The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Civil Appeal No. 28 of 2022

(Arising from the Chief Magistrate's Court of Soroti at Soroti Civil Suit No. 05 of 2021)

Eluku Joseph :: Appellant

Versus

Ecodu Moses :: Respondent

(Appeal from the Judgement and Orders of the Magistrate Grade 1's Court of the Chief Magistrate's Court of Soroti at Soroti delivered on 30th June 2022 by His Worship Emmanuel Pirimba)

Before: Hon. Justice Dr Henry Peter Adonyo

Judgement

1. Background:

The plaintiff (now appellant) instituted Civil Suit No. 05/2020 in the Chief Magistrate's Court of Soroti at Soroti against the defendant (now respondent) for a declaration of ownership of approximately five gardens located in Opiyai B village, Acetgwen parish, Soroti sub-county, in Soroti District (hereinafter "the suit land"), and for vacant possession, general damages, a permanent injunction and costs of the suit.

The appellant claimed that in 1975, his grandfather, the late Elwaru, requested the plaintiff/appellant's father, the late Etitu Wilson, for a son to take care of him as he was ill, and thus the appellant was sent to stay with the late Elwaru. Upon the demise of Elwaru, the appellant inherited land measuring approximately 50

gardens situated at Opiyai B village, Acetgwen parish, Soroti sub-county, in Soroti District. The appellant contended that the respondent is settled on the land neighbouring that of the appellant, measuring approximately ten gardens, which land the defendant/respondent's grandfather, the late Anyau, who was a herdsman at Elwaru's home, was given by the same late Elwaru, separate from the 50 gardens that the appellant inherited.

The appellant avers that he enjoyed quiet possession of his land until 2016, when the respondent encroached on half of his gardens, which caused the appellant to report to the clan, where the matter was resolved in the plaintiff/appellant's favour, but the respondent paid a deaf ear and continued cultivating the land.

The appellant contends that the respondent again, in 2018, without any colour of right, entered the appellant's four-and-a-half gardens, making a total of five gardens (the suit land) and constructed thereon two grass thatched houses where he stays and also using part for cultivation. The appellant contends that attempts by the clan and LC 11 chairperson to resolve this issue failed, and the respondent continued his acts of trespass.

On the other hand, the respondent disputed the appellant's claim and stated that he was the rightful owner of the suit land (five gardens), which he occupies and cultivates. The respondent contended that he inherited the said gardens from his late father, Eniau Levi, who also inherited the same land from the respondent's grandfather, Aliu. The respondent contends that his mother, Ariau Martina, was married to Eniau Levi where they cultivated and that she still cultivates the suit land to date.

The respondent avers that he was born in 1964 on the suit land where his late father, Eniau Levi and the family cultivated the suit land to date. Further, the

respondent's grandfather Elim (brother to Aliu) lived, died and was buried on the suit land.

The respondent contends that Elwaru did not live on the suit land or cultivate the same and that there was no dispute between Elwaru and Aliu as they lived peacefully as neighbours.

The issues that the trial court determined were;

a) Who is the rightful owner of the suit land?
b) Whether the defendant is a trespasser on the suit land?
c) What are the available remedies to the parties?

At the trial, both parties testified and called witnesses, but judgment was given against the appellant, hence this appeal.

According to the memorandum of appeal, the appellant raised two grounds of appeal as follows,

a) That the learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on the record as a whole and came to the wrong conclusion that the suit land belongs to the respondent.

b) That the decision of the learned Trial Magistrate occasioned a miscarriage of justice.

The appellant proposed the following orders for consideration by this appellate court;

a) That this appeal is allowed.
b) That the Judgement and Orders of the trial Court be set aside and reversed.

c) A declaration that the appellant/plaintiff is the rightful owner of the suit land.

d) That costs of this appeal be awarded to the appellant.

2. Duty of the first appellate court

This is the first appeal from the decision of the learned magistrate. The duty of the first appellate court is to scrutinise and re-evaluate all the evidence on record in order to arrive at a fair and just decision.

This duty was well laid down in the case of **Kifamunte Henry vs Uganda SCCA No. 10/1997,** where it was pointed out that;

> ***"The first appellate court has a duty to review the evidence of the case and to reconsider the material 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."***

Furthermore, in the case ***Father Nanensio Begumisa and three others vs Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236,*** the obligation of a first appellate court was pointed as being;

> ***"...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."***

See also: Baguma Fred vs Uganda SCCA No. 7 of 2004.

3. Power of the Appellate Court

Section 80 of the Civil Procedure Act, Cap 71, grants the High Court appellate powers to determine a case to its finality.

The above legal position in regard to the duty and legal obligation of the first appellate court is considered while resolving this appeal.

4. Representation:

The pleadings filed in this appeal show that the appellant was first represented by M/s Legal Aid Project of the Uganda Law Society then later by M/s Ewatu & Co. Advocates.

The respondent was represented by M/s Engwau & Co. Advocates. Counsels representing the parties argued this appeal by way of written submissions.

The submissions and the whole record of the lower court, including pleadings, proceedings, judgement, and orders, are considered while resolving this appeal.

5. Evidence on Record

I have perused the lower court proceedings in detail. The following is found as oral evidence received therein.

PW1 Augustine Ekulu, 85, the grandfather of the plaintiff, testified that the gardens were for Mzee Ewaru and that the respondent trespassed on suit land. He stated that the appellant was made heir of the late Ewaru in 1975 because the late did not produce any child. He stated that the gardens given to the plaintiff were many and that he did not know the number but that he could tell the boundaries on either side because Ewaru and Joseph were on either side. He

testified that the trees showing the demarcation are still standing and that the boundaries can be clearly seen; to wit; the neighbours to the suit land include Michael Etadu, the late Epiru, and the swamp. PW1 testified that the land was vast and people were few. PW1 testified that he was present while the land was being given to the plaintiff, and it was of their clan because the late Ewaru was PW1's brother from the same family.

PW1 testified that the late Ewaru was born on the suit land and that he had brothers who were all staying in Opiyai on the suit land. PW1 testified that the late Ewaru died of an accident in 1975, and he was buried at his home, not on the suit land. PW1 testified that the land that the plaintiff is claiming is not the entire land but a piece where Echodu went and built.

During cross Examination; PW1 testified that the land in dispute is approximately three gardens. PW1 stated that he did not know Elimu because he did not find him, but he was informed Elimu was buried in the swamp, which is the land of the defendant. PW1 testified that he got Ewaru and Enyau, who were neighbours and that Enyau is a father to the defendant.

PW1 testified that his clan is called Ipiayatok Inomu. PW1 testified that he was not aware of the plaintiff being invited to attend a clan meeting, which he refused. PW1 testified that that Enyau and Ewaru did not have any dispute over his land and that he does not know when the dispute started, but he was told. PW1 testified that he knows Florence Alelo, who is the wife to Eluku's brother and a neighbour to the suit land. PW1 testified that the plaintiff has never cultivated the land in dispute. PW1 testified that the plaintiff is not a biological son of Ewaru and that PW1 was not aware of the Letters of Administration given to the Plaintiff.

During re-examination; PW1 testified that Ewaru convened a clan meeting and handed over the land to the plaintiff. PW1 testified that the land was being used by anyone at the time of encroachment, but the entire land was under the care of the plaintiff. PW1 stated that the land of Enyau has no dispute and that it is being used by the defendant for cultivation.

PW2 Eluku Joseph, aged 71 years old, the plaintiff, testified that the suit land which belongs to him measures about 5 ½ acres and is located in Opiyai B in Amen parish in Soroti district. PW2 testified that he inherited the suit land in 1975 from his grandfather Ewaru, who did not have any children. He stated that Ewaru asked his father, Etolu Wilson, for a boy, and his father gave PW2 to Ewaru. In 1975, PW2's father and him, went to Ewaru and the suit land was shown to them. The land had a place where the sand was being extracted, and it later developed a pond called Ewaru Pond. PW1 testified that he took possession of the land in 1975 and started using it the moment he was shown the land. He testified that he is currently using the land. PW1 testified that he used to cultivate the suit land together with Emaku, the brother of the defendant.

PW2 testified that upon the death of Emaku 3 years later, the defendant came to cultivate on the same land. PW2 does not remember the year when Emaku died but stated that Emaku was not buried on the suit land. PW2 testified that upon the defendant trespassing on the suit land, PW2 reported the matter to the matter to the clan around 2017, the same year that the defendant trespassed onto the land. PW2 testified that the defendant is using the land for construction and has finished construction on the suit land. PW2 testified that the clan stopped the defendant from using the suit land, but the defendant insisted and continued cultivation even during mediation. PW2 testified that there were no minutes taken during the clan meeting. PW2 testified that the neighbours to the

suit land include Etitu William, Emalu Florence, PW2 himself, the defendant on the right side of the land, and Adengo Simon. The plaintiff testified that the suit land has Palm trees, Iligoi trees, and Emalaina trees. The defendant is cultivating on the land measuring approximately five gardens together with his in-law, whose name PW2 does not know. PW2 states that he has been on the suit land for close to 40 years now and that the defendant started disturbing him since 2014.

During cross-examination, PW2 testified that the dispute started in 2017, but prior to that, their stay was peaceful. That the clan members were old and illiterate and could not write minutes and that the clan did not tell him that they had a dispute with the defendant in 2012. PW2 testified that Ekayo Isaac is his son whom the defendant had a dispute in 2012. PW2 testified that it was him who showed Ekayo Isaac where to where to build at the boundary of the land and that he did not show him the land in the absence of the defendant because the not his boundary neighbour. PW2 testified that the defendant did not take him to his clan, Ipiatok Inomu, for having taken his son to build at the boundary. He testified that the clan of the defendant is called the Awino clan.

When PW2 read the document titled The Joint Clan Meeting between Awino and Ipitok Clans, dated 5/10/2013, he stated that the dispute did not start in 2013 when his son built a house. He stated that between his grandfather, Ewaru and Eyao, his father, there was no dispute. Eliu Julius, his grandfather whom he met upon birth, was one of his witnesses attending the clan sittings. He testified that Eliu was not living where the defendant is living now but that Eliu was buried at the home of the defendant. PW2 testified that he was not aware that Eliu was the grandfather of the defendant. He testified that Florence is a neighbour to the suit land.

During re-examination, PW2 testified that Eliu is his grandfather because Eliu was an uncle to Ewaru and came from Agama. PW2 testified that Eliu was buried near the swamp because it was a cultural demand that when you are shot, you are not buried at home. PW2 that it was not necessary to call the defendant while giving his son land to build from because the defendant is not related to him.

During clarification from the court, PW2 testified that it was true that upon showing Isaac where to build, there was a dispute over the area, but it was not taken to any authority to resolve. PW2 testified that his son built where he showed him, and that is where he is currently. PW2 testified that the defendant planted cassava, potatoes and maize, and he has also built a permanent wall in the place. The defendant has left his land since he sold it and came onto PW2's land. PW2 testified that Ewaru is his biological grandfather but a brother to my grandfather called Peter. PW2 reiterated that he, together with Epiru and Epedu, were present when he was being given and that he was 24 years old.

PW3, Ediu Julius Joseph, aged 49 years old, a nephew of the plaintiff, testified that the defendant is a neighbour to the plaintiff in the village. PW3 testified that the suit land located in Opiyai village, Amen Parish, now Acetgweno, measuring 5 acres, is being grabbed by the defendant from the plaintiff, who is the owner. PW3 testified that the plaintiff got the land from his grandfather Ewaru, who picked the plaintiff to go and help him and upon his death, the plaintiff inherited the land. PW3 testified that the plaintiff has been on the land since 1980 during the Obote II regime. PW3 testified that the land neighbours are Etitu, Epedu, and Ebwora. It has a cattle pathway and Ewaru shallow well.

The land belongs to the Plaintiff. PW3 testified that the defendant entered the land around October 2018 and built on it, and he is also digging the land. PW3

testified that the matter was reported to the LC.1. Court, but nothing happened and that the defendant has continued digging and has also erected a wall fence.

PW3 testifies that he remembers that Adengu Nelson used to come and assist the plaintiff with heaping the potatoes and that he has also frequently gone to the land but not on the suit land.

During cross-examination, PW3 testified that he has been on the land severally. That Adengu Nelson, a brother to the plaintiff, was using the land, but he never had a home on the suit land. PW3 testified that he did not know Enyiau, the grandfather of the defendant.

He testified that he did not grow up in the place where Enyau was.PW3 testified that Ewaru did not show him the boundaries of his land even though he met Ewaru before his death. PW3 testified that he was not present when the adoption of the plaintiff by Ewaru was taking place and that he was not present when the land was being given to the plaintiff by Ewaru. He testified that he does not have the minutes of the LC.1 proceeding but that the plaintiff should have it. He testified that he did not know Ekoyu Isaac. PW3 testified that the dispute on the suit land, according to him, started in October 2018.

PW3 testified that he did not know about any clan meeting between the plaintiff and the defendant's clan and that he did not know any person called Eliu.

During re-examination, PW3 testified that he knows Ekoyu Isaac as one of the children of the plaintiff. And he goes to Opiyai not frequently but two times monthly. He testified that he did know all the people who lived in the area of Opiyai. He testified that he was told about the plaintiff being given the land by

Ewaru by his mother, Margaret Ikano and that Adengu Nelson is not related to the defendant.

During the court's clarification, PW3 testified that the plaintiff's son is staying in Oderai, not on the suit land. He did not attend any sitting in the village of the suit land, but the plaintiff told him about the court L.C.1 sitting, not the clan.

PW4 Margaret Ikau aged 73 years old, a brother to the plaintiff, testified that he did not know the defendant but she was testifying that the defendant left his land and went and constructed on his brother, the plaintiff's land. She reiterates the particulars of the land and the size of 5 and ½ gardens. She reiterated PW2's testimony of how he got ownership of the land through Ewaru. She testified that the plaintiff took possession and started using the land in a year she could not remember since she was young.

She testified that the plaintiff is currently in possession of the land partly, and Ecodu is also using the land. During cross-examination, she testified that she was present when there was a dispute between the defendant and Isaac Ekoyu, which was in respect of land given to Isaac by the father, but she does not remember when it took place as she did not attend the meeting.

DW1 Ariau Martin, aged 83 years old, testified that he knows Ecodu Moses as her son, whose father is called Levi Enyau. The suit land is her land. DW1 testified that he was married on the land by her husband many years ago and that they have been using the land for cultivation with my husband. The father, Aliu of her husband, died and left the husband on the land which has Engosorot trees and Egirigiroi trees cut but still visible, Ebiong trees were present. There is only one grave for my brother's grandfather, called Elim, brother to Eliu. The neighbours to this land are Egoca, son of Epiru, Ewaru, and Epedu, who are all deceased.

During cross-examination, DW1 testified that the suit land measures five and ½ gardens. She is from the Awino clan. She is old, and she has been on the suit land to date from the time she was married, and she has never left that land to date. She testified that Eluku does not have land there. She produced all her children on the suit land. She testified that her husband and grandparents are all buried on the suit land, but she did not count the number of graves on the land. Eliu was also buried on the suit land in the swamp.

Alyelo Florence is her daughter-in-law, who has also cultivated and built on the suit land; she constructed a semi-permanent house. The Plaintiff has never cultivated on the suit land but in his own garden, which is different from the land in dispute. She testified that the land is hers and that the plaintiff is not a neighbour, but he is on the upper side of the land in dispute. She testified that Ewaru did not produce any child but that the suit land neighbours Elwaru's land. She testified that Adengo was the one who inherited Elwaru's land. The defendant constructed on the suit land a long time before the case started.

During re-examination, she testified that the same land in dispute is not the land Alyelo Florence is cultivating, but they are sharing a boundary.

She clarified that Alyero Florence is a wife to Adengo, the one who inherited the land of Ewaru. Adengo died a long time, but lyelo Florence is still alive.

DW2 Ecodu Moses, the defendant, testified that the suit land is 5 ½ gardens and it belongs to him, having got it from Enyau Levi, who died in 1971. He was born and grew up there till now I was on the land. That Levi inherited the land from his father, Aliu. The dispute started in 2016 when the plaintiff sent his son Isaac Ekoyu to come, and he trespassed on the land by way of building on the boundary between the plaintiff and his land. The son of the plaintiff changed the boundary

mark by planting a tree, "Gitigiti". He reported the issue to the Ainomomawoku Opiyai clan. The matter was resolved that he should not encroach on land not belonging to the plaintiff. The plaintiff's son kept quiet for three years, DW2 planted cassava on the land, and the plaintiff's son came and uprooted the same; the matter was reported to the police. In 2020, the plaintiff filed a suit against DW2, but the plaintiff's son has not stopped disturbing DW2.

The features on the land include Gitigiti, the Engosorot tree, and the guava tree, which was cut. There is a road.

DW2 testified that his grandfather, Aliu, was buried on the suit land. The land neighbours are Egocha, Epedu, Aleso Florence, Alo Imalo, the plaintiff's sister, and the plaintiff is also a neighbour on the upper side. Eriau died in 1971 and was buried on the following day.

During cross-examination, DW2 testified that he is from the Celemawino clan, where his father belonged, but the suit land belongs to the Awoko clan, but his father inherited the land from his father. The Plaintiff has never cultivated the suit land. The plaintiff is a neighbour to the suit land. The land of Ewaru is being used by the plaintiff. The plaintiff calls Ewaru his grandfather. DW2 testified that he does not know how the plaintiff came into Ewaru's land. Eliu and Plaintiff Eluku are not related. The plaintiff is a clan relative to DW1. Aliu was buried in the cemetery where there is no dispute. Eliu stayed on the suit land, died and was buried on the suit land. The suit land is for Aliu. Aliu and Eliu were joint owners of the land. The land that DW2 I inherited is 7 ½ gardens in total, and that he is currently using the whole land.

DW3 Engulu John Peter testified that the plaintiff is the son of his brother Wilson Etilu. The suit land, located in Opiyai B, measures 5 ½ gardens, and it belongs to Ecodu, the defendant. DW3 testified that when he was born, he found when the father of the defendant, Levi Enyaru, was cultivating the suit land, and he had never seen the plaintiff cultivating the land. The clan meeting did not resolve anything, as the plaintiff's son became violent.

The plaintiff was present together with the children. Ewaru was a brother to the father of DW3, Peter Epiru. The plaintiff filed a case against the clan before the Inomu clan. They failed to resolve the matter. There is a grave for the defendant's grandfather called Eliu, a cattle path on the right-hand side, separating the land in dispute between plaintiff and defendant, three gardens on the right, 2 ½ on the left-hand side of the cattle corridor, trees were also on the land but cut down, Ibui tree, Engosorot and Eligoi tree. DW3 is the one neighbouring the defendant on the three gardens' side. On the left is Alelo, who is the wife of the plaintiff's brother, Nelson Adengo.

On the upper side, Ekoyu, the plaintiff's son, is the one neighbouring the defendant. The wife of the defendant's brother called Ayebo is a neighbor. The defendant's brother Ebony Michael is also a neighbour to the 2 ½ gardens.

During cross-examination, DW3 testified that Ewaru never cultivated on the suit land.

Eliu is not related to him, and he did not find Eliu on the suit land. Ecodu inherited about 8 ½ gardens; some have been sold recently. The plaintiff inherited Ewaru's land.

6. Determination

Counsel for the appellant, in his submissions, chose to argue the grounds consecutively; that order appears to me plausible, and I shall follow it in resolving this appeal.

a) That the learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on the record as a whole and came to the wrong conclusion that the suit land belongs to the respondent.

Counsel for the appellant submits that they are not in agreement with the trial magistrate's finding that the defendant/ respondent is the rightful owner of the suit land measuring 5½ gardens because the trial magistrate did not evaluate all the evidence on record in regards to ownership and came up with a wrong finding that the suit land belonged to the respondent.

Counsel for the appellant contends that the suit land is customary land, proof of which has been a subject of judicial interpretation because it is based on non-titled ownership and hence depends on evidence. To that end, counsel cited the case of ***Marko Matovu and two others vs. Mohammed Sseviiri and two others, C. A No. 7 of 1978*** where it was held, among others, that customary land can be acquired through inheritance. It is, however, clear under the succession law that for one to claim inheritance of property from the deceased person, the same must have belonged to the deceased during his lifetime.

Counsel for the appellant submitted that the crucial issue for determination in the lower court was ***"who the rightful owner of the suit land is".*** In his submissions, counsel reproduced the parties' testimony adduced in the lower court as reflected on the record of proceedings, which I shall not do word for word, but I

will only spotlight that piece of evidence which, upon reading the trial court's judgement, was not reflected therein.

The appellant's counsel submits that PW3 Ediu Julius Joseph, on pages 10, 11 and 12 of the record of proceedings, consistently testified that he was in court over land that was grabbed by the respondent from the appellant. PW3 stated that the appellant acquired the suit land from his grandfather, Elwaru who picked the appellant to go and help him and upon his death, the appellant inherited the suit land. PW3 testified that the appellant has been on the suit land from the time of the Obote II regime. PW3 testified that the respondent entered the land and constructed on the land. The matter was reported to the LC 1 court, but nothing happened. It is the contention of the appellant's counsel that during cross-examination, PW3's evidence remained unshaken when he informed the court that he had ever been on the suit land severally and that Adengo Nelson, a brother to the appellant, was using the land and never had a home on the suit land. PW3 also maintained that he does not know the grandfather of the defendant.

The appellant's counsel submitted that PW4 Christine Ikau, a sister to the appellant, on pages 12 to 13, corroborated the evidence of the other plaintiff witnesses when she testified that the land belonged to their grandfather Elwaru and now belongs to the plaintiff. The appellant inherited the suit land from their grandfather, Elwaru, who didn't give birth. PW4 testified that upon Elwaru's death, the appellant took possession and is still in possession of the suit land partly, as well as the respondent. PW4 also confirmed that the land in dispute is approximately 5 acres and that the respondent, on top of cultivating the land, has also constructed. PW4, during cross-examination, testified that she was present when there was a dispute between the respondent and Isaac Ekoyu. The

dispute was in respect of the land given to Isaac by the father. That Elwaru and Levi Enayu were not related. The person buried on the suit land is called Elina. Alyero Florence is a boundary neighbour to the suit land. In re-examination, she affirmed that she only attended a clan meeting where the respondent was stopped from cultivating on the suit land. The land in dispute is being used by the defendant.

The appellant's counsel submits that the evidence of the appellant and his witnesses as to ownership was consistent. His acquisition and possession thereof were not disputed during the trial, and had the trial magistrate properly evaluated the whole evidence; he would have found that the appellant is the rightful owner of the suit land.

The appellant's counsel contends that it was wrong for the trial Magistrate on page 6 of his Judgment to find that the appellant did not tell the Court how much land he was given and or whether the land was counted as opposed to his pleadings of 50 gardens. Counsel avers that whereas the appellant pleaded that his land given to him by his grandfather, the late Elwaru in 1975 measures approximately 50 gardens, he was clear on the estimation of the suit land even at the trial that what the respondent has trespassed on measures about 5 ½ gardens.

Counsel submits that PW1 Augustine Ekulu, PW3 Ediu Julius Joseph and PW4 Margaret Ikau all knew the suit land estimated to be approximately 5 ½ gardens and that the matter before the Court was not about how much land was given to the appellant by late Elwaru but the respondent's trespass on the 5 ½ gardens which the appellant and his witnesses demonstrated during trial.

Counsel for the appellant submits that the respondent also corroborated this testimony on page 17 of the typed and certified record of proceedings that the respondent/defendant is also settled on land neighbouring that of the appellant measuring approximately ten gardens which land was also given to the respondent's grandfather the late Anyau by Elwaru. Counsel contends that this piece of evidence was not challenged during the trial but the trial Magistrate decided to ignore it while evaluating evidence.

Counsel avers that the respondent waited till about 2016 to trespass on the suit land and whereas the appellant reported this matter to the clan around 2017, the clan stopped him from using the land but he insisted and continued cultivation illegally. Counsel avers that this evidence was not challenged in cross-examination by the respondent.

Counsel for the appellant avers that the respondent also, on page 17 of the record, admitted in his testimony that there was a dispute in 2016, and the matter went to the clan. Wherefore on page 9 of the record of proceedings, when the Court sought clarification from the appellant, counsel avers that the appellant informed the Court that the respondent left his land and has since sold theirs and came to his own, that, however, the trial Magistrate ignored such vital evidence.

Counsel for the appellant contends that on page 7 of the Judgment, the trial Magistrate made a finding that;

> ***"the Appellant claimed he was given land in 1975 and took possession of the same, yet the sister PW4, who is older than him, stated that she was young when the land was allegedly given to the Appellant by the late Elwaru"***

which evidence does not suffice on the record of proceedings because to counsel, PW4 ably supported the appellant's ownership of the suit land and stated that the respondent left his land and went to construct on the appellant's land.

Counsel averred that the appellant at the time of his testimony was aged 71 years, meaning he was born in 1951, and by 1975, when the late Elwaru gave him the suit land, he was aged 24 years and of majority age to counsel, it is not true that the appellant was still young or showed boundaries that he did not know.

Counsel for the appellant avers that the appellant knew what constitutes the land of Elwaru. Counsel contends that PW1 Augustine Ekulu, who was elderly, did not say he didn't know the boundaries as found by the trial Magistrate; but he knew the boundaries and also named the neighbours before the Court since he was present when the land was given to the appellant.

Counsel for the appellant contends that much as the trial Court, to the contrary, held that the respondent and his mother showed the boundary between her land and that of late Elwaru, the said boundary and its features were not captured in the Judgment, leaving the imagination of what constituted the boundary between the parties.

Counsel for the appellant contends that after evidence was led in court, the court visited the locus, and the appellant clearly showed and identified all the boundaries to the suit land, inclusive of the grave; however, to counsel, it was wrong for the trial Magistrate to make a finding in the alternative at page 7 of his Judgment, at the bottom that the evidence on record showed that the appellant never used the land as long ago as 1985 to date, yet the appellant testified that when he was given the land in 1975, he took possession of the same. The appellant stated that he had been on the land for close to 40 years and further

asserted that the respondent started disturbing him in 2014, and the dispute itself started between 2016-2017, which evidence to counsel was not challenged at all at trial.

Counsel for the appellant contends that the doctrine of adverse possession that the trial Court relied upon by DW1 Ariau Martin in favour of the Respondent is misplaced because DW1 did not state in her testimony that she got married on the suit land in 1985 but that this was imagination, in any case, to counsel, the position was when did she give birth to the respondent because at the time of his testimony in Court, he was aged 58 years meaning he was born in 1964 which to counsel for the appellant was unbelievable.

Counsel contends that the doctrine of adverse possession does not arise in the instant case as the respondent started disturbing the appellant in 2014, and the dispute started between 2016-2017. Counsel avers that the cases of ***Miza S/o Beki (Miza Bhaki) Vs Bruna Ososi, HCCA No.26 of 2016*** and ***Rwajuma Vs Jingo Mukasa, HCCS No. 508 of 2012,*** which *was cited by* the trial Magistrate that, as a rule, limitation not only cuts off the owner's right to bring an action for the recovery of the suit land that has been in adverse possession for over twelve years but also the adverse possessor is vested with title thereto. To counsel, the said case on adverse possession does not apply in the instant case because the respondent has never been in adverse possession for over twelve years, and thus, no title is vested in him as held by the trial Court. To counsel, the respondent only trespassed on the suit land by raising false claims of ownership, the reason the dispute arose in 2016-2017. Counsel contends that no cogent evidence was adduced to show that the respondent has settled on the suit land with perhaps a homestead and carrying out activities thereof, that he is merely neighbour to the suit land, which, to counsel, it is the appellant's property.

Counsel contends that upon analysis of the evidence of the appellant and his witnesses as to ownership, it was consistent, his acquisition and possession thereof was not disputed during the trial, and had the trial magistrate properly evaluated the whole evidence, he would have found that the appellant is the rightful owner of the suit land and not the respondent

On the other hand, the respondent's counsel, in his submissions in reply, highlighted the contradictions and inconsistencies in the appellant's case regarding the size of the suit land in that PW2 Eluku Joseph testified that the suit land is 5½ gardens in contrast to paragraph 3 of the plaint which claims for five gardens. Further, PWI only testified with respect to three gardens.

Counsel for the respondent submitted that PW3 and PW4 testified that Adengu Nelson, brother to the appellant, cultivated the suit land with his wife DW4, which evidence was rebutted by DW4, Alyelo Florence, that she and her husband Adengu Nelson had never cultivated the suit land.

PW1 stated that the appellant has never cultivated the suit land in contrast to the appellant's evidence.

Counsel for the respondent submits that the trial Magistrate rejected the appellant's evidence as a result of the contradictions and inconsistencies because in the case of ***Bahema Patrick & Another vs Uganda Supreme Court Criminal Appeal No. 1 of 1999 on page 7***, 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".***

In rejoinder, the appellant's lawyer stated that the evidence adduced by the appellant and his witnesses at the trial Court regarding his ownership of the suit land was consistent, the appellant having acquired the suit land from his late

grandfather Elwaru through inheritance by 1975 and that he immediately took possession and is currently in possession of the suit land, which fact to counsel for the appellant was not disputed during the trial and to him, had the trial magistrate properly evaluated the whole evidence he would have found that the appellant is the rightful owner of the suit land.

Counsel for the appellant, in rejoinder, submits that whereas the respondent contends that the appellant, PW2, testified for 5½ gardens, while PWI testified in respect to 3 gardens, PW3 and PW4 testified in respect of 5½ gardens. Counsel submits that whereas the respondent contends that PW3 and PW4 testified that Adengu Nelson, brother to the appellant, cultivated the suit land with his wife DW4, Alyelo Florence, which evidence she rebutted that they have never cultivated the suit land, to counsel for the appellant, DW4, Alyelo Florence testified as a defence witness who only came to support the respondent's fabricated case. Counsel for the appellant submits that whereas the respondent's counsel submitted that PW1 stated that the appellant has never cultivated the suit land in contrast to the appellant's evidence, to counsel for the appellant, the appellant's evidence is clear that ever since he was shown the suit land in 1975, he took possession of it and is currently in possession of it. To counsel for the appellant, the alleged contradictions and inconsistencies cited by the respondent are misplaced, minor and negligible, which do not affect the substance of the case. Counsel quoted the case of ***Mujune Joshua vs. Uganda, HCT 04-CR-CN-0033 of 2011;*** Stephen Musota, J (as he then was) held that

> ***"...the law allowing admission of evidence of a witness who has been truthful in one part and false in another area of his or her testimony admitted in part is obsolete and the Courts of law have long varied this position. The law now governing inconsistencies or a discrepancy is that grave inconsistencies if not***

satisfactorily explained, will usually result in the evidence being rejected. Grave inconsistency or contradiction is the one that goes to the root of the case."

To this end, counsel for the appellant contends that it is apparent that to him, the inconsistency and contradiction cited by the respondent are not grave in any way to go to the root of the case but merely minor and do not affect the substance of the case.

a. <u>The court's analysis and decision:</u>

Upon perusal of the pleadings and submissions in this instant suit, I note that the land in question is customary land, which, according to **Section 1 (l) of the Land Act, Cap 227** (as amended), is defined as a system of land tenure regulated by customary rules which are limited in their operation to a particular description or class of persons.

Customary Land Tenure system in Uganda is provided for under the Constitution of the Republic of Uganda 1995 As Amended but more specifically by section 3(1) of the Land Act, Cap 227 as amended.

By the provisions of section 3(1) of the land Act As Amended for any piece of land to qualify under customary land tenure system the following features must exist and these are;

a. applicable to a specific area of land and a specific description or class of persons;
b. subject to section 27, governed by rules generally accepted as binding and authoritative by the class of persons to which it applies;

c. applicable to any persons acquiring land in that area in accordance with those rules;
d. subject to section 27, characterised by local customary regulation;
e. applying local customary regulation and management to individual and household ownership, use and occupation of, and transactions in, land;
f. providing for communal ownership and use of land;
g. in which parcels of land may be recognised as subdivisions belonging to a person, a family or a traditional institution; and
h. which is owned in perpetuity.

As rightly cited by counsel for the appellant, in the case of ***Marko Matovu and two others vs. Mohammed Sseviiri and two others, C.A No. 7 of 1978*** customary land can be acquired through inheritance.

Under the Succession Law for one to claim inheritance of property from a deceased person such property must have belonged to the deceased person during the deceased's lifetime.

From the facts and evidence adduced in the instant matter, I find that none of the parties appropriately brings out their ownership of the suit land in the ambit of customary land vide the incidences provided for under the law as cited above. The main question and contention which I see is thus as who is the owner of the suit land.

The trial magistrate tried to determine this question on page 7 in the following manner;

> ***"...it is clear that the plaintiff does not know what constitutes the land of the late Elwaru. He was young at the time the land was being given to***

him; PW1, who is quite elderly and mature, doesn't seem to know the land boundaries apart from saying it's vast. This witness also claimed the defendant's land was in the swamp, whereas at locus, it was discovered that the defendant's land was not at the swamp.

Even if the land was gifted to the plaintiff by Elwaru, the evidence on record shows that the plaintiff never used the land as long ago as 1985 to date. It is only the defendant who has been in adverse possession of the land, according to DW4, from the time she was married on the suit land in 1985. That adverse possession by the defendant confers a right of ownership on the said defendant, Moses."

The appellant's counsel avers that the evidence adduced by the appellant and his witnesses at the trial court regarding his ownership of the suit land was consistent.

That is, that the appellant having acquired the suit land from his late grandfather Elwaru through inheritance by 1975 and he immediately took possession and is currently in possession of the suit land, which fact to counsel for the appellant, was not disputed during the trial and to him had the trial magistrate properly evaluated the whole evidence he would have found that the appellant is the rightful owner of the suit land.

On the contrary, the respondent's counsel contended that they were inconsistencies in the testimony adduce by the plaintiff's which to the respondent's counsel goes to the root of the instant matter.

These inconsistencies, counsel alluded, were in regard to the size of the suit land as PW2 testified that the suit land was five and half gardens whereas in his pleadings he stated them as five gardens.

More so, counsel alluded that even that evidence of PW2 in regards to five and half gardens was contradicted by PW1 who testified that indeed the suit land was three gardens.

The other contradictions pointed by counsel for the respondent was that PW3 and PW4 testified that Adengu Nelson, brother to the appellant, cultivated the suit land with his wife DW4 but that this evidence was rebutted by DW4, herself Alyelo Florence who told court that she and her husband Adengu Nelson had never cultivated the suit land.

Also that PW1 stated that the appellant has never cultivated the suit land in contrast to the appellant's evidence.

Counsel for the appellant rejoined on the inconsistencies and contradictions and in regard to the discrepancy in the size of the suit land, counsel submitted that PW3 and PW4's testimony was that the size of the suit land was five and a half gardens which testimony was consistent with the plaintiff's testimony in court but only different in material from what he pleaded.

Also regarding cultivation and possession, counsel for the appellant submitted that unlike PW1 who stated that the plaintiff had never cultivated the suit land in contrast to the plaintiff's evidence was that he cultivated it and this was confirmed by PW3 and PW4.

Of worthy note is the major contradiction as pointed out from DW4's evidence Whereas counsel for the respondent submitted that the evidence of PW3 and PW4 show that Adengu Nelson, brother to the appellant, cultivated the suit land with his wife DW4, Alyelo Florence, this evidence was rebutted by Alyelo Florence (DW4) who denied that she and her husband Adengu Nelson had never cultivated the suit land.

This is a material contradiction is telling and cannot be wished away as it goes to root of the claim of the appellant.

While on record PW1 testified that he was present when the suit land approximately three gardens was being given to the plaintiff he later relapses and state that the gardens given to the plaintiff were many and he did not know the number but insisted that he could tell the boundaries on either side because Ewaru and Joseph were on either side of the suit land.

It is a cardinal principle of equity that he who alleges must prove and in this respect while the appellant testified that when the dispute arose in 2017 between him and the defendant, he referred the matter to his clan for adjudication and the matter was resolved in his favour, he produced no minutes of the meeting on allegation that that the people who were in the clan meeting were old and could not write. The appellant evidently failed to back up his averment with either documentary evidence or even producing any of those persons who attended that clan meeting.

The observation of the trial magistrate in this respect is that excluding of PW1 and PW2, the rest of the plaintiff witnesses testified that they were told that the suit land was given to the plaintiff while they were not around to witness the same.

Those who were said to be present at the time the land was allegedly given or at the clan meeting never appeared in court and no explanation was given as to whether they were around or not to assist the court in coming with a conclusive position.

Of note is the testimony of PW2 who testified that the defendant came onto the suit land to cultivate it three years after the death of his brother, Emaku,

but could not with certainty remember when Emaku died yet at the same time he went on to state that the defendant trespassed onto the suit land around 2017, the year he decided to take the matter to the clan, of which no evidence was presented as to the resolution of the dispute.

While PW2 stated the defendant started trespassing on the suit land in 2017 he contradicts himself in the same breath that the defendant started disturbing him in 2014.

The trial magistrate in trying to resolve the issue of ownership of the suit land visited it and was shown the land in question which turned out to be not in the swamp as alleged by the plaintiff's witnesses.

Upon perusal of the evidence on record, I find that the evidence of the defendant's witnesses was more believable in regard to the ownership of the suit land for beginning with DW1, she testified that she married onto the suit land and produced her children while there and that the land was for her husband who inherited it from his father and the same was inherited by the respondent upon the death of his father.

Also, the trial magistrate's findings at locus were to the effect that the mother of the defendant and the defendant showed the boundary between her land and that of the late Elwaru which she noted that she had been cultivating from the time she married to date and the defendant's witnesses were consistent as to the size of the suit land and its ownership.

The plaintiff on the other hand was not consistent as to when he started using the suit land. While he testified that allegedly inherited it in 1975, he had never cultivated the land since then.

I am thus persuaded to believe the testimony of the respondent that upon the death of his father in 1971 he inherited the land and began cultivating it which piece of evidence was not challenged.

The trial magistrate thus rightly concluded that the respondent had adverse possession of the suit land prior since he had established by evidence that he cultivated the same and had had prior settlement of the suit land.

This fact is established as was held in the case of ***Miza s/o Beki (Miza Bhakit) vs Bruna Ososi HCCA No. 26 of 2016*** that an uninterrupted and uncontested possession of land for a specified period though hostile to the rights and interests of the true owner is considered one of the legally recognized modes of acquisition of ownership of land.

In law, pleadings of adverse must be set forthright but it is also trite that once the facts of the case point to such a proposition, the court can safely find on the same as is found in this instant matter.

I am also persuaded that where a claim of adverse possession succeeds, it had the effect of terminating the title of the original owner. And because, the appellant allegedly inherited the suit land in 1975 but has never been in possession of the land through cultivation or otherwise as there is no evidence that he was in actual possession prior to 2014, 2016 and 2017 as mentioned by his witnesses when the dispute arose, then the law on limitation bars him from suing for recovery since it is well over 12 years.

Therefore, it is my finding that since the appellant's case was riddled with major contradictions and he failed to prove actual possession of the suit land, then he lost ownership of the same through adverse possession by the respondent.

Accordingly, I would conclude in respect of this ground that the trial magistrate rightly evaluated the evidence before him and arrived at the right conclusions as he did and found that the suit land belongs to the respondent. So this ground fails.

b. <u>That the decision of the trial magistrate occasioned a miscarriage of justice.</u>

Counsel for the appellant submits that miscarriage of justice occurs when it is reasonably probable that a result more favourable to a party appealing would have been reached in the absence of any error and that where there is a claim of a miscarriage of justice, before an appellate court, the appellate court must examine the entire record of the lower court including the evidence adduced before it before setting aside a judgment or directing for a retrial as per ***Onek Manacy and another vs Omona Michael Civil Appeal No. 032 of 2016.***

On the other hand, counsel for the respondent submits that a miscarriage of Justice only occurs where the court makes an erroneous decision, and that is not the case here because to counsel's mind, there was no evidence to compel the trial court to decide the suit in the appellant's favour. Since ground one has failed, the trial magistrate's decision did not occasion a miscarriage of justice. This ground also fails.

7. <u>Conclusion:</u>

Counsel for the respondent prayed that the court disallow/reject this appeal with costs as under Sec.27 of the Civil Procedure Act costs follow the event.

Thus, in the case of ***Primchand Raichand Ltd & Another vs Quarry Services of East Africa & 6 Others [1972] EA 162*** court held that,

"A successful litigant ought to be fairly reimbursed for costs he had incurred ...."

This instant appeal is found to have no merits on all grounds and since it upholds the decision of the lower court and since it was unmeritorious for the appellant to bring this appeal and thus disturbed made the respondent to unreasonably incur costs defending this appeal, I would award the costs of this appeal to the respondent.

8. Conclusion:

- This appeal is dismissed for being unmeritorious on all grounds.
- The judgment and orders of the trial magistrate in Civil Suit No. 05 of 2021 filed in the Chief Magistrate's Court of Soroti at Soroti delivered on 30th June 2022 is upheld.
- The respondent is awarded the costs in this court and in the court below.

I so order.

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Hon. Justice Dr Henry Peter Adonyo

Judge

11th October 2023