The Republic of Uganda

In The High Court of Uganda Holden at Soroti

CA no. 0049 of 2021

(Arising from Katakwi Chief Magistrates Court Civil Suit no. 0013 of 2018)

1. Etukoit John Imodot
2. Amodoi Nelson :: Appellants

Versus

Acen Lucy :::Respondent

Before: Hon. Justice Dr henry Peter Adonyo

Judgment

1. Background:

This appeal arises from the judgment and orders of the Chief Magistrates Court of Katakwi delivered on the 13th day of December 2021 by H/W Owino Paul Abdonson.

The respondent filed civil suit no. 13 of 2018 in Katakwi Chief Magistrates Court against the appellants for recovery of land measuring approximately 8 acres situated at Apeleun Village, Omodoi Parish, Omodoi Sub-County, Toroma County Katakwi District and a permanent injunction restraining the appellants from interfering with the respondent's land.

The respondent's claim was that the suit land originally belonged to her late husband Otwao Yovan and upon his death in 1993 she inherited it and the appellants came to be on the disputed land when a camp was established on the suit land around 2004. After relative peace returned people started returning to their homes including the appellants however, later in 2010 they forcefully entered the suit land.

The appellants in their joint WSD denied the respondent's claim contending that the suit land originally belonged to the late Isaac Adiama the father of the 1st appellant and grandfather of the 2nd appellant and not Otwao Yovan.

The trial magistrate after considering all the evidence entered judgment in favour of the respondent with the following orders;

i. A declaration that the disputed land belongs to the plaintiff.
ii. The defendants are ordered to vacate the suit land.
iii. Permanent injunction issues restraining the defendants or their representatives from interfering with the suit land.
iv. Costs of the suit are awarded to the plaintiff

The appellants dissatisfied with the judgment appealed on the following grounds;

1. The learned trial magistrate erred in law and fact when he found that the only mabati house on the suit land belonging to the 2nd appellant was very old and belonged to the late Otwao the Respondent's husband.
2. The learned trial magistrate erred in law and fact when he failed to evaluate evidence on record and at locus in regards to ownership of the suit land and came to a wrong conclusion that the respondent is the rightful owner of the suit land.
3. That the decision of the learned trial magistrate occasioned a miscarriage of justice.

2. <u>Duty of the 1st appellate court.</u>

In ***Kifamunte Henry vs Uganda SCCA No. 10/1997***, it was held that;

The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

In ***Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236,*** it was held that;

> This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion.

3. Evidence:

a. Testimonies:

The respondent testifying as PW1 stated that the suit land which is 8 gardens was given to her and her husband Otwao Yovan by her father in law Ikeleng. She got married on the suit land and produced her children there and only fled during the Karamojong insurgency but during this period she used to come and cultivate the suit land. When she came back to resettle on the land in 2010 she found the 1st Appellant cultivating it, he even ploughed three graves belonging to her children. That during this period she moved around the suit land to establish boundaries with the chairman and people in the area including the 1st appellant and the 8 gardens includes where the appellants now have their homes. The 1st appellant during this exercise raised an objection that the suit land belonged to him and she reported the same to the LC1 Apeleun village and the LC1 asked him to give her back her land he refused. When she left the land during the insurgency the 1st appellant wasn't her neighbour. PW2 Icila Joseph, LC1 Apeleun Village, stated that he knows that suit land as

well as both the appellants and the respondent and the land belonged to the late Otwao, husband of the respondent. He grew up in the area and never saw the appellants having homes on the suit land when going to school around 1978. When peace prevailed after the insurgency the respondent came back with her children around 2008 with the intent of showing them the boundaries of the land. He stated that nobody complained when they moved around the land and they all signed an attendance list. He further stated that the appellants have land across Dadas road and when they moved around the suit land that's where they were staying. That when he was born was already on his land on the upper side of Dadas road and he was also staying on the lower part bordering the suit land.

PW3 Egirait John Michael LC II Atirir Village testified that he had known the suit land for over 10 years and it belonged to the late Otwao who had built a mabati house on the suit land and he grew up while the house was still there, this was around 1985 but the house collapsed. When he came back from his refuge in 2005 he found the respondent's daughter cultivating the suit land, the respondent came back in 2008 wanting to confirm the boundaries of the suit land. She called the neighbours, camp people and together with Alemunyang John Michael and Etukoit she showed her boundaries. He corroborates PW2 on the fact that the appellants are neighbours to the suit land and that the 1st appellant made no complaint when they moved around the land and they began laying claims on the land around 2011 to 2012 and the case went to the LC II Court. He stated that Alemunyang son of Ikileng is on the western part of the suit land, and he was the one that led the team around the suit land in 2008.

The 1st appellant testifying as DW1 stated that the suit land belongs to his father Isaka Adyama and he gave the land (5 acres) to his son the 2nd appellant in 2005 in the presence of clan members and elders. That his father died in 1972 but was not buried on the suit land rather on his father's land. He stated that the graves the respondent is referring to are in her compound and not the suit land. He further stated that the land they moved around in 2008 is not in dispute and sisal was planted to demarcate the respondent's land, that the camp was also on the respondent's land and not on the suit land. That the respondent is on the western part with Alemunyang's brother. The 2nd appellant testifying as DW2 stated that he is utilizing the suit land and he started doing so when he grew up, further that when his father was away he used the land with his mother Amule Clementina.

Like DW1 he states that the land moved around in 2008 was not the suit land and it has sisal boundaries, he also agrees with DW1 that he acquired the land from him except he states the year as 2008 and only corrects it 2005 after requesting leave from court to refresh his mind. DW3, Alemunyang John Michael denied being related to the respondent as stated by all the other witnesses called by either party and stated that the suit land belonged to the 2nd appellant after he inherited it in 2006 when people returned to their homes from the camp. That the appellants have been on the suit land for many years as opposed to the respondent who has never been on the suit land and does not own any land in that village. He contradicts this later by stating that the respondent left the suit land after her husband died. He denied being present when the respondent took villagers around the land in 2008 which is contrary to the respondent's witnesses and DW1 who clearly stated that Alemunyang was present that day.

DW4 Ajirot Rose stated that the parties are her neighbours and the suit land belongs to Etukoit and his son Amodoi after it was inherited from Isaac Adiama and a portion given to the 2nd appellant in 2002. That the respondent's land is across the road (western side) and that is where her old home is; she has never seen her utilizing the suit land. She stated that she knew Otwao Yovan and his home was in the land that belonged the old man Ikileng who married Otwao's mother and this place which is identified by an *'Eligoi'* tree is not in dispute. Alemunyang (DW4) son to Ikileng is related to Yovan Otwao. Alemunyang who is staying on Mzee Ikileng's land borders the suit land on the west.

b. Documentary evidence:

DEX1, is a document wherein 5 gardens were given to the 2nd Appellant on the 1st May 2005 in the presence of clan members. The location of the land is not indicated in this document. This document was admitted as evidence to show court that DW2 knew how to read despite his claims otherwise.

Upon perusal of the lower court file, court noted that it was alluded that the lower court visited the locus in quo however no report was on record. On the 10th of January 2023, this court ordered the Chief Magistrate Katakwi to appoint a Magistrate G1 not being the trial Magistrate to visit locus a make a report, which was done.

Findings of the locus visit conducted on 7th of February 2023.

The respondent showed court the suit land and the appellants confirmed that the suit land as shown by the respondent is where they also have an interest. The respondent confirmed that the suit land is eight gardens. At the extreme west of the suit land there was a sisal plant and the appellants told court that they do not have interest in this part. There were two visible

homesteads of the appellants on the suit land constructed in 2000 and 2008 respectively. There was also a grave of the late Ajilong mother of the 1st Appellant, she is claimed to have died in 1968. PW3 showed court a spot he stated to have been the 1972 settlement of the late Otawa Yovan but there were no visible marks of an old homestead. The appellants also showed court a spot where they claimed their parents' old homestead was but there were no visible marks.

4. Determination:

Before I determine this appeal on its merits, the appellant raised a preliminary objection in their submissions to the effect that the respondent had no locus standi to bring Cs No. 13/2018 and as such there was no cause of action against the appellants in the trial court. Counsel for the appellant submitted that since the respondent claimed to have inherited the land from her late husband she needed letters of administration before she could properly claim ownership of the suit land especially since she claimed to have produced many children who under the law are the biggest beneficiaries of their parent's estates. That furthermore the respondent did not prove that she was married to the late Otwao or that she was a member of his household at the time of his death. Counsel relied on section 191 and 30 of the Succession Act, ***Helena Namazi vs Bannada Kayondo Kiwanuka and 2 Others SCCA 16/2019*** and ***Elizabeth Nalumanzi Wamala vs Jolly Kasande and 2 Ors SCCA 10/2015.***

Counsel for the respondent in reply to the preliminary objection submitted that the respondent in her plaint and evidence states that the suit land was given to her and her late husband Yovan Otwao by her father-in-law-Ikileng and this therefore means that the respondent and her late husband owned the suit land jointly with no distinct portions.

When her husband died the suit land automatically became hers as the surviving co-owner. Counsel relied on ***Hellen Okello Versus Akello Jennifer Ocan High Court Probate Civil Appeal No. 0084 Of 2019*** where it was held

> ***"where property is acquired jointly, there is a presumption that it is a joint tenancy. That Joint tenants hold single unified interests in the entire property and through survivorship one of the tenants will own the entire property upon death of the other".***

Counsel submitted that the respondent did not require letters of administration to assert her rights as a co-owner of the suit property. Counsel further submitted that based on respondent's pleadings and evidence in court, there is no doubt that the respondent had "sufficient interest" in the suit property and such had Locus Standi to sue in respect of the suit land. counsel relied on ***Dima Dominic Poro Versus Godfrey and Apiku Martin, Civil appeal No. 0017 of 2016*** where Justice Stephen Mubiru in explaining the meaning of the word Locus Standi held that for any person to have locus standi, such person must have "sufficient interest" in respect of the subject matter of a suit, which is constituted by having, an adequate interest, not merely a technical one in the subject matter of a suit, the interest must not be too far removed (or remote), the interest must be actual, not abstract or academic, and the interest must be current, not hypothetical.

Counsel finally submitted that the point of Law raised by the appellants is misconceived, ill-advised and unnecessary. It is an attempt to divert this honourable court from the grounds of the appeal which are in the memorandum of appeal. He prayed that this honourable court be pleased

to overrule the points of law raised by the appellants and determine this appeal on its merits.

The respondent in her plaint stated that the land was originally for Otwao her husband and she inherited it after his death. It was her evidence that the suit land was given to her and the late Otwao by her father in law Ikileng and she got married and had children on the land. No evidence was led to the contrary showing that the land was only given to only Otwao and as such I find that they were joint tenants and she automatically took over the land after his death.

Secondly, the issue of her marriage, all the respondent's witnesses and DW2 testified that the respondent was married to Otwao. Regarding the issue of separation as submitted by the appellants, the respondent testified that in the 1980s she fled suit land due to the insurgency and in her pleadings she stated that around the time she fled her husband was transferred to Kapelebyong as a sub-county chief. The appellant is seeking to use section 30 which bars a husband or wife of an intestate from taking any interest in the estate of the deceased if he/she was separated from the intestate as a member of the same household. This section introduces a whole new cause of action which does not concern this appeal or the civil suit from which it arises. The respondent filed a suit for recovery of land and not an administration cause under which her suitability to take over her husband's estate needs to be analysed. This notwithstanding, there is no evidence on the record to show that the respondent ever separated from the husband, the husband being transferred to another area as a sub county chief cannot be construed as a prelude to separation.

This preliminary points are accordingly overruled.

a. Ground 1:

Counsel for the appellants submitted that the locus in quo was improperly conducted and the Trial Magistrates conclusion that the mabati house on the suit land belonged to Otwao Yovan is a mystery as during locus no questions were put forward regarding the ownership of the mabati house. That furthermore the trial magistrate did not record his observations at locus.

Counsel for the respondent in reply submitted that the appellants faulting the trial magistrate allegedly for not recording what was observed at locus is a blanket allegation as they do not point out what they could have mentioned in court and was not observed at locus by the trial Magistrate. The appellants also have not demonstrated how the magistrate's flaws at locus if any, prejudiced their case.

As already noted above, this court directed that a fresh locus in quo be conducted before this appeal could be determined. The locus report arising from this did not indicate the presence of any old "mabati" house and as such this court cannot make any determination on this specific issue. If indeed there was one when the first locus in quo was conducted and the trial magistrate made a determination while relying on the same, this court cannot make a varying determination when the features of the land per the new locus report have changed and do not include a "mabati" house. However, it should be noted that the appellants are not denying the existence of the "mabati" house on the suit land during the first locus visit rather the fact that the trial magistrate automatically found it to belong to the late Otwao. From the evidence on record I do not find this mysterious at all as the testimonies given in court all led to the existence of a "mabati" house that belonged to the late Otwao. Furthermore, none of the appellants in their evidence claimed the "mabati" house as their own. I

therefore cannot fault the trial magistrate foe finding that the structure belonged to the late Otwao. This ground accordingly fails.

b. Ground 2:

Counsel for the appellant submitted that the inconsistencies the appellants' witnesses were faulted were minor and could not diminish the credibility of the witnesses. Counsel further noted that owing to the time that had passed from the period between when the apportionment happened (early 2000s) and the time the witnesses testified, the witnesses are expected to have difficulty in accurate recollection of the events.

Counsel additionally submitted that the trial Magistrate misapplied the evidence rule on estoppel when he stated that the appellants were estopped from laying any claim over the suit land since they did not protest when the respondent called for a meeting on 17th August 2008 with the intention of repossessing the same. That the appellants did not have any legal relationship with the respondent in regard to the suit land and furthermore, the trial magistrate used the principle as a sword and not the shield it is intended to be as the respondent who brought the suit against the appellants could not use the estoppel rule a basis for bringing a suit. This rule can only be invoked by a defendant to whom its applicable.

Counsel also sought to introduce the issue of limitation, submitting that the suit was filed 13 years after the appellant apportioned land and worse still the respondent left the suit land in the 1980s.

Counsel for the respondent in reply submitted that the trial Magistrate properly evaluated the evidence and arrived at a just conclusion finding that the respondent owned the suit land. That both the appellants and the respondent presented witnesses to support their evidence. What is however peculiar about the plaintiff's witnesses is that they were both

local leaders of the area in which the suit land is found. PW 2 is the LC I while PW 3 is the LC II. These witnesses are conversant with the village where the suit land is located and their subjects.

With regard to the inconsistencies faulted by the trail Magistrate counsel submitted that the trial Magistrate was right to reject DW4's evidence because she claimed to have been present at the time the 1st appellant was giving the 2nd appellant land but mentions a different year. That this was not a minor inconsistency but rather grave in that whereas the 1st appellant claims to have apportioned land to the 2nd appellant in 2005, DW4 who also claimed to have been present during the said exercise claimed that the same was done in 2002. The contradiction between the 1st appellant and the DW4 was worsened by the 2nd appellant's testimony as the 2nd appellant claimed to have been given land in 2008 by the 1st appellant.

Counsel further submitted that the appellants did not reconcile the inconsistency between the 1st appellant's evidence, the 2nd appellant and DW4 in respect to which year the 1st appellant apportioned land to the 2nd appellant and as such the trial magistrate was right to reject the evidence of DW4.

Regarding the rule of estoppel counsel submitted that the trial magistrate properly applied the rule of estoppel against appellants. It is the evidence of the plaintiff at page 4 of the lower court proceedings that the 1st appellant who is the father of the 2nd appellant was present in 2008 as she moved round the boundaries of her land which is the suit land. This position is repeated by PW 2 & PW3 who all confirmed that the 1st appellant was present and signed the attendance list. The 1st appellant also confirms at page 16 of the lower court proceedings that he was present at the time the plaintiff moved round her land with the locals and that he

signed as No. 20 and also confirms that DW3 was present. That it is upon this background that the trial magistrate invoked the rule of estoppel against the appellants on the grounds that they acknowledged the respondent's ownership of the suit land in 2008 and want to turn around.

Regarding the issue of limitation against the respondent's suit in the lower court counsel submitted that this issue is very pedestrian and unnecessary. The fact that the 1st appellant acknowledges the exercise of identifying the respondent's boundaries in 2008 waters down the aspect of limitation as this is the land which the respondent now disputes with the appellants. For this reason, counsel opted not to delve much in submitting about Limitation.

The trial Magistrate in his judgment found that the inconsistencies in the appellants' evidence regarding when the 1st appellant apportioned land to the 2nd appellant were not properly clarified. I noted this inconsistency and would have found it minor had the rest of the appellant's evidence been consistent. Even DEX1 which the appellants seek to rely on for proof was tendered into evidence on request of counsel for the respondent to prove that DW2 knew how to read contrary to his claims.

The evidence of the appellants was marred with other inconsistencies such as whether or not the respondent was ever on the suit land, first they stated that she had never stayed there and had no land in the area but later contradicted themselves and stated that she stayed across the road with her husband Otwao where there was a grass thatched house and mabati house (DW2). DW2 also stated that his father DW1 showed him the boundary of the land in 1984 and the neighbours were around when they moved around the land, that it was also in the period of 1977-1984 when he started understanding that Otwao's home was on the other side of the road. DW1 never testified to taking his son around the land in 1984, in fact

he only testified to giving him land in 2005, furthermore, he stated that in 1979 there was insecurity and his sons left for Ngariam. This brings DW2's evidence under question. DW1 also stated that he did not know when Ajilong was buried on the suit land as he was young then, however during locus he claimed she was buried in 1968. DW3 stated that the respondent had never had land in the area but he later contradicts himself when he says that the respondent left the suit land after the death of her husband. DW3 also stated that the grave of Isaac Adiama was on the suit land contrary to the evidence of all the other defendant witnesses that the Isaac was not buried on the suit land. Another area where the appellant's evidence had contradictions was the presence of the camp on the suit land during the insurgency, DW1 first stated that the camp was on the respondent's land and not on the suit land and later in cross-examination he stated that the camp was on the suit land and Kraal for people in the camp was on the other side. DW1 in his evidence stated that from 1972 to 2002 he was in the army and his family went to Ngariam and whenever he returned he would find his father Oluka using the suit land. DW2 the son of DW1, on the other hand stated that he was born in 1977 on the suit land and he grew up on it and that when his father was not around he used the land with his mother. If indeed dw2 and his brothers went to Ngariam as testified by Dw1 at what point did the 2nd appellant grow up on the suit land? This grave inconsistency was never explained by the parties. Another inconsistency is in terms of the relationship between DW3 Alemunyang and the respondent; it's the evidence of the respondent and all the appellant's witnesses except DW3 that Alemunyang is a brother-in-law to the respondent being the son of Ikileng her father-in-law. DW3 however denies this but insists that he is the son of Ikileng. Dishonesty was also noted on the part of DW2 when during examination in chief he claimed that he could not read and yet when given the attendance list

which he was being examined on he proceeded to read the names in the order they appeared on the list.

Counsel for respondent rightly relied on ***Bahemuka Patrick & Another Vs Uganda Supreme Court Criminal Appeal No. 1 of 1999*** where it was held that

> ***"where discrepancies or contradictions are found in evidence to be serious or grave unless reconciled will result in the rejection of evidence".***

These inconsistencies put up against the consistent evidence of the respondent that Otwao and her were given the land by Ikileng her father in law and she proceeded to get married on the suit land and have her children till she fled during the insurgency. The evidence of PW2 and 3 who are local council leaders that grew up in the area and only saw Otwao and the respondent on the suit land further strengthens the respondent's case. I also noted that the neighbors to the suit land as stated by the respondent collaborated with some of the neighbors marked on the locus map as opposed to those stated by the 1st appellant.

From the foregoing I find that the trial magistrate rightly found that the respondent was the owner of the suit land.

Regarding the rule of estoppel, proprietary estoppel is an equitable doctrine where a legal owner of a property acts in a such a manner that induces another party to believe they have interest in a property. The legal owner is then estopped from later claiming that the property does not belong to the other party.

As noted by counsel for the respondent Justice Stephen Mubiru discusses this in depth in the case of ***Ibaga Taratizo v Tarakpe Faustina [2018] UGHCLD 1,*** I will reproduce part of this discussion:

This doctrine has been used to found a claim for a person who is unable to rely on the normal rules concerning the creation or transfer (and sometimes enforcement) of an interest in land. In Crabb v. Arun District Council [1976] 1 Ch.183, Lord Denning explained the basis for the claim as follows: "the basis of this proprietary estoppel, as indeed of promissory estoppel, is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law." It will prevent a person from insisting on his strict legal rights, whether arising under a contract, or on his title deeds, or by statute, when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.

This doctrine will operate where the claimant is under a unilateral misapprehension that he or she has acquired or will acquire rights in land where that misapprehension was encouraged by representations made by the legal owner or where the legal owner did not correct the claimant's misapprehension. It is an equitable remedy, which will operate to prevent the legal owner of property from asserting their strict legal rights in respect of that property when it would be inequitable to allow him to do so.

That doctrine is founded on acquiescence, which requires proof of passive encouragement.

From the above, it is clear that this doctrine was misapplied in the instant case, while it is true that the 1st appellant was present when the respondent took people around the suit land in 2008 and he did not dispute her

ownership of the land at the time, the doctrine of proprietary estoppel as discussed above cannot be used in this case as there was no misrepresentation on the part of either party that the land belonged to the other. This doctrine would require that the land in the first place belonged to the appellants but by some acquiescence they let the respondent believe the land was hers. This is not the case, it is clear from the evidence that the land belonged to the respondent and at no point did the appellants misrepresent it as hers. In my opinion what the trial magistrate was aiming at was that after the meeting in 2008 wherein the respondent took people around the boundaries of the suit land, the 1st appellant having failed to raise an objection at this point and even signed the attendance sheet, could no longer lay claim on the suit land.

With regard to the issue of limitation, I find that section 5 of the Limitation Act does not apply to this suit, first as seen in the evidence of PW1 and PW3, the respondent tried to resolve this issue through the clan and LCII Court and when it failed she then field a civil suit, she even filed a case for criminal trespass. This evidence was not challenged by the appellants. She was therefore not idling around until 2018 when filed the suit, she was actively trying to resolve the matter through other mechanisms.

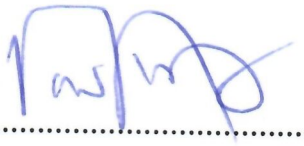
This ground would partly succeed with regard to the issue of estoppel, however, given that the determination of this rule in regard to the facts at hand has not been in favour of the appellants this ground accordingly fails.

c. <u>Ground 3:</u>

This ground relates to miscarriage of justice. Having determined the first two grounds in the negative, it follows that the decision of the trial magistrate determined the matter basing on the evidence adduced in court and rightly passed judgment in favour of the respondent.

5. Orders:

This appeal is dismissed with costs to the respondent.



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Hon. Justice Dr Henry Peter Adonyo

6th April 2023