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The Republic of Uganda

In The High Court of Uganda at Soroti

Civil Appeal No. 0037 of 2018

(Arising from Amuria Magistrates Court Civil Suit No. 08 of 2015)

10 Icomai Edward :: Appellant

Versus

Vance Omome :: Respondent

Before : Hon. Justice Dr Henry Peter Adonyo

15

Judgement

1. Background.

This appeal arises out of the judgment and orders of the Magistrates Court of Amuria delivered on the 27th day of August 2018 by H/W Awacnedi Freddie.

20 The respondent filed Civil Suit 008 of 2014 against the appellant for recovery of land measuring approximately 20 acres, vacant possession, permanent injunction, a declaration that the appellant is a trespasser and costs of the suit. His claim was that he was the rightful owner of the suit land having inherited it from his late uncle Arebu s/o Ocan Akipileng. He
25 assumed ownership of the land in 1961 having been handed to him in the presence of clan members of Ikaruok Ikiriwo.

The appellant in his written statement of defence denied the allegations contending that the land where he is settled is more than 40 gardens and



5 he owns and uses it communally with his brothers Opio John Robert and Okwakol Joseph.

The trial magistrate entered judgment in favour of the respondent with the following orders;

- a) A declaration that the suit land belongs to the plaintiff.
- 10 b) The defendant and all persons who bought/entered the plaintiffs land without the said plaintiff's consent are trespassers.
- c) A permanent injunction issues to restrain the defendant, his relatives, agents, workmen, persons purchasing land from the defendant from interfering with the plaintiff's land.
- 15 d) The defendant and all persons who bought part of the suit property from the defendant will give vacant possession of the land to the plaintiff within six months from the date of this judgement unless allowed by the plaintiff.
- e) The defendant will refund all the monies or other forms of
20 consideration he wrongly got from the people who purportedly bought part of the suit land from him.
- f) Costs of the suit is awarded to the plaintiff.

The appellants being dissatisfied with the judgement and orders appealed to tis court on the following grounds;

- 25 a) That the Learned Trial Magistrate Grade 1 erred in Law and Fact when he failed to properly evaluate the evidence on record 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.
- b) That the decision of the Learned Trial Magistrate occasioned a
30 miscarriage of Justice.

5 2. Duty of the first appellate court.

This Honourable Court is a first appellate court. Its duty was well exemplified in *Kifamunte Henry vs Uganda SCCA No. 1 of 1997* where it was held that;

10 *“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.”*

15 In *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236*, the obligation of this court as a first appellate court was also explained as follows;

20 *“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.”*

The legal principles in regard to the duty and obligation of this court as a first appellate court are taken into account while considering this appeal.

25 above holdings in regard to

3. Evidence on record:

PW1, Vance Omome who is now the respondent, in his testimony told the lower trial court that in 1961 his grandfather called Ocan Peter Akipile took him to stay with him at the suit land where he stayed till 1964 when
30 he relocated for work in Kabong district. That upon his relocation to

- 5 Kabong, he left his grandfather on the suit land with his daughter called Martina Imede and Ongaria, the wife of his son Atisai. That his grandfather had two sons who occupied two different pieces of the suit land with Atisai occupying the 1st piece of land and Arebu occupying the 2nd piece of land until the insurgency when he died.
- 10 That Atisai and Martina also later died, leaving Ocan with no child and by virtue of being his grandchild and heir he applied for letters of administration to manage the estate which *inter alia* includes the land in issue. He further mentioned that the piece of land that was occupied by Arebu remained unutilized from 1987 till 2012 when he noticed that the
- 15 same was being used by the appellant.

Pw2 testified that he and his father were invited to take refuge on the suit land by Ocan in 1979 and they found the respondent on the land using it for cultivation.

- Pw3, Atisai's daughter and a cousin to the respondent testified that the
- 20 land belongs to the respondent and he got the same from Ocan and during the insurgency this land remained vacant. She stated that Ocan had a home on the suit land and he was a neighbour to Matayo F/o Oucun and this old homestead was next to an old tree locally called 'ebiong'.

- Pw4 Odongo William a son-in-law to the respondent testified that the
- 25 appellant had two homes, one on the suit land and the 2nd was where he was originally staying.

He told court that he did not know the boundaries of the suit land or its owner but that in 2010 the respondent called him and told him that there was land available in Okobatum.

- 30 That the land was unoccupied and was total bush and it had the respondent's grandfather's old homestead. He told court that he

5 eventually bought 10 acres (35 by 140 paces per garden) at 10 heads of cattle and Ugshs. 650,000/= with the part of the swamp given to him for free by the respondent because his daughter is Pw4's wife. That the appellant was not present on the day of this transaction and they sat with the LC1 of Oburaiteng.

10 He further told court that in 2012 he built on the suit land and shortly thereafter left. That a clan meeting of the *Ikiriwo-Ikarubwok* even sat and he was shown his boundary but the appellant declined to attend its meeting. After his boundary had been drawn and marked he remained on his land.

15 That shortly after this, the appellant came with his clan to draw boundaries of his land which was on the northern part of his land.

Icomai Edward, who is the appellant herein testified that he inherited the suit land from his father called Okwakol who had also inherited from his father Odonio.

20 He told court that he was born on the suit land and grew up thereon but that his grandfather died and was buried on a different piece of land and also his father died in Usuk during the insurgency. That the respondent or any of his relatives had never used the suit land and that their land does not border the suit land.

25 In cross-examination he told court that Ocan's land is separated by a swamp from that of his grandfather. That he did not allow the respondent to give the land in issue to Odongo.

Dw2, Ojenaise Barnabas testified that the land belonged to the appellant who inherited it from one Odomo who was his grandfather. That the
30 respondent came from Apeduru village which was about 16 kms away from where the suit land was and that the suit land belonged to the

5 *Emuria kolia* clan to which the appellant belonged and that it was in 2017
when the appellant began laying claims. He denied attending a clan
meeting in 2013 which resolved that the land belonged to the respondent
Omome Vance but, however, when he was shown the said minutes, he
admitted that he did attend the said clan meeting and even signed the
10 attendance list.

He admitted that he showed the respondent a portion of land belonging
to Arebu. He contradicted himself that the appellant's grandfather was
buried on the suit land and that he would show court the grave, however,
he later changed his mind and told court that the grave in question was
15 near the suit land.

He also stated that before 2010 the appellant was not on the suit land but
on the upper side but that the appellant later moved to the suit land and
even sold part of it.

Dw3, Otim Vincent testified that the suit land belonged to Odomo who
20 was the appellant's grandfather who died and was buried on the suit land.
He told court that even Okwakol, the appellant's father was also buried on
the suit land and he would show court their graves.

However, during locus visit, it was confirmed that the appellant's
grandfather was buried outside the suit land about 1 km away. It was also
25 confirmed that the appellant had sold parts of the suit land.

4. Determination of trhe Appeal:

In this case, this suit appellant was represented by M/s Ewatu & Co.
Advocates while the respondent was represented by M/s Menya & Co.
Advocates.

30 The two grounds of appeal were submitted upon by counsels. The
submissions and the record of trial court proceedings, witness statements,

5 locus visit report and the judgment of the lower trial court are taken into account in determining this appeal as below.

10 a. Ground 1: *That the Learned Trial Magistrate Grade 1 erred in Law and Fact when he failed to properly evaluate the evidence on record 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.*

The appellant's submissions through his counsel is that he had shown abundant evidence to prove that he had been using and was in possession of the land for a long period of time and so the trial Magistrate should have
15 in his evaluation of the evidence found that indeed he was the true owner of the suit land.

Furthermore, it was the appellant submissions that during the trial of the suit before the trial court, he had proved that the suit land belonged to him since he had inherited the same from his father called Okwakol who also
20 inherited it from his father(grandfather) Odonio with the history of his acquisition of the suit land being well laid out in chronological manner and not challenged during trial.

Counsel for the appellant in their submissions additionally stated that the trial Magistrate by faulting DW2 for denying having not attended a clan
25 meeting of 2013 where issues of the suit land were discussed but in the absence of the appellant, was wrong to conclude otherwise since the issue discussed in that clan meeting was not connected to the appellant being the owner of the suit land and that even the Appellant did not attend that meeting thus being of no consequence.

30 The appellant also faults the respondent for explaining how Ocan Peter Akipileng allegedly acquired the suit land. The appellant submits that the

5 respondent cannot be the administrator of the estate of Ocan Peter which he said formed the suit land and at the same time tells court the suit land was also donated to him by Arebu.

Counsel thus submitted in respect of this point that this court should find that this assertion by the respondent should be found to be a contradiction
10 in his evidence with this position being degraded by PW3's testimony when she states that the suit land was given to the respondent by her father Atisai.

The appellant further submitted that the trial court in reaching its decision against the appellant erroneously relied on the evidence of Okwamo John
15 who testified only during locus yet he had not testified in court for any of the parties.

Counsel for the respondent in reply submitted that the trial magistrate properly evaluated the evidence on record and found the respondent to be the rightful owner of the suit land.

20 Relying on ***Kasozzi Lawrence vs Uganda SCCA No. 13 of 2009***, counsel for the respondent submitted that there was no formula for evaluating and re-evaluating evidence but it depended on one's style and such does not amount to an error leading to miscarriage of justice. He submitted that the respondent adduced sufficient evidence to prove that
25 he is the rightful owner of the suit land.

That according to the evidence on record, the appellant claimed ownership of the suit land through his father called Okwakol who also inherited from his father called Odomo.

That on the other hand, the respondent claimed ownership of the suit land
30 through his grandfather called Ocan Peter Akipileng, though none of the parties give history of the land beyond their grandparents.

5 Accordingly, counsel for the respondent submitted that counsel for the appellant cannot fault the trial magistrate for finding the respondent the owner of the suit land simply because he did not explain how Ocan acquired the suit land.

10 My findings, based on the evidence on record, is that both parties herein are claiming customary ownership of the suit land. The respondent told court that he was brought on the suit land by his grandfather called Ocan in 1961, the said Ocan had two children, that is, Atisai and Arebu who he gave distinctive pieces of land.

15 Ocan stayed on his land including the suit land with his daughter and Atisai's wife and when these people all passed away the respondent as the only grandson became the heir and later applied for letters of administration for Ocan's estate.

20 The contention by the appellant is that the estate the respondent got letters of administration for includes the suit land and at the same time that which was donated by Arebu.

25 This contention is not founded in evidence for there is nowhere stated by the respondent that the land was donated to him by Arebu. He only gave the history of how the suit land came to be owned by him. Also the statement by PW3 that the suit land was given by Atisai was not inconsistent with the facts on the ground as the appellant would want this Honourable Court to believe as PW3 told court that the land was given by Atisai (her father) and Ocan (her grandfather).

30 This is in addition to the corroborated fact by PW3 and PW4 as to the testimony of the respondent who told court that after the death of Arebu in 1987, the land Arebu left for him remained vacant throughout the

5 insurgency period and it was only in 2012 when he noticed that the appellant had illegally occupied it.

In relations to this fact, PW4 goes on to state that when he went to the area to buy land in 2010, he found the suit land bushy and unoccupied by anyone with the appellant only later encroaching on the same.

10 Pw4 also stated that the suit land was even shown to him by the appellant as being available for buying and even the appellant pointed out to him Ocan's old homestead but never claimed to him ownership of the suit land. This evidence was not even challenged in cross-examination. Furthermore, a meeting was called in 2013 was held to discuss the then
15 ranging land boundary dispute between the clan of Ikiriwo, to which the respondent belongs, and Imenekolia to which the appellant but the appellant and most of his clan's men did not care to appear though DW2 attended the meeting with one of the issues discussed was that the fact of the appellant having encroached on the land of the late Arebu despite
20 several warnings not to do so.

This is a factual evidence which was only elicited out of Dw2, who had originally denied attending the said meeting only to admit doing so when confronted with an attendance list which contained his name and signature.

25 That denial and sudden acceptance by DW3 of his attendance of the said meeting was a clear sign of his dishonesty which caused the trial magistrate to disregard his evidence and rightfully so for if such a witness can unashamedly deny the existence of such fact that only to accept the existence of the same proved by an unchallenged documentary evidence,
30 then how is such a witness's other testimony to be believed when he can blatantly lie to court as PW3 did in the trial court? In my considered opinion, such a witness testimony and its truthfulness cannot be relied

5 upon and accordingly I would find that the trial court was right to consider him a liar and not a credible witness.

I also noted that in the appellant's written statement of defence he stated that Arebu shared a common boundary with his land however when he came to court to give testimony he abandoned this point all together
10 stating that Arebu was not his neighbor and he suddenly says the swamp is the boundary between Odomo's land and Ocan's land.

This change in testimony is further evidence of the appellant not knowing the extent of his land and thus had encroached onto Arebu's land as found by the clans' meeting held in 2013 as corroborated by PW4 who told court
15 that the clans moved around the boundaries of land in dispute including the suit land and properly mapped out the boundaries.

There was also the inconsistency in the evidence presented by the appellant with regards to where the graves of his father and grandfather were to be found. While the appellant testified that neither his grandfather
20 nor father were buried on the suit land, his witnesses, that is, Dw2 and Dw3, confirmed in court during their testimonies that in fact both the grandfather nor father of the appellant were buried on the suit land.

These two witnesses promised to show court those graves but during locus visit the court established that none of these persons were buried on the
25 suit land. This led the trial court to correctly be persuaded that the testimony of the appellant and his witnesses in respect of the burial of grandfather nor father of the appellant was inconsistent and so could not be relied upon.

I would concur with the trial court and would disregard such blatant
30 incongruity and find that indeed the suit land was never a burial place for the appellant's relatives even if he did point out so because his witnesses

5 were of the opposite view and contradicted him though he was found true in this respect by the locus visit by the trial court.

The appellant furthermore insisted that he grew up on the suit land and that his father also used the same for settlement and cultivation. This assertion, however, is disproved by the locus report which does not show
10 anywhere that neither the appellant or his family ever had any settlements on the suit land. This confirmation by court on the ground disabuse the that the barney that the has ever had actual or other possession of the suit land even if proof of ownership of land under the customary tenure is not established only by evidence of long user or occupation of land without
15 any more other evidence.

In this suit, the locus proceedings actually established as a matter of fact the appellant had been energetically selling the suit land even though the same did not belong to him in spite of being severally warned against doing so.

20 Accordingly, I would find that the trial magistrate was correct and right in finding that the respondent had proved that he had inherited the land and was the rightful owner of the suit land because on the balance of probabilities he clearly proved his claim.

With regard to the evidence of Okwamo John, I find that even without this
25 evidence the trial Magistrate would still have found for the respondent for as noted by counsel for the respondent section 166 of the Evidence Act provides that;

**The improper admission or rejection of evidence shall not be ground of itself for a new trial, or reversal of any decision in any
30 case, if it shall appear to the court before which the objection is raised that, independently of the evidence objected to and**

5 **admitted, there was sufficient evidence to justify the decision,
or that, if the rejected evidence had been received, it ought not
to have varied the decision.**

This ground accordingly fails.

10 *b. Ground 2: That the decision of the Learned Trial Magistrate
occasioned a miscarriage of Justice.*

Having found that the trial magistrate properly evaluated the evidence on
record, it follows that no miscarriage of justice was occasioned to the
appellant. This ground accordingly fails.

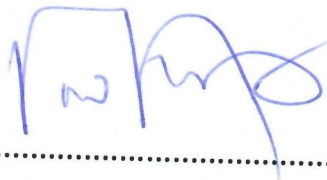
15 Overall this appeal would thus fail on all grounds and it thus found to have
no merit. Accordingly, it is dismissed with costs to the respondent with
the judgment and orders of the lower court are upheld.

5. Orders:

- This appeal collapses on all grounds.
- It is found to lack any merit at all.
- 20 - It is dismissed accordingly.
- The judgment and orders of the lower court are upheld.
- The costs of this appeal and in the lower court are awarded to the
respondent in any event.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

18th April 2023