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The Republic of Uganda

In The High Court of Uganda at Soroti

Civil Appeal No. 0061 of 2022

(Arising from Civil Suit No. 031 of 2014)

10 Elweu Israel ===== Appellant

Versus

1. Abiji Margaret
2. Ikeu Veronica
3. Benefasio Ocung } ===== Respondents

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Before: Hon. Justice Dr Henry Peter Adonyo

Judgment

1. Background:

20 This appeal arises from the judgment and orders of the Chief Magistrates Court of Soroti delivered on the 30th day of June 2022 by H/w Pirimba Emmanuel.

Elweu Israel, the appellant filed Civil Suit No. 31 of 2014 against Abiji Margaret, Ikeu Veronica and Benefasio Ocung, the respondents for the recovery of 22 acres of land at Wila in Amotot village, Wila parish, Wila sub county and 24 acres at
25 Kung'ur village, Airabet parish, Kapelebyong, Amuria District. He also sought for a declaration that the suit land was his. He further claimed for damages and the costs of the suit.

5 Elweu Israel's claim was that the suit land belonged to his late grandfather called Semeo Elweu who bequeathed the same to his late father called Okiror Vincent into whose estate he had letters of administration.

According to Elweu Israel Abiji Margaret, Ikeu Veronica, the 1st and 2nd respondents encroached on the suit land at Wila while Benefasio Ocung, the 3rd respondent encroached on the land in Airabet.

That initially the appellant had to apply to recover land wrongfully attached in Civil Suit 37 of 2007 from Ekuu Max and Etedu Enos vide Land Claim No. 0036 of 2007 for which judgment was delivered in his favour.

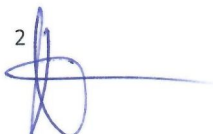
The respondents in their joint Written Statement of Defence agree that indeed the late Semeo Elweu was also the grandfather to the 1st and 3rd respondents and indeed formally owned the suit land but had distributed all his land to his respective wives who also allotted the same to their sons from which the respondents also derive their beneficial interests from.

That respondents further allude the land that belonged to the appellant's late father called Okiror Vincent and whose estate the appellant administers was intact and were in full possession of the appellant and his siblings and that they had never trespassed in any part of it.

The respondents further concede that Civil Suit 37 of 2007 and Land Claim No. 0036 of 2007 were entirely in respect to the land belonging to the estate of the late Okiror Vincent in which they had no interest.

The trial magistrate after evaluating the evidence found that the appellant was not entitled to any of the remedies sought in his pleadings. He found that appellant was not the owner of the 2 pieces of land in dispute and that the suit lacked merit and as such dismissed it accordingly.

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5 The appellant being dissatisfied with the judgement of the lower trial court appealed to this court citing the following grounds;

1. That the learned trial Magistrate erred in law and fact when he proceeded to hear the suit in the lower court which had been dismissed for want of prosecution.
- 10 2. The learned trial Magistrate erred in both fact and law when he disregarded to conduct a locus in quo to ascertain the rightful owner of the suit land.
3. That the learned trial Magistrate erred in both law and fact when he failed to evaluate the evidence on record hence arriving at a wrong decision.
- 15 4. That the decision of the trial Magistrate has occasioned a miscarriage of justice upon the appellant.

2. Duty of the 1st appellate court.

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 as was held in *Father Nanensio Begumisa and Three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236.*

25 3. Representation.

In this appeal, the appellant was represented by M/s Obore & Co. Advocates while the respondents were represented by M/s Legal Aid Project of the ULS.

5 4. Determination of Appeal:

- a. Ground 1: That the learned trial Magistrate erred in law and fact when he proceeded to hear the suit in the lower court which had been dismissed for want of prosecution.

 The submissions in respect of this appeal by the counsel for the appellant starts
10 with the pointing out that the head suit relating to this appeal was in the lower
 trial court was dismissed for want of prosecution under Order 9 r 22 CPR on the
 14/5/2019.

 That on the other hand, on 6/2/2020 the head suit again went up for hearing but
 was proceeded on without the filing a formal application to have the earlier
15 dismissed suit reinstated which action rendered any subsequent proceedings null
 and void.

 Counsel for the respondent in his submissions confirms that indeed as rightfully
 stated by counsel for the Appellant, the head suit was dismissed for want of
 prosecution under 0.9 rule 22 CPR but adds that the then Counsel Amodoi c/o
20 Ogire and Co. Advocates filed an application for the reinstatement of the
 dismissed suit on the 27th day of May, 2019 which application was served upon
 the Respondents who did reply to the same on the 12th day of June 2019 and that
 both pleadings were filed in the court.

 Furthermore, counsel for the respondents point out that on the 13/6/2019 the
25 said application was consented to by both counsel of the Appellant and the
 Respondents by then with costs of UGX 400,000/= leading to the reinstatement
 of the head suit.

 The perusal of lower court file and proceedings confirms the position of the
 counsel for the respondents.

5 It is true that on the 14/5/2019 the trial magistrate dismissed Civil Suit No. 0031 of 2014 for want of prosecution precisely because the appellant had declined to avail his witnesses for cross-examination.

Later on, Counsel for the appellant at that time, then filed Miscellaneous Application No. 0028 of 2019 seeking to have reinstated the head suit of Civil Suit
10 No. 0031 of 2014 with the prayers that the order expunging the appellant's evidence be set aside.

On 13/06/2019 when the Miscellaneous Application No. 0028 of 2019 came up for hearing, Counsel Amodoi for the applicant informed the trial court that counsel for the respondents had no problem with the application being allowed
15 for as long as the appellant met costs of UGX 500,000/-.

The trial court basing on the agreed position of counsels for both sides allowed Miscellaneous Application No. 0028 of 2019 with costs of UGX 400,000/- to the respondents/defendants. Accordingly, Civil Suit No. 0031 of 2014 was reinstated and it then proceeded for further hearing on the 6/2/2020.

20 From the above facts, I am surprised that the current counsel for the appellant could not have established these facts before formulating the ground that the learned trial Magistrate erred in law and fact when he proceeded to hear the suit in the lower court which had been dismissed for want of prosecution.

These facts are on record and had counsel for the appellant perused d the entire
25 lower court record he would have found that Miscellaneous Application No. 0028 of 2019, which was the application for reinstatement of the dismissed suit, was allowed upon the consent of both parties and that grant enabled the reinstatement of the earlier dismissed Civil Suit No. 0031 of 2014.

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5 That being the case, I would find baseless the ground that the learned trial Magistrate erred in law and fact when he proceeded to hear the suit in the lower court which had been dismissed for want of prosecution. This ground thus fails.

10 b. Ground 2: The learned trial Magistrate erred in both fact and law when he disregarded to conduct a locus in quo to ascertain the rightful owner of the suit land.

Counsel for the appellant submitted that the varied accounts from both parties and their witnesses regarding the suit land necessitated a locus visit by the trial Magistrate. That in the absence of a locus visit by the trial court there is no justification from the evidence on record that indeed the respondents are the
15 rightful owners of the suit land. Counsel prayed that in the interest of justice the matter be retried.

In reply counsel for the respondents submitted that the submissions of the Appellant on this ground were misguided as it seemed that counsel for the Appellant did not peruse the record appropriately to ascertain the indeed and
20 fact a Locus in quo visit was conducted by the trial magistrate. That on the 18th day of June, 2022 a locus in quo visit was finally conducted by His Worship Pirimba in the presence of both Counsels for the Appellant and the Respondent.

The typed record of proceedings of the lower trial court clearly indicates that on the 24/09/2021 all parties were in court and the matter was adjourned to
25 16/10/2021 for the locus visit.

There are two letters on record showing the trial Magistrate informing the LC1s of Kungur village, Airabet parish and Amotot village parish of the locus visit on 18/06/2022.

The *locus in quo* notes on record clearly show that on 18/06/2022 the trial
30 Magistrate visited both areas where the disputed pieces of land were located and

5 from his locus notes, the trial magistrate indicate that all parties and their counsel were present and that the pieces of land subject to the suit were found in two different locations which were visited and separate notes for each location were made with even the time for each location visited indicated.

10 Furthermore, the trial Magistrate also from the *locus in quo* records established the neighbours to the suit lands and even those who were in the occupation of each piece of land and even drew a sketch map for each of the pieces of land visited.

The records of the lower trial court thus once again show that the ground raised by the appellant that the learned trial Magistrate erred in both fact and law when
15 he disregarded to conduct a *locus in quo* to ascertain the rightful owner of the suit land was misconceived.

It appears that counsel for the appellant drafted the ground and even made submissions in that respect without accurately perusing the record of the lower court.

20 Had he done so, the said ground would have not been raised as definitely the trial magistrate duly conducted *locus in quo* proceedings for each of the two pieces of land in disputes in the presence of both parties and even there are locus in quo reports for each. This ground is thus found to have been misconceived and as such fails.

25 c. Ground 3: That the learned trial Magistrate erred in both law and fact when he failed to evaluate the evidence on record hence arriving at a wrong decision.

Counsel for the appellant in his submissions faults the trial magistrate for not highlighting points which he considered while giving judgment in favour of the
30 respondents as well as not giving reasons for his decision.

5 That the trial court did not state its decision and the reasons thereof and as such doubt is cast on its authenticity and consciousness.

Counsel relied on Order 21 rule 4 of the CPR to submit that the trial magistrate's judgment fell short of what is expected of a good judgment.

Counsel for the respondents in reply submitted that the Trial Court and Trial
10 Magistrate properly evaluated the evidence on record thereby reaching a just decision where the Respondents were declared as the rightfully owners of the suit land.

Counsel for the respondents submitted at length on the burden of proof and highlighted the evidence given by both sides.

15 It should be noted that the appellant has not specified any evidence that was not properly evaluated, counsel's focus is that the trial Magistrate did not write a good judgement. Counsel for the appellant focuses on these two particular paragraphs of the judgment and these are;

- 20 - *"The contradiction in the evidence of the plaintiff and the defendants including their witnesses goes to the route(sic) of the pleadings and the same was made with intention to mislead court and or tell deliberate untruthfulness to this honourable court."*
- *"This however being the case of the plaintiff the burden of proof in this suit or proceeding lies with the plaintiff who would fail if no evidence at*
25 *all were given by the defendant."*

Counsel for the appellant submitted that the trial magistrate based his judgment on the foregoing and as such failed to live up to the expectations of what is expected in a good judgement.

5 Order 21 rule 4 of the CPR on which the appellant is relying provides for the contents of a judgment thus;

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision on the case and the reasons for the decision.

This means that essentially a judgement should have an introduction which gives
10 the facts of the matter at hand, then the issues for determination followed by analysis of the evidence on record to determine the issues at hand. This all ends in a decision which determines the rights of the parties.

I have carefully perused the judgment of the trial court and find it in accordance with the provisions of Order 21 rule 4 Civil Procedure Rules and find the following;

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1. The trial magistrate clearly gave a background to the dispute between the parties which I won't reiterate the same here.
 2. He followed the issues raised during scheduling save for one which pertained to trespass. He duly explains why this issue was moot.
 3. He states the evidence adduced during hearing and evaluates the same.

20 While resolving the issues, the trial magistrate noted that basing on the evidence adduced in court the following facts were not in dispute;

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- i. *The 22 acres' piece of land at Wila in Amotot village, wila parish, wila sub county, Amuria District and the land measuring 24 acres at Kungur village, Airabet Parish, Kapelebyomg in Amuria District (the land in dispute) originally belonged to the late Simeo Elwelu.*
 - ii. *The late Simeo Elwelu had 3 wives (Ayio Josephine, Amedio and Ayupo) who are all now deceased.*
 - iii. *The plaintiff including the 1st and 3rd defendants are the grandchildren of the late Simeo Elwelu the original owner of the land in dispute.*

5 iv. *The late husband of the 2nd defendant (Loroberto Odong) is the son of
the late Elwelu Simeo the grandfather of the plaintiff and the 1st and
3rd defendants.*

 v. *All parties to the suit are related.*

Finally, the trial magistrate resolved the suit by deciding that the appellant had
10 not proved his claim.

The trial magistrate compared the claim of the appellant that the late Elwelu
bequeathed all the land in dispute to his father Okiror Vincent and he is now the
administrator of the same as against the claim of the respondents that they each
occupy their respective portion of land as distributed by the late Elwelu to his
15 wives before his death.

In determining which claim was correct, the trial magistrate increasingly went on
to determine and rationalize whether the late Elwelu Simeo bequeathed the 2
pieces of land in dispute only to the appellant's father as alleged or whether the
late Elwelu Simeo distributed while alive and including those in dispute amongst
20 his three (3) wives, with the respondents derive interest from the land in dispute.

The trial magistrate noted that the appellant had the burden of proof to show
that indeed that disputed land was donated to his late father.

The trial magistrate found out that the appellant had failed to mention in his
evidence in chief how he came to acquire the suit land save for stating that he
25 inherited it only during cross-examination.

The trial magistrate further went on to note that the appellant during cross-
examination advanced a totally different particular that his late grandfather
Simon Elwelu had only two wives, that is, Aiyo, his grandmother and Amecho,

5 mother to the late husband of the 2nd respondent/ defendant, to whom each was given land.

In respect of this assertion, the trial magistrate then went on to find that this was a total departure from the appellant's pleadings where he had claimed the land was directly bequeathed to his father by the late Simeo Elwelu.

10 The trial magistrate again noted that the appellant did not lead any evidence to show that his grandmother distributed her land to any of her children including Odong who is the 2nd defendant's / respondent's husband.

The appellant as noted by the trial Magistrate, also testified during cross-examination that it was not only his father that was entitled to inherit the land
15 belonging to his late grandfather Simon Elwelu, in both Wila and Kapelebyong.

From the assessment of evidence as above, I would agree with the trial Magistrate's finding that the evidence given in court pointed out only to the fact that no rights to all the pieces of land belonging to the late Simon Elwelu was inherited by late Okiror Vincent, the father of the appellant, in respect of the land
20 given to his grandmother and neither any individual right to the suit lands accrued to the appellant in respect of the entire suit land.

This is because while the appellant in his pleadings state that the two pieces of land were bequeathed to his father by his late grandfather Simeo Elwelu and that now he was the administrator of his late father's estate in which he had interests,
25 during cross-examination the appellant, changed this testimony and told court that his late grandfather had three (3) wives but had distributed the suit lands to only two of the wives with his grandmother getting the bigger chunk and the other wife of his grandfather called Amecho getting only 20 gardens and that the

5 3rd and last wife Ayupo only stayed for a few months with his grandfather but was chased away.

From the perusal and the assessment of all the evidence on record, I would agree with the trial Magistrate that the disputed land originally belonged to the late Simeo Elweu and that the late Simeo Elweu prior to his death distributed his land
10 amongst his three (3) wives and children with each getting a distinct share where they all currently reside.

It is also true that the appellant's father was one of the sons of the late Elweu Simeo and he got his share found at Amotot through his mother and that is only the land the appellant is entitled to with the evidence on record showing that the
15 appellant's brother was in occupation of that land found at Amotot.

The trial magistrate on the other hand found that the respondents had not proved distribution of the estate of the late Elweu Simon and as such it was his conclusion that the entire suit land still belonged to the late Elweu Simon and was undistributed.

20 That position is not based on the evidence received in court and I do respectfully disagree with it because while there is no documentary evidence that the late Elweu Simon distributed his land to each of each three (3) wives, the uncontested testimonies of all witnesses, including those of the appellant himself during cross-examination, show that the late Elweu Simon did in fact distribute
25 all his land as gifts *inter vivos* to his three (3) wives and children before his death with the only unconfirmed issue being that all the witnesses were not certain of the exact sizes of each of the land given to either wife and children.

However, despite this anomaly, it is clear to me from the evidence received in court that each of the families knew exactly their own boundaries and had never

5 had any dispute with one another until the appellant filed Civil Suit No. 0031 of 2014 claiming the whole all the land which originally belonged to the late Elwelu Simon as the administrator.

From the evidence on record , the appellant failed to show through his evidence that the late Simeo Elwelu bequeathed both pieces of land in dispute to his late
10 father given the fact that during cross-examination, the appellant assertively told court that his father was not the only one entitled to inherit the lands in both Wila and Kapelebyong.

This confirmation together with the evidence by both the appellant's and respondent's witnesses that the late Elwelu Simon had distributed his lands to his
15 wives and sons go on to prove that the lack of appellant's interest in the suit land as is even pointed out by PW2 that the appellant has his land which he was not even utilising and which was not the suit land.

Also the *locus in quo* visit notes in respect of the land at Amotot village further indicate that the appellant 's land neighbours the suit land which proves that
20 that there is no encroachment rather that the appellant was only trying to grab the land his grandfather left for the other children and wives.

Furthermore, the claim by the appellant that the 2nd respondent's husband did not get any land from the late Elwelu Simeo and that the clan chased him away was not proved in evidence as even his own witnesses were not aware of these
25 events.

The trial magistrate also cited the inconsistencies and contradictions in the appellant's evidence after proper evaluation of evidence on record which led him to the conclusion that the suit land belonged to the late Simeo Elwelu and that all the parties had the right to benefit from the same.

5 And so as already stated above, the land in dispute clearly originally belonged to the late Simeo Elwelu and from the evidence of both the appellant and respondents, all land were distributed while Simeo Elwelu was alive to his three wives and children with each family getting their share and all living at peace till recently when the appellant tried to claim all the land belonging to his late
10 grandfather yet his claim would ONLY be in regard to what his grandmother and father got from the late Elwelu Simon.

Therefore, I do find that the evidence relating to that fact that the suit land were distributed was properly evaluated by the trial court and as such I do not agree with the contention by counsel for the appellant that the trial magistrate failed
15 to properly evaluate evidence in that respect.

Accordingly, I find that the decision of the trial magistrate was justified and the reasons for the same were given in the judgment while considering the burden of proof.

I also agree with the trial Magistrate's findings except that he only failed to
20 conclude properly on the issue of distribution of the late Elwelu Simon's estate which was proved by evidence that it was done during the lifetime of Elwelu. Overall, this ground does fail.

d. Ground 4: That the decision of the trial Magistrate has occasioned a miscarriage of justice upon the appellant.

25 Counsel submitted that the decision of the trial magistrate did occasion a miscarriage of justice.

Counsel for the respondents in reply submitted that right from ground one, two and three the trial Magistrate properly subjected the evidence on record to sufficient scrutiny right from the respondent's case, and all his witnesses
30 including the Respondent were all consistent which clearly comes out that the

5 suit land belonged to the Respondents which originally belonged to the late Elweu Semeo grandfather.

That no miscarriage of justice was occasioned on the Appellant as a result of the decision of the trial court. Counsel relied on *Onek Manacy and Another Versus Omona Michael Civil Appeal No.0032 Of 2016*, where it was held that;

10 *"A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error. The court must examine the entire record, including the evidence, before setting aside the judgment or directing a new trial."*

Basing on the above definition, after careful re-evaluation of the evidence on
15 record I would find that no miscarriage of justice was occasioned to the appellant as the evidence on record does prove that the late Elwelu Simon was very much aware of his situation as a polygamous man and before his death he ensure that all his three (3) wives and children were well catered for in terms of land and as such he gifted each of his wives with land such that each part of his family had
20 own pieces of land. No miscarriage was thus occasioned to the appellant by the decision of the lower trial court.

4. Conclusion:

Overall, I find that this appeal fails on all four grounds as it lacks merit and is accordingly dismissed with costs to the respondents.

25 5. Orders:

- This appeal is dismissed for lack of merit. The appellant, Elweu Israel can only administer the land which was bequeathed to his father by the late Simon Elwelu through his grandmother only and not any other land.

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- The Judgment and orders of the lower trial court are confirmed.
 - The cost of this appeal and in the lower court is awarded to the respondent.

I so order



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Hon. Justice Dr Henry Peter Adonyo

Judge

13th June 2023

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