

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
CIVIL APPEAL NO. 54 OF 2017

(Arising from Bukwo Civil Suit No.10 of 2017)

1. MUSOBO ARAPSOMIKWO

2. ARAPSOMIKWO MARICH ::: APPELLANTS

VERSUS

SATYA KABUTAKI CHRISTOPHER ::: RESPONDENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

- [1] This is an appeal from the judgment and orders of **H/W Opio James**, Magistrate Grade 1 Mbale Chief Magistrate's court at Bukwo, delivered on the 5th of May 2017.
- [2] The facts of the appeal are that the Respondent filed **C.S.No.10 of 2017** against the Appellants/defendants jointly and severally for among others, a declaration that he is lawful owner of the suit land measuring 30 acres and that the sale of the portion of the suit land to other people was illegal, recovery of the encroached upon land measuring approximately 10 acres, a permanent injunction against the Appellants/defendants and costs of the suit.
- [3] It is the plaintiff's case that the land in question was customarily acquired by his grandfather **Kabutaki Kwalia** in 1927 and was inherited by his father **Kabutaki Ndiema** who died in 1990 and left the suit land to his 2 sons, the plaintiff and **Muigei Joseph**, who have utilized the suit land until of recent in 2012 when the 1st and 2nd defendants encroached on land measuring approximately 10 acres without the consent or knowledge of the plaintiff and fraudulently sold part of the land to other people.

- [4] The defendant/Appellants on the other hand denied the plaintiff's allegations and argued that they are the lawful owners of the suit land, and were in occupation and use of the same until the displacement by the insecurity (of the Pokot and Sabiny war) but thereafter, resumed occupation and use of the same unchallenged until the plaintiff's/Respondent's claim.
- [5] The suit was fully heard and upon evaluation of the evidence before him, the trial Magistrate found that the plaintiff family were rather of the area where the suit land is situate and on the other hand, the defendants had no known settlement of the relatives in the area thus concluded that they were merely temporary immigrants who came from **Lositit**, where they had their land and as a result he decided in favour of the plaintiff/Respondent.
- [6] The defendants/Appellants were dissatisfied with the decision/judgment and orders of the trial Magistrate and being aggrieved, they filed the instant appeal on 3 grounds as contained in the memorandum of appeal:
- 1. That the learned trial Magistrate Grade 1 in passing judgment did not properly evaluate the whole evidence on record.*
 - 2. That the learned trial Magistrate Grade 1 erred in law and fact when he did not take into consideration of the facts and circumstances proved and or admitted.*
 - 3. That the decision of the learned trial Magistrate Grade 1 occasioned a miscarriage of justice.*

Counsel legal representation

- [7] On appeal, the Appellants were represented by Counsel **Wakosese of Wakosese Advocates, Mbale** while the Respondent was represented by **Counsel Nyote of Nyote & Co**

Advocates, Mbale. Both counsel filed written submissions as permitted by this court.

Duty of the 1st Appellate court

- [8] As this appeal is arising from the Grade 1 Magistrate Bukwo, this court as a 1st appellate court has the legal duty to judiciously scrutinize, evaluate the evidence on record and come up with its own conclusions of fact bearing in mind that it did not have the opportunity to see or hear the witnesses at trial as it determines this appeal; **KIFAMUNTE HENRY Vs UGANDA S.C.C.A No.10 of 1997.**

Counsel submission and resolution of the grounds of appeal

- [9] Both counsel submitted and argued all the 3 grounds together and rightfully so, because they all relate to how generally the trial Magistrate evaluated the evidence before him.

Ground 1, 2 & 3

- [10] Counsel for the Appellants/defendant submitted that the burden of proof in civil cases is on the claimant pursuant to **Sections 101-103 of the Evidence Act** and that the standard of proof is on a balance of probabilities; **Dr. VINCENT KARUHANGA T/a FRIENDS POLY CLINIC Vs NIC & ANOR [2008] HCB 151 at 152.** He contended that the plaintiff/Respondent in this case failed to discharge the burden of proof on the balance of probabilities that he is the lawful owner of the suit land.
- [11] First, that the plaintiff (PW1) in this case did not in his evidence show under what capacity he filed the suit over the suit land. That throughout his testimony, the plaintiff did not show that he has any interest in the suit land or that he is suing on behalf

of his father- the alleged owner of the suit land, either as a holder of power of attorney or letters of administration. That it was therefore unlawful for the trial Magistrate to declare the plaintiff/Respondent as the lawful owner of the suit land in absence of his evidence of ownership.

[12] Secondly, that the plaintiff/PW1 admits that the 1st defendant was given land by **Araplelbel** in which he lived before they were all displaced by the insurgency. According to counsel, this was confirmed by **Ndiwa Kamarus** (PW3) who testified that the land was for **Araplelbel** and was occupied by the 1st defendant who came from **Lositit** in pokot land in 1951 and stayed at **Araplelbel's** place.

[13] Thirdly, that **Ndiwa Kamarus** (PW3) contradicts the testimony of **PW1** and **PW2** in as far as he testified that the suit land “**was for Araplelbel**” who was bordering **Kabutaki**, the grandfather of the plaintiff/Respondent.

[14] Lastly, that the defendants/Appellants on the other hand led evidence that the land in dispute is his and it borders with the plaintiff/Respondent though the respondent has disputed the boundary. His parents lived on the suit land as his father had thereon 3 homesteads, a kraal and grinding mill. Him and his sister were on the suit land. Lastly, that the suit land is separated from the plaintiff's land by sisal and a stream as was confirmed at the locus in quo.

PRELIMINARY OBJECTION

[15] As regards what capacity the plaintiff filed the suit over the suit land, counsel for the plaintiff/Respondent correctly submitted that under **paragraph 1 and 5 of the plaint**, the plaintiff pleaded that the suit land was left for him and his brother **Muigei Joseph** by their grandfather **Kabutaki Ndiema**

before his death in 1990 and that the Appellants/defendants trespassed on the same.

[16] As per the plaintiff's pleadings and evidence, it is clear that the plaintiff as a son of the late **Kabutaki Ndiema** and therefore a beneficiary of his father's estate with an interest in the estate and therefore is entitled to take steps to protect the estate, even before acquiring letters of administration or without any power of attorney. This is supported by the Supreme Court decision in **ISRAEL KABWA Vs MARTIN BANOBA S.C.C.A No. 52 OF 1995**, that a beneficiary of an estate (for example heir and a son) has the capacity to sue for preservation of the estate of the deceased though he/she would be without letters of administration. Besides, the plaintiff is seeking to recover his customary inherited land, a form of acquisition of land that is recognized by our legal systems; **DIMA DOMINIC PURU Vs INYANI GODFREY & ANOR H.C.C.A. No. 018/2016 (ARUA)**.

[17] I find that the plaintiff/Respondent had capacity to file this suit by virtue of being a beneficiary of the estate of his late father and was therefore, entitled to file for recovery of his customary inherited land. This ground of the appeal in the circumstances, fails.

Contradictions

[18] Counsel for the Appellants/defendants submitted that **Ndiwa Kamarus's** (PW3) evidence contradicted the testimony of the plaintiff **Satya Kabutaki** (PW1) and **Petero Kamarot** (PW2) in as far as who the neighbours to the suit land are, and further, in as far as he testified that the suit land was for **Araplelbel**.

[19] I have perused the evidence on record regarding **PW1, PW2** and **PW3**. They all clearly explained in their evidence that the family of the defendants was initially in **Lositit**, pokot but due

to displacement by the insecurity of the pokots, they came and were accommodated by **Araplelbel**, a neighbor to the plaintiff's family in the 1960's. Both families i.e the plaintiff's and the defendants' family were further displaced by the insecurity and each family fled to their respective places of refuge. It is upon the return of the plaintiff's family in 2013 that the plaintiff found when the defendants had settled on his portion of the suit land.

[20] **Ndiwa Kararus** (PW3) in particular testified at **page 5 of the typed proceedings** as follows.

“D1 was on the other side of Lositit in pokot land. Sister in law was killed by pokots. Came from there in about 1951 They came and stayed at Araplelbel's home, lived up to when the 1st defendant was circumcised in 1954. Continued to stay up to when they migrated from there to Alalam.”

[21] The important point regarding the plaintiff's case, irrespective of different years being mentioned by the witnesses, is that the defendants were initially in **Lositit** in **pokot** area and due to displacement by insecurity, they took refuge in **Araplelbel's** home. **Araplelbel** was a neighbour to the plaintiff's family. In the premises I am unable to find any contradictions in the plaintiff's case regarding where the defendants' family secured refuge upon being displaced by the pokots in **Lositit**.

[22] The defendants themselves admit to hail from **Lositit** though they claim that it was merely their father's 1st home where he had his 1st wife.

[23] As regards contradictions related to persons neighbouring the suit land, it is evident from the record that the prosecution witnesses named different persons as neighbours but this did

not only occur to prosecution witnesses, it was also the case with the defendants and their witnesses; for example **Musobo's** (DW2) description of neighbours to the suit land was different from that of **Kokop Cherotho** (DW6). This is majorly because not every neighbor known to one witness was known to the other witnesses hence the seemingly contradictions that were actually not there.

[24] The trial Magistrate on his part did not make any comment on the alleged contradictions and I think rightfully so because there is not any. There isn't any contradiction in the plaintiff's case that is so major to go to the root of the case. This ground of appeal therefore, in the circumstances accordingly fails.

Miscarriage of justice

[25] A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would be reached in the absence of the error; **OLANYI JAMES Vs OCITI TOM & 2 ORS H.C.C.A No. 64/17 (ARUA)**. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial.

[26] In this case, there is overwhelming evidence that the plaintiff's family is in occupation and utilization of the suit land. It was the evidence of the plaintiff that the suit land initially belonged to his grandfather **Kabutaki Kwalia** and he, the plaintiff then inherited it from his late father. He was born on the suit land and all his siblings were buried thereon.

[27] The plaintiff's evidence is supported and corroborated by that of **Ndiwa Kamarus** (PW3) who testified that **Mzee Araplelbel** and **Mzee Kabutaki**, were neighbours and upon the death of **Kabutaki**, he was buried on the suit land. The Rest of the

plaintiff's family had been in occupation and use of the suit land.

[28] The defendants on the other hand conceded that they had never buried any of their relatives on the suit land, the 2nd defendant, **Musobo William** claims his father, the 1st defendant **Andiema Simikwo** settled on the suit land in 1946 at the age of 13 years. Their father was buried in **Lositit** in **Pokot**. This is indeed the position of the plaintiff that none of the relatives of the defendants were buried on the suit land.

[29] Counsel for the Appellants' submission that the 1st defendant/Appellant borrowed the suit land from the late **Mzee Araplelbel** and therefore it is wrong for the plaintiff to attempt to claim it, is misleading. The true position is that what the plaintiff is claiming is not **Araplelbel's** portion of land that was occupied by the defendants'/Appellants' family during the Pokot displacement period. The plaintiff is claiming that the defendants have left **Araplelbel's** land and encroached on his land. The plaintiff's evidence is supported by that of **Mzee Araplelbel's** son, **Kokop Kityo** (PW5) whose evidence was never challenged at all during cross examination. PW5 testified that the suit land shares boundary with that of his father **Araplelbel**. The defendants came to **Lositit** and settled at their home but that the **Kabutaki** (plaintiff) family was utilizing the suit land.

[30] In the premises, where none of the defendants and their witnesses led any evidence in regard to how their father allegedly secured the suit land and coupled with the fact that none of their relatives since 1946 was ever buried on the suit land, I find that the trial Magistrate was justified to make a finding that the defendant had no known settlement of the relatives in the area thus confirming that they were merely temporary immigrants who came from **Lositit**. This was in

contrast to the plaintiff, whose stay on the suit land was never disputed by the defendants and had relatives buried thereon.

[31] Counsel for the Appellants has not shown any misdirections on part of the trial Magistrate. The trial court properly directed itself and it came to the right conclusion at locus when it rejected the defendants' claim that the sisal along the stream/water channel was the boundary of the suit land of the plaintiff's family. I find that the trial Magistrate formed a balanced view of the evidence before him and reached a just decision that was supported by evidence.

[32] In the premises, I find that this appeal lacks merit and it is accordingly dismissed with costs to the Respondent.

BYARUHANGA JESSE RUGYEMA

JUDGE

12th /10/2021.