IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 16 of 2013

ARISING FROM KUMI CIVIL SUIT NO. 1 OF 2009

1. **ATUTUR SUB COUNTY**
2. **KUMI DISTRICT LAND BOARD**
3. **KUMI DISTRICT LOCAL GOVERNMENT**
4. **ATTORNEY GENERAL.....APPELLANTS**

V

IKURET JOHN PETER.....RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

The appellants through their advocates, Attorney General's Chambers appealed the judgment of HW Opio Belmos Ogwang Grade one magistrate dated 28th February 2013 sitting at Kumi on twelve grounds of appeal that i will revert to later in the judgment.

Both Mr. Eric Lumbe and Ms. Omongole & Co. Advocates for the appellants and respondent respectively filed written submissions that i have carefully considered.

The duty of the first appellate court is to re-evaluate the evidence and arrive at its own conclusion bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses. In doing so, the court renders its own decision on issues of fact and law.

In **Fr. Narcensio Begumisa v Eric Tibegaga, SCCA 17 of 2002,** it was held that

> *' it is now a well settled principle that on first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as law.'*

The respondent sued the appellants for declaratory orders that

a) the respondent is the rightful owner of the land comprised in Atutur sub-county

b) the respondent is entitled to compensation at current market value for the land taken by government of Uganda and 3rd defendant and allocated to the 1st defendant, Atutur secondary school, Augustine Okello, Olupot, Kerement Muron and others.

c) A declaration that the respondent is entitled to damages for the long suffering caused .

d) Costs.

The respondent averred that the land in dispute was inherited from his late mother Benadeta Isiaga who in turn inherited it from her late father Okwang. The respondent avers that he was illegally deprived of the land measuring 100 acres by the government in the 1950s for the benefit of the defendants and also allocated part of it to Occella, Olupot, and Muron for construction of the residence of the parish chief.

The respondent further averred that at the time the land was compulsorily acquired by the government, the 1967 Constitution, Land Acquisition Act and the Public Lands Act provided for compensation which the defendants refused, neglected and failed to pay.

The respondent further averred that although the land was acquired for public purpose, it is not being utilised for the same but rather for personal use.

He concluded that he had suffered loss of income, as the land was the main source of income.

In their defence, the defendants denied that the respondent has a cause of action and pleaded the Limitation Act Cap 80 .

The defendants denied the respondent's claim and pleaded that the land in question was acquired by the colonial government before the birth of Benadeta Isiaga .

At the trial , five issues were framed.

1. Whether the respondent has a cause of action

2. Whether the respondent is the rightful owner of the disputed land

3. Whether the respondent is entitled to compensation

4. Whether the respondent is entitled to damages for deprivation of the suit land

5. Remedies.

The respondent's case was that his late mother Benadeta Isiaga inherited from her father Okwakol 60 gardens equivalent to 120 acres situated near Atutur secondary school. According to the respondent who testified as PW1 , the school is located on part of the disputed land while he lives on the part not occupied by the school.

His evidence was that in 1948 , Gombolola police beat up his grandfather Okwakol , for refusing to leave land the government wished to acquire. That later, the home of the parish chief was constructed in the suit land but the government did not compensate Okwakol. That as a result of the acquisition, the Okwakol's family remained with five gardens where the family now lives.

According to the witness, more land was annexed by the government and allocated to Okwii's people and that in 1985, his late mother Benadeta sued four people Olupot, Ocella, Ikeremet, and Emuron , who were given land by the government which case she won. A judgment was exhibited as Plaintiff's ID. 1.

The respondent's evidence further is that in 2005, he wrote to the Board of Governors Atutur Secondary school about the acquisition.

An evaluation of the respondent's evidence shows that he was eight years old in 1948 when the government allegedly beat his grandfather Okwakol for resisting government acquisition of the land. In cross examination, the respondent testified that it was Okwii's people who beat up his grandfather in 1948 and that between 1948 and 2003, it was the parish chief who utilized the land .

According to the respondent Atutur secondary school was built in 2003.

With regard to the 1986 suit, the evidence of the respondent is that the subject matter of that suit is the same as subject matter of the current case.

His evidence further was that his late mother did not sue the government because she was threatened by the parish chief.

PW2 John Wiliam Adito aged 69 years who was nine years old at the time, testified that gombolola police destroyed Benadeta' s house in 1948 and the government sub divided her land .

PW3 Okwii Cosmas aged 96 years also supported respondent's claims. According to this witness, the government needed land for a park so in 1948, it pushed Isiaga, Okwakol, and Etyang off the land. Two other witnesses, PW4 Faustino Okurut and PW5 Akol Michael repeated the same evidence.

In summary, the appellants' case presented through six witnesses was that the land was acquired in the 1920s by government and that Okwakol never lived on the suit land. This was according to DW1 Muhammed Opedun born in 1935.

DW3 Etoori's testimony is that he is aged 63 years and that the respondent's grandfather was not on the land when the government acquired it. And neither was there objection from the respondent when Atutur secondary school was constructed in 1997. DW4 Okwii and DW5 Aloikin John testified that the government was offered the suit land by elders in 1948 and most of them are alive.

This notwithstanding, the respondent 's claim is based on his grandfather Okwakol's title to the suit land. While the respondent testified that his grandfather was beaten for resisting government acquisition of the land in 1948, PW2 John William Adito testified that it was Benadeta's house that was destroyed in 1948 . The memory lapses are understandable given that witnesses testify to events that happened when they were very young children .

What emerges from the evidence is that in 1948 to 1950, government laid claim to the land now in dispute. This implies two things.

1) It was already gazetted as public land for public use and

2) the respondent's ancestors never occupied 100 acres as alleged and therefore the respondent is making wild claims.

I am inclined to the conclusion that the land was possibly alienated in 1925 or thereabouts when the colonial government gazetted districts, townships and sub counties throughout the colony.

Therefore , in 1948 when Okwakol or Benadeta were harassed, the land was already gazetted as public land.

It is not clear whether Okwakol owned 100 acres of land. I have studied Dexh.1 which are proceedings and judgment of a grade two magistrate in Kumi civil suit No.33 of 1986. The respondent sought to rely on these proceedings to prove that his late mother owned 100 acres of land. In this case, Benadeta sued Ocella, Olupot and Emuron for recovery of nine acres of land they occupied after the three were thrown off government land in 1950. Judgment was in her favour.

This case shows that government land was in existence in 1950 when the respondent's ancestors were allegedly evicted . I observe that Benadeta's testimony is conspicuously missing from the proceedings . Her testimony in the case under reference would have assisted the trial magistrate or the appeal court in arriving at the veracity of the respondent's claim. It is noteworthy that she did not sue the government in 1986 but rather three individuals for recovery of nine acres.

Indeed DW 4Okwii was emphatic that the suit land in the 1986 case is different from the land being claimed by the respondent which means the government's control of the suit land was not in dispute in 1986.

I find that the trial magistrate wrongly concluded that the respondent's ancestors owned 100 acres of land in 1950 and that they were deprived of it by the colonial government. I am mindful that the appellate court should not overturn a finding of fact unless the trial court was plainly wrong.

In this case, i have carefully re-appraised the evidence and find that the respondent did not prove to the required standard that his ancestors owned 100 acres of land in 1950 and that they were dispossessed by the government. It was not enough to assert that his late mother Benadeta inherited land from Okwakol or that they were dispossessed.

I now turn to the grounds of appeal.

I note that the appellant formulated twelve repetitive grounds of appeal which is unacceptable and contrary to Order 43 r 1 of the CPR. I will therefore summarise these grounds as follows:

1. The trial magistrate erred in law when he found that the respondent had a cause of action.

2. The trial magistrate erred in law when he failed to find that the suit was time barred.

3. The trial magistrate erred in law and in fact and misdirected himself when he failed to find that the respondent had no locus to bring the suit for recognisance and or a declaration that he is the rightful owner of the suit land.

4. The trial magistrate erred when he found that the respondent's constitutional right to property was violated.

5. The trial magistrate misdirected himself when he found that the suit land was compulsorily acquired by government without compensation.

6. The trial magistrate misdirected himself when he awarded general damages of 20m to the respondent.

Ground one : the trial magistrate erred in law when he found that the respondent had a cause of action.

Ground two: The trial magistrate erred in law when he failed to find

that the suit was time barred.

Ground three : The trial magistrate erred when he found that the

respondent's constitutional right to property was violated.

These three grounds will be handled together because they are inter related.

Counsel for the respondent submitted that section 5 of the Limitation Act relied upon by counsel for the appellants , does not apply to this case for the reason that the respondent brought a suit for a declaratory order that he is the rightful owner of the suit land inherited from Benadeta and Okwakol. Counsel makes a distinction between a suit for recovery of land and a suit for declaratory orders. Counsel's reasoning is that the latter orders are not caught by the statute of limitation.

My analysis of the respondent's case is that while in the plaint, he prays for a declaration that he is the rightful owner of the suit land or compensation in lieu , in his evidence, he asks for recovery of land or compensation. This notwithstanding, the head note of the Limitation Act clearly states :

> *'An Act to provide for limitation of certain actions and arbitration and for matters incidental thereto and connected therewith'*

Section 1(1) (a) defines an action to include any proceeding in court.

Consequently , whether the respondent sued for recovery of land or for a declaration that he is the rightful owner, it remains an action within the meaning of section 1 (1) (a) the Limitation Act.

Section 5 provides that no action shall be brought to recover land after the expiration of twelve years from the date on which the right to action accrues.

I found as a fact that the respondent's claim is premised on his late mother and grandfather's title. It is not clear when both ancestors died but what is clear is that it was in 1948-50 when the two were allegedly dispossessed. For nearly half a century, no action was brought to assert ownership or for recovery. The respondent attempted to plead that his mother was threatened by parish chiefs which explains her failure to bring an action . I find this a lame excuse for the failure to act to recover such a vast piece of land.

I agree with the counsel for the appellants' submissions that the suit was time barred.

With regard to whether the respondent had a cause of action, counsel for the respondent rightly cited the elements of a cause of action: that a plaintiff had a right that had been violated and the defendant is liable.

However, it is not enough to assert a right and that it had been violated. It must also be an enforceable right in law. The fact that the action is time barred means the respondent had no right enforceable in law and therefore no cause of action.

Counsel for the respondent's submitted that the respondent sought relief for violation of his constitutional rights under the 1967 Constitution and 1995 Constitution and therefore he was not barred by the Limitation Act.

Firstly, the respondent did not bring the suit under article 50 of the Constitution. Secondly, in this instance , the right to property would be protected where ownership is proved conclusively which is not the case.

Thirdly, interpreting different constitutions and whether statutes are inconsistent with those constitutions is the preserve of the Constitutional Court. Suffice it to say, there was no breach of the respondent's right to property because the property did not exist in 1950 as alleged.

Ground four : the trial magistrate erred in law and in fact and misdirected himself when he failed to find that the respondent had no locus to bring the suit for recognisance and or a declaration that he is the rightful owner of the suit land.

Counsel for the respondent further submitted that section 3(1) (b) of the Limitation Act is does not apply to the respondent's suit for declaratory orders. This submission is in relation

to the appellants' ground of appeal that the trial magistrate erred when he failed to find that the respondent had no right to bring a suit for recognisance. A recognisance as counsel for respondent explains,

is an obligation before court whereby the recognisor recognises that he will do some act required by law.

There being no recognisance being sought, i find this ground of appeal superfluous and it is struck out.

As to whether the respondent had locus to sue, the fact that he is a descendant of Benadeta and Okwakol from whom he would have derived title had the claim been genuine, means he had the locus to sue.

Ground five: The trial magistrate misdirected himself when he found that the suit land was compulsorily acquired by government without compensation.

I have found that the respondent failed to prove that his ancestors owned land that was compulsorily acquired by government . Consequently, the issue of compensation could not arise. This ground succeeds.

Ground six: The trial magistrate misdirected himself when he awarded general damages of 20m to the respondent.

There was no basis to award any general damages to the respondent who not only lacked a cause of action in law but who also suffered nothing as the right he claimed to assert was baseless. This ground of appeal succeeds.

In summary, i allow this appeal, set aside the judgment and orders of the lower court and award costs to the appellants both in this court and the court below.

DATED AT SOROTI THIS 9TH DAY OF NOVEMBER 2015.

HON. LADY JUSTICE H. WOLAYO