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The Republic of Uganda

In the High Court of Uganda at Soroti

Civil Appeal No. 0053 of 2019

(Arising from Kumi Civil Suit No. 003/2004)

10 Eurien David Appellant

Versus

Icoli Joseph Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

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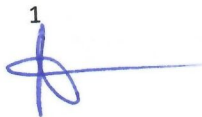
Judgment.

1. Background:

This is an appeal from the judgment and orders of the Kumi Magistrates Court delivered on the 31st October 2019 by Her Worship Lamunu Peace Elizabeth.

20 The respondent originally filed a Claim No. 0051 of 2004 for recovery of land in the Kumi Land Tribunal in 2004 and it was later transferred to the Chief Magistrates Court Kumi as CS No. 003/2004 when land tribunals were phased out.

25 The respondent claimed recovery of 4 acres of customary land located at Amuria Ojadas village, Ongino parish, Ongino sub-county, Kumi District, compensation for the murrum dug and sold and general damages for trespass. He claimed he acquired this land through succession along the family line. That the appellant



5 had tampered with his rights to the land and sold part of it to the constructors to dig out murram for construction of Ongino-Kapoli road.

The appellant in his written statement of defence denied that the land belonged to the respondent. That he sold murram measuring $\frac{1}{4}$ acres and the rest belongs to his father Iberut Samson who is occupying the same.

10 The trial magistrate after considering the evidence led by both parties found that the respondent had proved that his father stayed on the suit land. She declared the plaintiff/respondent the lawful owner of the suit land and the appellant on the other hand a trespasser.

The appellant dissatisfied with this judgement filed this appeal on the following
15 grounds;

1. The Learned Trial Magistrate erred in law and fact when she failed to judiciously scrutinize, evaluate and appraise the evidence before her and as a result reached a wrong conclusion.

20 2. The Learned Trial Magistrate erred in law and fact when she formed an unbalanced view of the case by accepting the plaintiff's case without giving sound reasons.

3. The proceedings, judgment and decision of the Trial Magistrate is tainted/riddled with fundamental misdirection and non-direction in law and fact, as a result has led to a miscarriage of justice.

25 2. Representation:

The appellant was represented by M/s Nabwire & Co. Advocates & Legal Consultants while the respondent was represented by M/s Nabende Advocates.

5 3. Duty of the first appellate court:

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

10 That holding above is taken into account while resolving this appeal.

4. Submissions:

Counsel for the appellant argued all three grounds of the appeal together. Counsel submitted that there were several inconsistencies and contradictions in the respondent's evidence specifically with regard to the size of the suit land,
15 how the respondent acquired the suit land and the years of the alleged trespass.

Counsel further submitted that the trial magistrate's judgement on the ownership of the land was not judiciously addressed as there was no probable evidence either oral or documentary adduced by the plaintiff/respondent to demonstrate how his father acquired the suit land. That this showed that the
20 respondent failed to prove allegations of ownership on a balance of probability and therefore it was wrong for the trial magistrate to enter a judgement in favour of the respondent.

Counsel further submitted that this is the evidence that would be acquired at the locus visit to supplement what the witnesses had adduced in court during the
25 hearing but it was omitted in the analysis and scrutiny of evidence by the trial court.

Counsel additionally submitted that the suit property was not registered land and the trial magistrate never came up with drawings explaining the boundaries of the suit land having heard or seen on the court file that during the hearing of

5 evidence there was a lot of contradictions and inconsistencies about the size of the land in dispute.

Counsel submitted that the issue of the size of the land in dispute was so fundamental as it would have helped the trial magistrate determine whether the trial court has pecuniary jurisdiction to handle the case before it.

10 Counsel finally prayed that the appeal be allowed and the lower court judgment be quashed.

Counsel for the respondent in reply reproduced the evidence given by both parties. Counsel then submitted that while counsel for the appellant is faulting the trial magistrate on the points of inconsistencies and contradictions in the
15 judgement he does not highlight the specific paragraphs in the judgment to support said inconsistencies. That the mere mention of 10 gardens does not translate into 10 acres of land and this does not contradict the decision of the trial magistrate.

Counsel further submitted that it is worth noting that all the respondent's
20 witnesses all stay around the suit land with the appellant, but none of these witnesses were in support of the appellant yet none of these witnesses were in support of the appellant yet the respondent stays in Bugiri from the time he relocated because of the insurgency.

Counsel added that he agrees with counsel for the appellant that miscarriage of
25 justice cannot be overlooked if there is a prima facie case that an error has been made or if there has been misdirection on matters of law or fact, however, in the instant case the Learned Trial Magistrate's decision was based on the evidence on record and as such there was no substantial miscarriage of justice occasioned to the appellant.

5 Counsel further stated that this is a court of law and decisions can only be based on actual evidence and not on any attractive or fanciful theories of reasoning. That when the trial magistrate evaluated and weighed the evidence on record, she rightly found that it was unsatisfactory to pass judgment in the appellant's favour.

10 Regarding the assertion by counsel for the appellant that the trial magistrate had no pecuniary jurisdiction over the matter, counsel for the respondent submitted that this issue was supposed to have been handled by the appellant's counsel in the lower court and nothing on the court record points to this fact. He further submitted that the value of land varies depending on location and land in the heart of Kumi District can never be at the same market value with land in Amuria village.

Counsel additionally submitted that the appellant's only other witness DW2 corroborated the evidence of the Respondent's witnesses that the respondent was born on the suit land but only took refuge in Bugiri due to the insurgency.

20 That the appellant did not challenge the respondent's assertion that he inherited the suit land from his father Mikayiri Opus.

Counsel finally prayed that this court be pleased to uphold the decision and orders of the trial magistrate and dismiss this appeal with costs to the respondent.

25 5. Evidence on record:

The hearing of the civil suit in the lower court proceeded by both witness statements and oral testimony. The respondents had five witnesses including himself and the appellant had two witnesses himself inclusive.

5 a. Plaintiff's evidence:

PW1, Icoli Joseph testified that he was born and he lived on the suit land with his father Opus Michael until the 1980s during the insurgency when they sought refuge in Busoga leaving the land under the care of his cousin Olupot Ben. That his late father bequeathed the land to him prior to his death in 1987. That while
10 in Bugiri he continued to check on the land from time to time and in 2003 he was informed by Olupot Ben that the appellant had trespassed upon his land, exhumed the graves of his late brothers, excavated murram, cut down trees and planted sorghum thereon.

That he immediately returned and reported the matter to the LC1 who called a
15 meeting to resolve the issue and it was decided that the suit land belonged to him and not the appellant but that nevertheless the appellant continued to claim ownership of the land which is how he ended up reporting the matter to the land tribunal in 2004 before they were phased out.

During cross-examination he stated that he took refuge in Bugiri in 1987 and by
20 the time he went there his father had land in Amuria village Ongino which is the very land in dispute and he inherited the land from him as he was born there. He continued to state that his father gave him the land before his death and told him that when he dies the land shall become his and this was in the presence of Epeded Peter, Imalingat and Ogwapit.

25 That his father was chased from Ongino Hospital in about 1930-1937 and he settled in Amuria on the suit land which had been given to him by Oumo. The chief gave his father land freely without any written document.

That his father was not a squatter on Iberut Samson's land. He maintained that his cousin brother Olupot was left to care take the land from 1987 till 2000 when

5 he came back and took over the land in 2004, however this was not documented.
That he handed over the land to Olupot at the village chief's home; Nyumbakumi
(village governor of ten homes).

That he took the Nyumbakumi around the suit land boundary but did not call any
neighbours as there was no problem.

10 That his father died in Bugiri where he had taken refuge. That what he told court
concerning the suit land between 1987 to 2000 was as reported to him by Olupot
Ben.

PW2 Osemwa Silvesto testified that he was the LC1 and LC2 of Ongino Amuria
and Ongino Parish respectively and knew both parties since they are residents of
15 his area. He stated that in 1963 Opus Michael the father of the respondent lived
on the suit land in a semi-permanent house with his family.

That during this time the land was bordered by Imerit Keresefio father to Ipeded
in the North, Iberut Samson father to the appellant in the east, Otimo Barnabas
father to Ogwapit Simon in the west and Ehaame Israel father to Imalingat
20 Stachus in the south.

That he never heard any land disputes from any of these people about the land
until the Appellant started encroaching on the land.

That he called a meeting to resolve the issue but the appellant did not attend,
however the meeting proceeded with the residents confirming that the suit land
25 belonged to the respondent.

That they then proceeded to the suit land and mapped out the same which had
already been demarcated with sisal plants.

5 That unfortunately, the defendant continuously encroached upon the suit land and he advised the respondent to refer the matter to the Kumi District Land Tribunal.

During cross-examination he stated that he was 11 in 1963, he did not know how Opus Michael acquired the suit land. That the respondent inherited the land from
10 his father and he was present with the neighbours when it happened.

PW3 Ogowapit Simon testified that he is a neighbour to the suit land to the west and this land was originally owned by the respondent's father and later the respondent.

That ever since he was born in 1977 the respondent lived on the suit land with
15 his parents. During cross-examination he stated that the suit land is separated from him by the road.

That he was present when the respondent inherited the suit land from his father but no document was executed since the inheritance was from his father.

That the respondent returned to the suit land after the insurgency in a year he
20 doesn't remember and built grass thatched huts on the land, but these huts were later burnt. That he did not know if the respondent's father was a squatter on the suit land and he also does not know how Opus got on the suit land.

During re-examination he stated that he attended the meeting where the respondent was given land by his father together with his parent because he was
25 still a child.

PW4, Ipeded Akol, testified that both parties are known to him as cousins, the suit land initially belonged to Opus Michael, the respondent's father who was the *bona fide* owner because he had stayed there during his lifetime and had no dispute with any neighbour he later bequeathed the same to the plaintiff.

5 During cross-examination he maintained that he found the respondent's father on the suit land and he doesn't know whether Opus was a squatter. That before he left for Kampala for work the respondent's father had a home on the suit land. He could not tell whether the suit land was for Iberut.

PW5 Imalingat Stachus testified that since his childhood Opus Michael was on the
10 suit land where he had constructed a semi-permanent house.

During cross-examination he stated that before 2009 there was someone using the land because the respondent was in Busoga. He maintained that when he grew up the respondent's father was using the suit land and later the respondent inherited it.

15 b. Defence's evidence:

DW1 Eurien David testified that the respondent's father was formerly his neighbour and his land is vacant.

That the suit land is 10 gardens and he is currently occupying it, having inherited it from his father.

20 That this land originally belonged to Emacet, wife of his grandfather and when they died Iberut Samson and Okullu took over.

That the plaintiff has no land in the area but in Bugiri, his father left their neighbourhood in 1985 but LC was sent away partly by Okullu and Iberut.

That Iberut took over the land the plaintiff's father left behind and after his death
25 he also took over the land which is now in dispute.

That other than the suit gardens his father lefty behind thirty gardens which his family is using.

5 During cross-examination he stated that the father of the claimant/respondent left behind over 10 gardens in 1985 and before leaving he had his home on the suit land.

He insisted that during the insurgency the respondent's father did not leave but was chased away and he went to Bugiri and when he was chased Okullu and
10 Iberut his father took over the land of the respondent's father.

During further cross-examination he stated that the suit land was taken by Iberut and Okullu and he does not know when the respondent's father took over and settled on the suit land.

He further stated that Iberut and Okullu took over the land in 1967 after the death
15 of Otyang their father.

During re-examination he stated that he has stayed on the suit land since the death of his father and the land was originally for Okullu.

That the father of the respondent concubined a lady called Munyuka who was brought as a domestic worker for his grandfather.

20 That Munyuka used and settled on the suit land as she looked after Imaset and after Munyuka's death the respondent stayed on the land till 1982 when he left for Bugiri.

That the respondent's father left on allegations of witchcraft and malicious damage to his millet crops.

25 That during the insurgency his father Iberut and uncle Okullu were on the suit land and he has never seen Olupot Ben on the suit land. In further re-examination he stated that the respondent's father did not have any land.

5 DW2 Imunat Rose testified that the appellant is a son of her co-wife, that the suit land belonged to Otyang the father of Iberut and Okullu.

That Munyuka was given a portion of land to put a hut and her father in law accepted, Opus then concubined with Munyuka on this piece of land.

That later on the appellant's father chased away the respondent's father because
10 he had no land there.

That Olupot has never stayed on the suit land.

During cross-examination she stated that the respondent's father never cultivated the suit land, he only cultivated the portion given to Munyuka and upon Munyuka's death she took over the gardens with the appellant.

15 That the suit land is neighboured by her and her children, with Otyang to the North, the appellant to the east, Okiror on the west and south is Elungat.

That Otim Barnabas is on the opposite western side of the suit land and so is Ogowapit (across the road).

She stated that the plaintiff was born on the suit land. In re-examination she
20 stated that the respondent's father left the suit land during the insurgency and went to Busoga and when he left they took over the gardens and used them.

6. Resolution of appeal:

From the above evidence, the respondent's claim is that his father Opus Michael gave him the suit land while he was still alive in 1987 and thereafter they left for
25 Bugiri where the father passed on. This fact was corroborated by all his witnesses and even the appellant and DW2 confirmed that the respondent's father was on the suit land and left during the insurgency.

5 The appellant himself admitted during his examination in chief stated that Opus left the land in 1985 and was sent away by Okullu and Iberut who later took over the land when he left. The appellant further admitted that Opus left behind 10 gardens and he had actually built a home on the suit land.

During re-examination the appellant tried to change this by introducing, Imaset,
10 his grandmother as the owner of the suit land and how Opus' concubine was given a piece of land which after her death he Opus took over.

The appellant later introduces Okullu as the original owner of the suit land. This claim then morphs into something else when the appellant claims that the land was taken over by Iberut and Okullu in 1967 after the death of Otyang their
15 father.

All the above points to inconsistencies in the appellant's evidence with regard to how the land came to be acquired by his father and later by him. All that raises the question of; was the land originally for Imaset, Otyang or Iberut and Okullu?

Furthermore, in his WSD the appellant claimed that Opus came to concubine
20 Munyuka the wife of Ocode and after Ocode died Munyuka went back their place which is not the suit land.

In his further testimony, the appellant told court that Munyuka was looking after Imaset and settled on the land which is how the respondent's father Opus came to be on the suit land as he was sharing a home with Imaset.

25 I find that evidence shows that the respondent's father was on the suit land prior to the insurgency when he left for Bugiri. What the appellant disputes about this is how Opus left the land.

5 While the respondent claims they voluntarily left the land and sought refuge in Bugiri, the appellant claims they were chased because of witchcraft and malicious damage.

The respondent's claim is corroborated by all his witnesses while that of the appellant is contradicted by DW2 who stated that Opus was chased because he
10 had no land in the area.

While the respondent simply stated that his father came to the suit land after being given the same by a chief, the appellant constructs a complex tale by which Opus came to be on the land and how he left.

Interestingly during cross-examination, he is unable to give the year when the
15 Respondent's father took over and settled on the suit land, yet he has a whole tale on how he got to the land.

The appellant first stated that the respondent's father had land neighbouring him and it is vacant, he later changed and said that the respondent has no land in the area but in Bugiri.

20 In the same testimony the appellant stated that the respondent's father left their neighbourhood in 1985 after being sent away by Iberut and Okullu who took over his land which is 10 acres and now subject to dispute.

I find that by this, the appellant confirmed that the respondent's father had 10 gardens which constitute the suit land and upon his departure in 1985 or
25 thereabout the appellant's father and uncle took over the land.

The claim that the respondent's father came to be on the land because of his concubine appears far-fetched.

Furthermore, the respondent's witnesses especially Ogwapit, Ipeded and Imalingat who are direct neighbours to the suit land and grew up seeing the

5 respondent's father on the suit land would have known if at any point he stayed with a concubine and none of them testified to this.

It is also worth noting that the respondent's witnesses especially Ogowapit, Imalingat and Ipaped are direct neighbours to the suit land and all of them testified that the land belonged to the respondent. I also noted that the appellant
10 in his WSD to the claim before the land tribunal, had listed Ipaped Akol (Pw4) as one of his witnesses, interestingly he testified for the plaintiff instead.

While someone might consider this minor, as a person is free to testify for whichever party they choose, I find that it shows that indeed the neighbours to the suit land including Ipaped grew up knowing the land belonged to the
15 respondent's father who later gave the same to his son.

Regarding the neighbours to the suit land, the respondent in his claim stated that the neighbours were Imalingat, Omanakwi and Imerit, the appellant in his WSD agreed that this were the neighbours including Ipaped and Enguriat.

DW2 on the other hand told court that the land was surrounded by her and her
20 sons which contradicted the appellant's testimony. This further increases the questions surrounding the appellant's claim to the suit land.

Consequently, given the very contradictory statements made by the appellant in the lower trial court I am left but with no alternative to find and conclude that given the evidence on record on a balance of possibilities the respondent did
25 prove that the suit land was his.

Counsel for the appellant submitted that the inconsistencies regarding the size the suit land, how the respondent acquired the suit land and the years of the alleged trespass were not addressed by the trial Magistrate.

5 Regarding the size of the suit land, the respondent in his original claim before the land tribunal was for four acres.

PW2 Osemwa said the land was 11 gardens and some are double, PW3 Ogwapit said the land was 13 gardens and PW4 said the land was 12 gardens. The appellant himself stated that the land is 10 gardens and DW2 stated that the land
10 was 15 gardens.

It is worth noting that the suit land is customary land that has never subjected to any survey to establish its exact size in terms of acreage. The witnesses all gave evidence basing on their estimates of the size of the land, furthermore, the appellant himself confirmed that the land left by the respondent's father which
15 lberut and Okullu later took over was 10 gardens and this is the land subject to dispute.

I therefore find that the parties and their witnesses were all aware of the location and size of the suit land. The variances in the size of the land are based on the estimation of the various witnesses and do not constitute a major inconsistency
20 since the parties were still well aware of the land they were litigating over.

Regarding how the respondent acquired the suit land, counsel for the appellant submitted that it was not clear from the various testimonies whether he inherited the suit land or got it while his father was alive.

I note that the respondent and his witnesses all state that he was given the suit
25 land by his father Opus while he was still alive and they all describe this as inheritance. This is where the appellant's discontent arises because the term inheritance refers property received from an ancestor under the laws of intestacy or property that a person receives by bequest or devise (*Black's Law Dictionary*

- 5 *9th ed.*); yet the respondent's testimony was that the land was given to him while the father was still alive which implies it was a gift *inter vivos*.

The law is that a gift *inter vivos* takes effect when three situations are fulfilled, that is, there is intention to give the gift, the donor must deliver the property, and the donee must accept the gift.

- 10 From the record it is clear that the respondent was given the land by his father before they both left for Bugiri seeking refuge during the insurgency. The respondent and his witnesses carelessly use the word inheritance but interpreting their statements it is clear that the respondent is referring to a gift *inter vivos*. His father gave him the land and he accepted the same as his before
15 they left for Bugiri, he even left his cousin to care take the same. This issue as raised by counsel for the appellant becomes minor when the evidence as a whole is considered.

Finally, on the issue of when the appellant is alleged to have trespassed on the land is not a major inconsistency as brought out by counsel for the appellant.

- 20 The first incidence was in 2004 when he dug out and sold murram to the Mogel Constructors and this was corroborated by all the respondent's witnesses.

- The appellant himself in his Written Statement of Defence under paragraph 3 stated that the land he sold murram from measures $\frac{1}{4}$ and the rest belongs to his father. Though in re-examination he later changed his averment and stated that
25 it was his father who excavated and sold the murram.

The respondent following this filed his claim first before the LCs and later the tribunal and he states that after that the appellant did not tamper with the land. The second time the appellant trespassed on the land was when he started

- 5 cultivating the suit land. The respondent stated that this was in 2009 and pw2 said that in was 2011.

It is clear to me that the appellant trespassed on the land in 2004 and when the respondent filed his claim he stopped, he once again entered the land around 2009 and stayed thereon till date.

- 10 Finally, counsel for the appellant also sought to raise the issue that the suit land was out of the pecuniary jurisdiction of the trial magistrate because of the uncertain number of gardens.

This issue was never raised in the trial court and furthermore, no evidence by way of a valuation report has been adduced to prove this fact.

- 15 I therefore find that without proof that the land was out of the trial magistrate's pecuniary jurisdiction I cannot address this issue.

The trial magistrate after considering the evidence led by both parties found that the respondent had proved that his father stayed on the suit land. She declared the plaintiff/respondent the lawful owner of the suit land and the appellant on
20 the other hand a trespasser.

In conclusion, basing on the evidence on record as discussed above, I find and conclude that the trial court was spot on when it passed judgment in favour of the respondent that indeed the suit land belonged to him and the appellant a trespasser thereon.

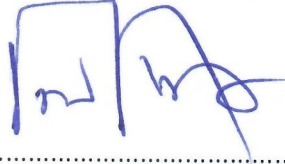
- 25 The above being so, I would find that this appeal has no merits and is accordingly dismissed and the judgement and orders of the lower court upheld.

7. Orders:

- a. This appeal is found to lack merits and it thus fails.
- b. The Judgment and orders of the lower trial court are upheld.

- 5 c. The cost of this appeal and in the lower trial court are awarded to the respondent.

I so order.

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Adonyo, J

12th July 2023

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