Abyang took him to school and in 1952, he returned for holidays.

In 1952, a dam was constructed and several people were displaced including Pedo, Atingiro, Etukoit, Ekweer who all moved.

In 1956, his father Abyang died and he remained with his brothers Ilukor, Ariko , Olar Nikanori and Okiror in the land. He retired to Usuk in 1981 after serving as an askari in Local government.

In 1996, the appellant saw the respondent cultivate the homestead from where his grandfather Egwang had been moved out by government and he went to Katakwi to file a case against the respondent for encroaching on ten gardens but was denied the opportunity.

At the locus, I saw the valley dam, a cattle truck forms the western boundary between the dam and the disputed land which is a vast piece of land. On the west of the valley dam is formerly Egwang's land that was lost to the dam. There are mainly shrubs on this unutilised vast expanse of land . Although some open spaces were identified as formerly homesteads, there is no settlement on the entire piece of land. Near the cattle truck, close to the valley dam, both parties were in agreement that Egwang's homestead was located in the area. The eastern boundary is marked with ikumia trees and an anthill and borders the appellant's land that is not in dispute.

Going back to the history of this land, according to PW3, Aalet, LC1 Chairman, Egwang complained to him in 1993 that he wished to reclaim his land from the appellant. By implication, the appellant was in possession before this date and by 1995 when Egwang showed the respondent the boundaries of his land, this land was not under the control of Egwang. By implication, the respondent was gifted land that was in adverse possession by the appellant. The respondent's right to re-claim the disputed land was extinguished long before 1993 when Egwang first attempted to re-claim it, possibly 1952 when the valley dam was constructed. Under section 5 of the Limitation Act,

> ' no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her, or if it first accrued to some person through whom he or she claims..'

Although the respondent stated that he started using the land and was interrupted by the appellant's sons when he was away herding cattle, the appellant states that

when he saw the respondent cultivate Egwang's old homestead in 1996, he reported the matter to the Resistance Committee.

Clearly, the respondent has never been in possession of the disputed land . Instead, it is the appellant who has been in possession.

When the Resistance Committee under the chairmanship of PW3 Aalet decided the case ex parte in favour of Egwang, the appellant ignored their decision and continued possession. That Egwang tried, belatedly, to re-claim the land in 1993 by filing a case in the RC court, was a positive step but it was coming late . According to the appellant, in 1956, his father Abyang died and he remained on the land with his brothers Olar, Okello, Ariko, Ilukot and Inangolet.

The appellant retired from government service in 1981 .

The resolution of this dispute revolves on the principle of adverse possession. If the dam was constructed in 1952 , and Egwang was displaced according to PW 6 Igela Kevina, and he first laid claim to the land in 1993 when he sued the appellant in the RC court, he is caught up by the doctrine of adverse possession.

Because the respondent 's claim to the land is rooted in a title that had long been dispossessed, his claim to the land based on an unclear oral gift of land by Egwang is not tenable.

I am mindful that the trial court had opportunity to observe demeanour of witnesses but my conclusions are based on the evidence on record which goes against the conclusions made by the lower court.

Under these circumstances, and on a balance of probabilities, the trial magistrate ought to have found that the respondent had failed to prove his claim to the land.

Turning to the grounds of appeal.

The first ground is that the trial magistrate erred in defying the Limitation Act as the appellant's lineage had been on the suit land for a long time.

I am in agreement with counsel for the appellant that the appellant has at all times been in possession of the disputed land as evidenced by the attempt by Egwang to dispossess him in 1993 and as testified by the appellant that his family was in possession as far back as 1950s when the valley dam was constructed.

I agree with authorities cited by counsel Wegoye that a possession gained by permission becomes adverse possession if the person remains in possession after the permission has been withdrawn**. Colchester Borough Council v Smith (1991) ch. 448.**

Counsel Wegoye argued that Abyang , father of the appellant was allowed to live on the land by Inangolet, father of Egwang way back on a date that is not clear from the respondent's witnesses. However, the appellant gives the 1940s when he was old enough to know that Egwang lived in the neighbourhood. While it is true that the two families lived side by side in the first part of the (20th century, the situation changed when the valley dam was constructed in 1952 and Egwang was partially displaced giving an opportunity for the appellant's family to gain possession . This family remained in possession until 2003 when litigation commenced.

Counsel Wegoye submitted that the respondent was raising adverse possession on appeal when it was not raised in the trial court. No new evidence is being introduced on appeal as the evidence on record shows the appellant was in adverse

possession for more than 12 years before litigation whether in the RC court in 1993 or before the land tribunal.

Ground one succeeds.

Ground two is that the decision of the trial magistrate is against the weight of evidence. This ground has been dealt with under ground one.

Ground three is that the trial magistrate erred in not revisiting the locus which had already been visited by the tribunal. Earlier in my judgment, I found that the tribunal did not visit the locus. At page 14 of the typed tribunal proceedings on 14.6.2005, the tribunal went to the locus but the tribunal did not inspect the land as witnesses were absent. What appears at pages 15 and 16 are tribunal notes on what to look out for during the locus visit.

On 14.6.2005 ,at page 16, the tribunal chairman records as follows:

'with all fairness the visit to be rescheduled to another date to allow time , not a market day , for the witnesses to attend the tribunal. Both parties agree to this suggestion and the case is therefore adjourned to 11.8.2005 for visiting the locus.'

Therefore the tribunal did not visit the locus and hence my decision to visit the locus which I did on 15.5.2014.

Ground four is that the decision of the trial magistrate occasioned a miscarriage of justice. I have found that the magistrate arrived at a wrong conclusion contrary to the evidence before him.

I accordingly allow the appeal and make the following orders:

1. Judgment and orders of the trial magistrate are set aside.

2. A permanent injunction shall issue restraining the respondent from laying claim or interfering with the quiet enjoyment of the twenty gardens that are decreed to the appellant.

3. Owing to the length of time this dispute has been in the court system, i.e., since 2003, each party to bear its own costs.

DATED AT SOROTI THIS 26TH DAY

OF JUNE 2014.

HON. LADY JUSTICE H. WOLAYO