

IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 36 OF 2010

(ARISING FROM KUMI CIVIL SUIT NO. 80 OF 2004)

1. OMONG HARUNA

2. ALASA AUGUSTINE (IN PLACE OF ETUSU LAZARO)

.....APPELLANTS

V

OSIRE JOHN.....RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellants, through Ogire & co advocates appealed the judgment of HW Opio Belmos Ogwang magistrate grade one sitting at Kumi. From the original court record, judgment was delivered on 22.9.2010.

Both counsel were required to file written submissions but only counsel Opio Philip for the respondent complied.

It is trite that the duty of the first appellate court is to re-appraise the evidence adduced in the lower court and arrive at its own conclusion on issues of fact and the law.

In 2004 ,the respondent sued the appellants in the Land tribunal for recovery of his late father's land measuring seven acres located in Omerein ,Mukongoro, Kumi district. I have carefully evaluated the evidence on record and arrived at the following conclusions.

The respondent's case presented through his witnesses is that he is son and customary heir of his late father Emmanuel Tukei. According to PW2 Annariko , her father Lareti Ariebi owned seven gardens and on his death, Tueki Emmanuel was appointed heir as Ariebi had no male children. Ariebi was paternal uncle to Tukei. It was the evidence of PW2 Annariko that after Ariebi's death, there was a dispute between Tukei on the one hand, and Orikodi and Musei in Kanyum magistrate's court.

It is Annariko who brings out the fact that the 1st appellant was cultivating four gardens while the 2nd respondent cultivated three gardens. This witness complains that the respondent became customary heir to the land without consultation with the four daughters of Ariebe including herself.

Another dimension to the respondent's case is presented by PW3 Rev. Yason Okia is that three gardens were cultivated by Osako, a brother to Ariebe while the latter cultivated four gardens to the left side of the road.

On the death of Osako, Ariebe took over the three gardens . According to PW3 Okia, Osako had only daughters .

Like PW2, PW3 comments that the respondent bases his claim to the seven gardens by inheritance as son of Tukei who was appointed customary heir of Ariebe. The witness also recalls a land dispute between Tukei on the one hand and Opado Juma and Arikodi on the other hand.

An examination of the typed record at page 5 shows that the cross examination is of the respondent and not PW4. The only evidence worth noting in this part of the record is that the respondent's father died in 1989 and that at the time, there was a subsisting dispute over the land. According to PW1 the respondent, his father Tukei was killed during insurgency and the family fled the area only to return in 1998.

From my analysis, the respondent has never been in possession of the suit land and prior to his appointment as heir, his late father was litigating over the same land.

Furthermore, apart from the witnesses emphasis on Osako as brother of Ariebe, there is no mention of their father or mother or their other brothers. Indeed, Tukei's father is not named anywhere which lends credence to my conclusion that the two Ariebe and Osako may not be closely related and therefore the assertion that Tukei was heir to two persons, highly unlikely.

PW2 Annariko states that her father produced only daughters while PW3 names Osako as the person who produced only daughters which suggests that Osako was her father and not Ariebe who also had no sons . This confusion between Osako and Ariebe's children is further

compounded by the insistence by respondent's witnesses that Tukei was heir to two persons , which as I have said is highly unlikely.

The fact that the respondent's father had a dispute over the suit land is a relevant factor because it suggests he took over a disputed estate and in fact has never been in possession.

With respect to the defence case, the 1st respondent Omong who was 40 years old when he testified bases his claim to the land on the case in Kanyum court between Tukei and Opado Juma his father who litigated over four gardens. According to DW1 Omong, his father got the land from court in 1994 and the witness has a home on the suit land.

With respect to the 2nd appellant, who was eighty years old when he testified, his father Oriada invited one Opio to the land measuring three acres and on Opio's death, Osako was chosen as guardian because Opio had only daughters. According to this witness, when Osako's wife died, he moved to Bulasio's home to live with the widow there and when he left, he handed the three acres to Arikod, brother to the 2nd respondent.

According to DW2, Ariebi paternal uncle of the respondent was on Musei's land. PW2 Annariko made reference to Musei as someone Tukei litigated with.

From my analysis of the defense case, three gardens that the respondent said originally belonged to Osako are claimed by the 2nd appellant who narrates how Osako came to be on the land. It seems Osako left the land that had been given to him by Oriada father of the 2nd appellant which then reverted to Arikod brother of the 2nd appellant.

With respect to land claimed to initially belong to Ariebi according to the respondent, I find that this land is traced to Opado Juma father of Omong the 1st appellant who has a home on this part of the suit land.

I find that the respondent's claim to the seven gardens is premised on shaky grounds. Firstly, the claims that his father inherited land from two persons is highly unlikely more so when the brother relationship between the Ariabi and Osako is vague and when Tukei is a paternal nephew to Ariebi only. This means, the respondent's claim that he is customary heir to Tukei and therefore to Osako and Ariebi becomes even more unlikely.

Even if it is accepted that he is customary heir to the two persons, how the two acquired the seven acres individually is not clear. It is not clear if the two inherited land from their ancestors or they were settlers on the land as is apparent from appellants' case.

DW3 Odong , clan leader confirmed to the court that in 2000 when he took leadership of the clan, he found when the families of the 1st and 2nd appellant were on the suit land and they continued to remain there in 2007 when he testified. According to the witness, when he received an unrelated complaint, he went round the land and the respondent did not make any claim. This witness struck the tribunal as very credible. (page 11 of typed proceedings).

Counsel for the respondent argued that Opado Juma informed a meeting called to appoint Tukei as heir to Ariebe, that he had no complaint. Opado was father of the 1st appellant. This evidence means that Opado had no objection to Tukei's appointment as heir and nothing more because the two later on litigated in court over the part of the suit land.

Counsel further submitted that the appellants' failure to challenge the testimonies of various witnesses as adverse to their case. He cited **Uganda v Sabuni 1981 HCB 1** in support. In that case, the court held that such conduct may lead to an adverse inference but on condition that it is not assailed as inherently incredible or probably untrue. I find that although the appellants did not cross examine witnesses at length, the respondent's case was not convincing .

Counsel also dwelt on the lack of evidence to prove a prior dispute between the parties.

The trial magistrate discounted evidence of a prior dispute because there was no proof . However, the parties did not claim the case was resolved rather they both claimed the case was never concluded due to insurgency. By discounting this evidence, the trial magistrate did not address himself to the real controversy that predates the current parties and goes back to Tukei and Opado ,the fathers of the respondent and 1st appellant ,and Arikod brother of the 2nd appellant.

Having found that the version of how Ariebe and Osako acquired land is wanting and having believed the version of the appellants on how Osako acquired land and the fact that he was invited by Oriada father of the 2nd respondent but later left the land prior to his death, and having found that the 1st appellant has been in possession of the land the respondent claims belonged to Ariebe, I find that the respondent failed to prove his case to the required standard in civil cases. I

further find that it is more probable than not that the appellants' claim to the suit land is legitimate.

The trial magistrate therefore did not properly evaluate the evidence hence arriving at a wrong conclusion.

I now turn to the grounds of appeal.

Ground one

The trial magistrate erred in law and in fact when he failed to properly evaluate the evidence

Ground two

The decision has occasioned a miscarriage of justice.

I have found that the trial magistrate did not properly evaluate the evidence thereby arriving at a wrong conclusion.

This therefore occasioned a miscarriage of justice.

I accordingly allow the appeal and make the following orders:

1. The judgment and orders of the lower court are set aside
2. Four gardens on one side of the road are decreed to belong to the 1st appellant
3. Three gardens on the other side of the road are decreed to belong to the 2nd appellant.
4. A permanent injunction shall issue restraining the respondent or his agents or successors in title from interfering with the appellants' quiet enjoyment of the land decreed to them.
5. Costs of this appeal and the lower court to the appellants.

DATED AT SOROTI THIS 9TH DAY OF NOVEMBER 2015.

HON. LADY JUSTICE H. WOLAYO

