

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT GULU
HCT-02- CV-CA – 0001 – 2015

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WILOBO PEYOT ALFRED :::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

10 OTTO LUCY :::::::::::::::::::::::::::::::::::RESPONDENT

JUDGEMENT OF HON. LADY JUSTICE MARGARET MUTONYI J

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1. Wilobopeyot Alfred hereinafter referred to as the Appellant being dissatisfied with the decision of His Worship Irene Akello Magistrate Grade One Kitgum then delivered on 27/11/2014 in favour of Otto Lucy the Resp`ondent appealed to this court on the following grounds

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- (1) That the trial Magistrate erred in law and fact when she dismissed the plaintiff's case.
- (2) That the trial Magistrate failed to evaluate the evidence before her, thereby reaching a wrong decision.

The Appellant prayed that (1) the appeal be allowed and (2) Judgment of the Lower court be set aside.

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- (3) That the appellant be declared the owner of the suit land, be awarded general damages of shs.6,000,000, and court issues a permanent injunction against the Respondent, her agents, workmen, interest on general damages from the date of judgment until payment in full, vacant possession and costs of the suit both at the high court and lower court.

30 Counsel Ocorobiya Lloyd of Ocorobiya & Co. Advocates represented the Appellant while the Respondent was unrepresented by Counsel. She represented herself.

2. Brief Background

35 The brief background of this case is that the Appellant was the custody owner of the land in dispute measuring 15m x 30 meters having inherited from his late father who also inherited from his father. The Appellant inherited it in 1987. This land is situated at Gangdyang village, Kitgum Town Council. He was using the land for cultivation. The Respondent according to the Appellant trespassed on this land in 2009 by constructing on it a house and uprooting his sweet potatoes. The Respondent claimed she was allocated
40 land by Kitgum District land Board.

The issues that were framed for courts resolution were the following.

1. Whether or not the plaintiff is a customary/lawful owner of the suit land.
2. Whether or not the defendant has trespassed on the suit land
3. What remedies were available?

45 The above issues were all resolved infavour of the Respondent hence this appeal.

3. The duty of the first appellate court is now well settled. It is to review challenged and questioned findings rendered by the lower court and subject them to a judicial review for legal sufficiency. This entails the appraisal of the evidence on record and the law
50 applicable to enable the court come to its own conclusion bearing in mind that it did not have the opportunity to see and assess the demeanour of the witnesses thought.

I have read through the evidence and the judgment of the lower court. The main issue of contention was ownership of the land.

The Appellant claims customary ownership while the Respondent claims she was
55 allocated the land by Kitgum District Land Board.

4. Both parties filed written submissions and I have taken them into consideration while writing the judgment.

60 The main issue for court's opinion is whether the trial Magistrate erred in law and fact when she dismissed the appellant's case. Once this ground is resolved, the second one would have been resolved as well because the decision to dismiss was as a result of evaluation of evidence.

65 5. **RESOLUTION OF THE GROUNDS**

It is trite law that the burden of proof rests on the person who alleges the existence of facts. This is based on the law of evidence also known as the rules of evidence.

It encompasses the rules and legal principles that govern the proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the trial court, before reaching its decision and sometimes, the weight that may be given to that evidence. The law evidence is also concerned with the quantum, quality and type of proof needed to prevails in litigation.

70 The quantum of evidence is the amount of evidence needed; while the quality of proof is how reliable such evidence should be considered.

75 Important rules that govern admissibility concern hearsay, authentication, relevance, privilege, kind of witnesses, opinions, expert testimony, identification and rules of physical evidence.

There are various standards of evidence showing how strong the evidence must be to meet the legal burden of proof in a given situation ranging from reasonable suspicion, to preponderance of the evidence, clear and convincing evidence or in the case of criminal cases, beyond a reasonable doubt.

80 When a dispute whether relating to a criminal or civil matter reaches the court, there will always be a number of issues which is party will have to prove in order to persuade the court to find in his or her favour.

85 The trial court must ensure that the evidence presented is credible enough to be regarded as trustworthy.

Hearsay evidence is not admissible at any one time.

90 With the above in mind, the court has to establish whether the plaintiff enjoyed a right which has been violated.

In the instant case the plaintiff claimed customary ownership of the land in dispute. The defendant now Respondent claimed she was allocated the land by Kitgum District Land Board. The issue was who of the two. The Appellant/plaintiff and Kitgum District Local Government owned the land at the time it was allocated to the Respondent/Defendant. In 95 2005 Article 26(1) of the 1995 Constitution of the Republic of Uganda provides that “Every person has a right to own property either individually or in association with others (2) No person shall be compulsorily deprived of property or any interest in or over 100 property of an description except where the following conditions are satisfied.

(a) The taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health.

(b) The compulsory taking of possession or acquisition of property is made under a law 105 which makes provision for

(i) prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property and

(ii) a right of access to a court of law by any person who has on interest or right over the property” 110

Further to the above, the constitution provides for land ownership in Uganda under Article 237 (1) “Land in Uganda belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure systems provided for in this constitution.

(2) The Government or a local Government may, subject to article 26 of this Constitution 115 acquire land in the public interest and the conditions governing such acquisitions shall be as prescribed by Parliament.....

(3) Land in Uganda shall be owned in accordance with the following land tenure system

(a) Customary (b) freehold (c) Mailo and (d) Leasehold.

120 (4) On the coming into force of this constitution (a) all Ugandans Citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament and (b) Land under customary tenure may be converted to freehold land ownership by registration.

125 5. Any lease which was granted to a Uganda Citizen out of public land may be converted into a freehold in accordance with the law which shall be made by parliament.

130 6. For the purposes of clause (5) of this article, “Public land” includes statutory leases to urban authorities.

7. Parliament shall make laws to enable urban authorities to enforce and to implement planning and development”

135 Indeed to operationilise the above provisions of the constitution, parliament passed. The Act Cap.227 in 1998.

S. 2 of the Land Act provides that “ subject to article 237 of the constitution, all land in Uganda shall vest in the citizen of Uganda and shall be owned in accordance with the following land tenure system

140 (a) Customary (b) Freehold, (c) Mailo and (d) Leasehold and S.3(1) provides for incidents of forms of customary tenure.

Article 5 (2) C provides for Districts in Uganda and its promulgation Kitgum District was number 26 under the 1st schedule of the constitution. Kitgum was therefore a local Government. Under section 42 of the Land Act, the Government or Local Government may acquire land in 145 accordance with articles 26 and 237 (2) of the Constitution.

The Government or Local Government can therefore acquire land subject to compliance with the provisions of the constitution which vested all land in Uganda in its citizens. Compensation of

land so acquired is not only statutory but constitutional and failure to do so amounts to breach of
150 a constitutional right of the land owner.

According to the evidence on record in the lower court, PW1 and PW2 informed court that the
eland belonged to the plaintiff/appellant which land was owned under customary land tenure.
The makers of the 1995 constitution appreciated the fact that most of the land tenure system in
155 most parts of Uganda, Acholi Region inclusive was customary.

In her defence the Defence stated she was allocated the land in 2005 by Kitgum Town Council
Kitgum Town is a Local Government which an acquire land by compensation of the customary
owners.

160 Unless it owned that land in dispute by 1995.

An area can be gazette to be a Town Council or city with specific area coverage but that does
not mean that the customary owners of that Land cease to be owners. According to the provisions
of the constitution and the land act cited above, the Local Government can only acquire by way
of paying fair and adequate compensation. This is because, a Town Council or municipality or
165 city entails new planning and development structures.

It entails opening up of roads and construction of offices. Hence the need to acquire land for that
purpose.

Certain areas may be restrictive usage such as industrial, residential or commercial. The
customary owners who cannot afford to rise to the new standard may have no option but give up
170 their proprietary rights to the local Government albeit after adequate compensation.

DW2 DW3 DW4 all told court that the land in dispute is in Gangdyang and it was former farm
land that was previously for some individuals. That however during Amin's Government, the
said land was identified and the sitting tenants were compensated and it became the Government
175 Land, surveyed and registered as government property that was relocated to Kitgum District.

That in turn the District resolved that the land should be reallocated to the public to develop
instead of its continuous use as prison farm land.

DW2 Wany Ojok David, who was the Secretary Kitgum District Land Board, DW3 Wokorach
180 Michael, the accounting officer Kitgum District Council and DW4 Mathew Otto, the District
Land Officer of Kitgum Local Government all testified in defence of the respondent. They
confirmed that they allocated the land to the respondent.

However none of them confirmed that the land in dispute belongs to Kitgum Local Government.
185 The witnesses all agreed that the land belonged to residents of Ganydyang. The issue of
compensation during Amin's regime was mere hearsay evidence. The issue of land being the
property of Kitgum Local Government was also hearsay. With due respect to the learned
magistrate, she did not have evidence before her that proved on the balance of probabilities that
the land in dispute was not customary land or was once customary land but ceased to be after the
190 customary owners were compensated.

The appellant to the contrary proved that in 1995, he was lawfully on that land. By the time the
Respondent was allocated the plot, he was on that land as the customary owner.

It is common knowledge that trading centres have developed and become Townships and
195 Townships have been elevated to Municipalities and Municipalities will be elevated to cities.
This is in accordance with the provisions of the 1995.

However, unlike the land Reform Decree of 3/1975 and the Public Land Act, 1969, which have
been repealed, land was vested in the citizens of the Republic of Uganda.

The District Officials did not help the Court by adducing evidence showing the relevant
200 documentary evidence on how they acquired land in Gangdyang where the Appellants land is
situated. There was no evidence of compensation and no evidence that the land was Prisons
Farm Land and therefore belonged to Government in 1995. There was no evidence that
Gangdyang was gazette as farming part of Kitgum Town Council by 1995. It was very
important to know the boundaries of the Town Council as at 1995 and how it acquired the land.

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In resolving the issue of whether the Plaintiff/Appellant now is the customary lawful owner of
the suit land, the trial Magistrate needed to establish whether he was illegally cultivating there
his sweet potatoes or whether he owned the land. If the Defendant was allocated the land, which

according to the evidence was done by the District Local Government, i.e. District Land Board,
210 was the Land for the District? Was he compensated in accordance with the law at the time the
land was purportedly acquired? All the above questions were not resolved and she had no basis
for dismissing the Plaintiff's case. In civil matters the burden of proof is not like in criminal
matters where it rests on the prosecution. The burden of proof rests on that person who alleges
the existence of a fact (S.101 (10 and (2) of the Evidence Act refers).

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This case also presents a very important issue of the right parties to the suit. Counsel for the
Appellant should have advised the Appellant to join Kitgum Local Government as a party to the
suit. No wonder all the References witnesses were officers for Kitgum Local Government. None
of them was tasked to explain to Court how the District Land Board acquired land formerly
220 belonging to the Appellants grandfather which was inherited by his father and then the plaintiff.

There is ample evidence on record showing that the land in dispute was customarily owned by
the family of the Plaintiff now Appellant. There is however no evidence that Kitgum District
Local Government acquired proprietary Rights over the land using lawful means.
225 Evidence of acquisition by Amin's Government and compensation is hearsay evidence which is
not admissible in law.

The respondent in her submissions relied on the none existent law which was repealed in 1998.
Her acquisition of land was in 2005 where the Local Government had to follow the prevailing
230 law which is the 1995 Constitution and the Land Act 1998 when dealing with land belonging to
Citizens of Uganda.

In view of the above this Court is of the view that the trial Magistrate failed to evaluate the
evidence and erred in law and fact by not applying the law to the evidence thereby arriving at a
235 wrong decision.

The land in dispute belongs to the Appellant who holds it under the recognized Customary Land
Tenure System.

In the result the Appeal is allowed and judgment of the Lower Court is set aside with no order as
240 to damages because the Appellant did not sue Kitgum Local Government which allocated the
land to the Respondent. She did not trespass into the land by herself.

In the same light costs of this Appeal would have been awarded to the Appellant, but the Right
party to pay costs would have been Kitgum Local Government which was not sued. Each party
245 should therefore meet its own costs.

I so order.

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Margaret Mutonyi

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Judge

26/5/2016.

Right of Appeal explained.

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24/6/2016

Judgment delivered in the presence of Ocorobiya Lloyd for the appellant.

Agnes Court Clerk.

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Henry Twinomuhwezi

Assistant Registrar.

24/6/2016