THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 32 OF 1992

ARISING FROM NGORA CIVIL SUIT NO. 2 OF 2012

EBIJU AUGUSTINE ……APPELLANT

V

1.EKICHU JOHN

2. EPECHU EKUDU MICHAEL……RESPONDENT

BEFORE: HON. LADY JUSTICE H. WOLAYO

JUDGMENT

In this appeal, the appellant appealed the decision of HW Jude Muwone sitting at Ngora dated 31.5.2013 on the following grounds.

1. The trial court erred in law and in fact when it failed to properly evaluate the evidence on record hence coming to a wrong conclusion.
2. The decision of the trial court has occasioned a miscarriage of justice.

Mr. Nyote counsel for the appellant and Ms Kanyeihamba & co advocates 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 arrive at its own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses.

The appellant sued the respondent for illegal occupation of the land which belongs to Ikatekok clan and members of this clan cannot share land with members of Igoria clan. The appellant alleges that the two respondents have used force to trespass on the land using unlawful arrests without court orders. He prayed for general damages for trespass and losses.

The respondents filed a written defence in which they deny the trespass and raised the defence of purchase from one Benard Omuron in 1990 after he had also purchased the land at a public auction vide Civil Suit 164 of 1981 and civil Appeal 117 of 1982. These pleadings were drawn by the parties in person and it was at hearing stage that they engaged advocates.

In the lower court, the following issues were framed:

1. Who is the rightful owner of the suit land?
2. Whether the defendants are trespassers on the suit land?
3. What remedies are available?

Whether Emau, father of the appellant was original owner of the disputed land

An evaluation of the evidence shows that Yokoyasi Emau was the original owner of the land in dispute. He died in 1993 and the appellant was appointed heir. Prior to his death, the defendants entered possession of Emau's land in 1992 and let their sons construct houses on the land amidst protests from Emau. P.ID 2 is a letter from the RC 1 chairman Morukakise parish dated 27.3.1992 addressed to 'to whom it may concern' a confirms that Emau was complaining that Elungu Yuventine and Eritu Basin erected houses on his land.

P.Id. 2 is a letter dated 26.3.1992 from the office of RC 1 chairman Morukakise addressed to the RC 111 chairman Mukura sub-county and raised the same complaint by Emau that Mr. A.Ekudu had instructed his sons to build on another person's land. That Emau complained to local authorities in 1992 is evidence that he did not sit on his rights.

DW1 , Ekichu John , the 1st respondent confirms in his evidence that his son began living on the land in dispute in 1992. It is therefore not disputed that the defendants entered possession of the land in 1992.

Whether the entry into the land by the respondents was lawful.

A close examination of the respondents' case shows that on 15.1.1990, the 1st respondent Ekichu John entered into a sale agreement with one Benard Omuron . According to this witness, the sale was witnessed by his clan relatives, the relatives of Omuron and the LC 1 chairman by the name Nelson Obungu. Dexh. 1 is the sale agreement between the two and a closer scrutiny shows that the said Nelson Obungu did not indicate against his name that he was the RC1 chairman. The document is saved by the stamp of the RC 1 Chairman.

On the flip side of the agreement, the sub county chief of Mukura purports to witness the agreement on 27.2.2008, 18 years after the sale. It is also endorsed by the LC 111 chairperson Mukura on 18.7.2008, 18 years after the sale in 1990. The belated endorsement of the sale by local authorities shows that they did not witness the actual sale.

Also pertinent is the confirmation by DW1 that the neighbours to the land did not witness the sale.

By the time of this sale, Emau was still in possession since both parties concede that the defendants entered the land in 1992. In spite of the fact that the appellant's father was in possession, he did not witness the sale and neither did his sons or clan relatives , a fact confirmed by the appellant in his evidence. I accept the evidence of PW1 Ebilu that his relatives did not witness the sale .

The fact that the sale was not witnesses by neighbours to the land nor the person in possession renders the agreement suspect.

The contents of the sale agreement are that the seller sold 10 acres of land which the seller bought from court broker vide civil suit No. 164 of 1981 and Civil appeal No. 117 of 1982 registered at Mukura and Soroti magistrates courts. The land was sold for 15 cows and 6,300,000/.

Even if it were to be accepted that the sale agreement was valid , the question that arises is whether Omuron had a title to pass. An examination of the proceedings that were tendered in court as civil appeal 117 of 1982 and civil suit 164 of 1981 are questionable in view of the fact that grade two magistrates have never had appellate jurisdiction . This notwithstanding, the fact that they were certified correct renders the proceedings genuine on the face of it.

The suit before the magistrate grade two was by Yokoyasi Emau against Augustine Ekudu and John Ekichu (the 1st respondent) for return of his cattle impounded on 17.5.1977 by the defendants . The plaintiff Emau complained that he had already compensated the defendants after a court case but his 14 head of cattle were not returned. In his judgment delivered on 23.6.1982, the grade two magistrate

entered judgment against the plaintiff Emau in favour of the defendants with costs.

Immediately after reading the judgment, it is recorded that the defendants (the 2nd defendant Augustine Ekudu being father to the 1st defendant John Ekichu) presented their bills of costs. How could they have known they would win the case and therefore came with a prepared bill of costs is the question.

In the lower court, counsel for the appellant cross examined the respondents at length about the legality of this judgment . 1st respondent admitted that the grade two magistrate has no appellate jurisdiction and that there was no appeal to the decision of the grade two magistrate. He admitted he worked in the court, a fact that throws light to this strange judgment and proceedings exhibited as Dexh.3.

However, the fact that these proceedings and judgment were certified as a true copy of the original by another grade two magistrate on 30.8.2012, means they are authentic and must be accepted as a true record of what transpired.

That being the case, I proceed to examine Dexh. 2 a document entitled 'certificate showing ownership of land sold by court'. This document dated 27.4.1983 certifies that ten acres of land were sold to Benard Omuron by court broker vide civil case 164 of 1982 and civil appeal 117 of 1982 to recover a debt of 53,187 that the judgment debtor Emau owed judgment creditors A.Ekudu and John Ekichu .

Going by the judgment in Dexh, 3, this was supposed be recovery of costs awarded to the defendants .

The Third schedule to the Magistrates courts Act contains the civil procedure rules for courts presided over by magistrates grade two . Rule 30 of the third schedule to the magistrates court act gives the procedure for execution by grade two magistrates.

Rule 30(5) provides

‘ where a court broker or any person is directed to execute an order of the court, he or she shall first report to the sub county chief of the area where the judgment debtor ordinarily resides and thereafter the execution of the court’s order shall be done in the presence of the parish chief and two other witnesses from the debtor’s neighborhood.’

Rule 30(6)

The person executing the order shall file in the court a return on the execution bearing signatures of the sub county chief , the parish chief of the area and of the two witnesses to the execution.

Rule (30) 7

The magistrate after certifying himself or herself that the return is proper, shall endorse the return.

Rule 31 (2)

No execution of a court order involving the attachment of the judgment debtor’s immovable or real property or removal of the debtor from the land shall be

carried out except with the prior written consent of the chief magistrate where the property is situate.

Most of the above mandatory provisions of the law were not observed by the court broker who is named as Opolot Jusitne by DW7. The only compliance was with the presence of the sub county chief Robert Aisu DW 7 who signed Dexh.2 . This document is not a substitute for a return by the court broker envisaged in rule 30 (6) which ought to be addressed to the magistrate ordering the sale. In the absence of proof of compliance with the prescribed rules, Dexh. 2 is a mere piece of paper with no evidential value at all.

No valid sale took place by public auction as alleged by the respondent in the absence of proof that area authorities witnessed the sale or that the chief magistrate authorized the sale as required by the rules.

Accordingly, Mr. Benard Omuron the alleged purchaser had no title to pass to the respondents when he entered into a sale agreement for the ten acres on 15.1.1990.

When the respondents entered Emau's land in 1992, they had no legal authority to do so bearing in mind that the title they relied on was non-existent. There are restrictions on judgment creditors buying land belonging to a judgment debtor with whom they litigated except with express permission of the court.

Form 3 of the third schedule is a format for warrant of attachment and sale of property. Conditions of sale in the format stipulate that no bid by or on behalf of the judgment creditor will be accepted nor will any sale to him be valid without express permission of the court.

In the absence of compliance with the mandatory rules regulating execution by grade two magistrates, the defence witnesses who claim to have witnessed the sale by Omuron gave worthless testimony.

Although the two respondents bought the land eight years after the illegal sale to Omuron, they are caught by the rule because the judgment debtor Emau was still in possession as Omuron had never secured possession.

As Omuron had no title to pass to the respondent, it follows that in law they trespassed on the appellant's land in 1992 when they forcefully entered it. Neither are they bona fide purchasers for value without notice in light of my findings.

The trial magistrate therefore erred in holding that the appellant had not proved his case on a balance of probabilities in light of the glaring irregularities in the sale by the court broker, and the judgment that gave rise to the alleged sale .

The trial court visited the locus and found that the respondents had settled on the land in dispute since 1992, which makes a total of 20 years by 2012 when he visited the locus. This a factor I will consider when making final orders.

I now turn to the submissions of counsel on the grounds of appeal.

The two grounds of appeal were argued by both counsel together. I have canvassed most of the issues counsel raise. I am also in agreement with counsel for the respondents that the appellate court should not interfere with findings of fact arrived at by the trial magistrate unless the appellate court comes to a conclusion that the trial court was plainly wrong. I found that the trial magistrate

erred in relying on the invalid sale agreement between Emuron and a court broker; and the questionable judgment by a grade two magistrate's court, in arriving at the conclusion that Emuron had a title to pass to the respondents whereas not.

Counsel for the respondent also submitted that the appellant's counsel should not challenge the admitted exhibits on appeal because he conceded to their admission in the trial court. I find this reasoning flawed because counsel for the appellant challenged the exhibits tendered in court through cross examination of the respondents and their witnesses. Court has discretion in admitting exhibits tendered by both sides and its role is to evaluate that evidence along with oral testimony.

In all , I find that the decision by the lower court occasioned a miscarriage of justice and it is set aside.

In view of the length of time the respondents have been on the land , I make the following orders.

1. The appeal is allowed.
2. General damages of 1,000,000 awarded to the appellant for the trespass.
3. The respondents to remain in possession provided they compensate the appellant for the ten acres at prevailing market rate to be determined by the deputy registrar with assistance of a registered valuer.

4. Should the respondent fail to compensate the appellant within six months from date of this judgment, an order for vacant possession shall issue putting the appellant in possession of the ten acres of land.

5. Costs of this appeal and the trial court to the appellant.

DATED AT SOROTI THIS 11TH DAY OF JULY 2014.

HON. LADY JUSTICE H. WOLAYO