THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

HCT-04-CV-CA-0025-2013
(FROM TORORO CIVIL SUIT NO. 12/2012)
(FORMERLY CIVIL SUIT NO. 205/2011)

ZAKARIA ONNO.....APPELLANT

VERSUS

1. **OLANDO DIFASI**
2. **ONYANGO JAMES**
3. **ODUGO MOSES**
4. **OYAMBI JOHN**
5. **REV. OYO APOLLO**
6. **OWOR GEOFFREY.....RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal from the decision of the Chief Magistrate's Court of Tororo presided over by **His Worship Charles Emuria**, Chief Magistrate delivered on the 15th day of February 2013 wherein the appellant had sued the respondent in trespass to his land but judgment was given in the respondents' favour.

The facts leading to this appeal are that the plaintiff filed civil suit No.12/2012 in the Chief Magistrate's Court of Tororo claiming that he was the rightful owner of customary land measuring approximately 12 acres situate at Panjirenja village, Mulanda Sub-county, having inherited the land from his father **Alfred Ochieng** who owned the said land customarily from his ancestors. He further averred that the suit land was subject of court litigation in 1982 wherein the respondent's father **Yekonia Owora** filed civil suit MT. 32/82 against the plaintiff's father **Alfred Ochieng** and himself at the Grade II Magistrate's Court, Kisoko which suit the plaintiff/appellant and his father won. The appellant/plaintiff further stated that no appeal was preferred by the loser/respondent's father either to a higher court.

He stated that the land was allocated to him in 1962 and has been living on this land undisturbed until 2009 when the defendants/respondents trespassed on his land and evicted him with the help of the RDC against his will.

The defendants contended that the land belonged to their late father **Yekonia Owora** and that he had been chased out of that land by the appellant/plaintiff in 1982 when he was a police officer.

During the trial, the plaintiff led evidence of 4 witnesses in proof of his case and the defendants/respondents led evidence of 6 witnesses in proof of their case.

At the conclusion of the trial, the trial Chief Magistrate gave judgment in favour of the respondents/defendants, that they were the rightful owners of the suit land, hence the plaintiff being dissatisfied with this decision appealed to this honourable court on 5 grounds as are stated in the memorandum of appeal.

Both parties have filed their written submissions. But the respondents have raised 2 points of objection.

1. That the case against the 2nd and 5th defendants were withdrawn and no appeal can lie against them as they are dead.
2. That the appeal is barred by limitation as it was tried out of time.

This court has to determine these points of objection before going into the merits of the appeal.

According to the case of *Makula International vs. Cardinal Nsubuga (1982) HCB 11*, it was held that an objection on points of law will be entertained once brought to court's attention even in the course of proceedings.

Objection 1: 2nd and 5th defendants are dead:

It is trite law that as a general rule, the plaintiff in civil proceedings is "*dominous letis*" that is he is free to sue whoever he thinks he has a cause of action against.

See *Batemuka v. Anywa (1977) HCB 77*.

However, a suit cannot be sustained against a person who is dead. Where such a suit is commenced against a dead person, such a suit is a nullity.
In *Pathack v. Mpwekwe (1964) EA 24*, it was held that a suit cannot subsist against a dead person.

Thus in this particular appeal, the appeal against the 2nd and 5th respondents is dismissed since they are dead. The appellant in rejoinder conceded that in view of the said death; the appeal is still sustainable against the remaining respondents. This admission basically disposes off ground of the objection, and it is sustained.

Objection No.2: Appeal being out of time

Section 79 of the Civil Procedure Act is to the effect that an appeal shall take effect within 30 days from the date of the decree or order of court.
However, section 79 (2) of the Civil Procedure Act provides that in computing the period of limitation, the time taken by the court in making a copy of the decree or order appealed against and of the proceedings upon which it is founded shall be excluded.

In this particular matter before this Honourable court, judgment was delivered on 15th February 2013. On the 18th February 2013, the appellant filed a notice of appeal and the letter requesting for the original record, and certified copies of the proceedings. The memorandum was filed on 4th June 2013 and the certified proceedings provided on 5th July 2013. Thus the period between 15th February to 5th July 2013 was excluded by virtue of S.79 (2) of the Civil Procedure Act and therefore the appeal is still within time and properly filed. The objection above is overruled.

The court at this stage will now move to determine the grounds of appeal. However it will consider this appeal following the grounds in the order herebelow:

Ground 1: The learned Magistrate erred in law and fact when he failed to properly evaluate the evidence on record hence receiving a wrong conclusion.
Ground 3: The learned Chief Magistrate erred in law and fact when he held that the plaintiff was not a party to Kisoko civil suit No. MT.32/82.

Ground 4: The learned Chief Magistrate erred in law and fact when he created his own evidence in the proceedings in favour of the Defendants.
Grounds 2 and 5 will be handled together.

These grounds shall be resolved in the order as stated above.
On ground 1, it is the duty of this court as a first appellate court in this matter to re-evaluate the evidence on record and come to its own conclusion.
See *Father Nasensio Begumisa & 3 Others v. Eric Tibebaga SCCA No. 17/2002*.

I have looked at the judgment critically and found that the learned trial Chief Magistrate evaluated the evidence in isolation. He mainly dwelled on the defendants/respondents' evidence and ignored that of the plaintiff/appellant. However this honourable court will as required re-evaluate all the evidence and come to its own findings thereon. The evidence on record is as herebelow:

PW.1-PW.4 all testified that the land in dispute belonged to the plaintiff as it was given to him by his late father **Alfred Ochieng** in 1962. They corroborated each other's evidence properly and they were all consistent in their testimony.
PW.1 stated that the suit land was subject of litigation in 1982 where the respondent/defendant's father **Yekonia Owora** filed a suit against **Alfred Ochieng** and the plaintiff/appellant but lost.

The defendants/Respondents argued that they were the rightful owners of the land as it belonged to their late father **Yekonia Owora**. However their witnesses were not consistent in their evidence. Much of their evidence was hearsay evidence. They contended that in 1982, their father was chased out of the land by the appellant, when they were still minors at that time. They denied that there has ever been any suit between the plaintiff/Appellant's father and their own father. However DW.1 conceded that a certain Magistrate had visited the disputed land. The other defendants however denied this. From that evidence, appellant argued that the trial Magistrate in his judgment at page 6 noted this contradiction in the defence evidence but

ignored to find that these contradictions were material to the plaintiff's case. The failure to find as such among others is what appellant's complain about in this appeal.

In *Alfred Tajar v. Uganda (EACA) No. 167/1967* court noted that major inconsistencies will lead to the evidence of a witness being rejected. Minor inconsistencies will not have the same result unless they point to deliberate falsehood. The inconsistencies in the defence case as pointed out by appellant were major. This is because they related to a fundamental root of dispute in the case. The fact whether a Magistrate ever tried a case as alleged. Thus with these inconsistencies for the defendant/respondent it was not right for the trial Magistrate to say that the respondents were the rightful owners of the suit land. It was crucial to the plaintiff's case for court to find that civil suit MT.382 existed. The Defence contradicted themselves on this matter (see DW.1's evidence). I therefore agree with appellants that this was fatal.

The trial Magistrate also had to determine the issue regarding possession of the suit land in order to reach a proper conclusion of this case. Who was in possession of the suit land at the time of the suit?

From the record of proceedings the plaintiff's witnesses testified that since 1982 at the time of the suit, it was the plaintiff/appellant who was on the suit land and that he constructed there his permanent house. That it was in 2009 that the defendants trespassed on the plaintiff/appellant's land and began to claim it as their own.

In their evidence, the defendants stated that their father was chased by the appellant/plaintiff out of the suit land in 1982 and since then it is the appellant who has been in possession of the suit land until 2009 when they thought it prudent to claim for their father's land. However they stated their father died in 2001.

Accordingly, I find that the appellant was in an adverse possession of the suit land having been on it since 1982 undisturbed until 2009 when the respondents began to claim their interests therein.

In *Asher v. Whitlock (1865) LRA QB1*, it was held that a person who is in possession has a title which is good against the whole world except a person with a better claim.

In Pollock & Wright, an essay on possession in common law, pages 94-95, it is stated that at common law, title is relative. In order to defeat a possessor's title, the person challenging it must rely on the superiority of his own title and not the weakness of the possessor's title.
See *Perry v. Clissold (1907) AC 73*.

Thus according to common law, wrongful possession is effective against everyone except one with a better title.

In *Nambala Kintu v. Ephraim Kamuntu (1975) HCB 221*, court noted that possession must be continuous.

As noted above, in this appeal, it is clear on record that it is the appellant who has been in possession of the suit land since 1982-2009 when the defendants trespassed, thus he is an adverse possessor of the suit land.
In any case, the evidence shows that if the defendants laid any claim in the suit land, they are barred by limitation, having sat on their rights from 1982 till 2009 (see Section 5 of the Limitation Act).
They could not have founded their interest in land by forcefully taking it over aided by the illegal actions of the RDC. Their actions were barred by the law of limitation, and their occupation amounted to trespass. This ground therefore is upheld.

Ground 3:
The Plaintiff/Appellant in his testimony averred that there was a suit against the respondents' father in 1982 to wit MT. 0032 of 1982, **Yokonia Owora versus Alfred Ochieng and Z. Ono**. He provided a certified copy to prove his case. His evidence was collaborated by that of PW.2, PW.3 and PW.4 who testified that the suit took place in 1982. Even DW.1 contradicted himself and his evidence pointed to the suit of 1982.

In his judgment, the trial Magistrate disputed **Owora** and **Z. Ono** but admitted that MT.0032 of 1982 was between **Yokonia Owora** and **Alfred Ochieng**.

Thus that being the case, it is prudent to say that the trial Magistrate was wrong in saying there was no suit in 1982.

Indeed if it is found that MT. 0032/of 1982 existed then, this suit would be barred by *res judicata* as raised by the plaintiff/appellants in submissions.

Section 7 of the Civil Procedure Act provides that:

> "*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally described by that court*."

Thus in this case, since the same land had been the subject of litigation in 1982, the suit was barred by *res judicata* as the matter had already been dealt with by the court and the same was determined.

This finding is premised on the fact that the learned trial Magistrate ignored very vital evidence adduced by the plaintiff/appellant, and chose to rely on the defence; He ignored all contradictions in the defence case as pointed out in appellant's submissions and chose to "read into this evidence" his own conjectures. He for example ignored the clear evidence that the appellant is a son of the late **Alfred Ochieng** who had a dispute on the same land with **Yokonia Owora** the father of the defendant. The same dispute on ownership could not have again been determined by the trial Magistrate who himself had noted in his judgment at page 6 of his judgment that; "*I am persuaded though both parties do not want to say that there was however a suit between Yokonia Owora against Alfred Ochieng.*"

This suit was concerning this dispute and was hence a determined matter.

The evidence of the existence of this civil suit was provided through PW.1, (page 5) of pleadings, PExh.2, PW.2 (at page 11), PW.3 (at page 16) of typed proceedings PW.4 (page 19) and DW.1 at (page 20).

The trial Magistrate made observations on this matter which appears from page 5 of his judgment where he noted as follows;

> "*I noted the relevant photocopy of the page was apparently doctored. The plaintiff's name was added as "and Z. Onno" and the "S" in the defendants was another addition. Those additions are so conspicuous that one needed not to engage any technical skills to discover the said additions on the photocopy*."

With due respect, the learned trial Magistrate was wrong to conclude that these were additions. The record of proceedings shows that the trial court by letter dated 21.4.2010 authored by Magistrate Grade II **David Okwalinga** wrote to the Chief Magistrate informing him that he cross checked the "actual Register" not photocopy and found that the case had been registered and concluded as *Yekonia Owor vs Alfred Ochieng & 2 Others*. He then photocopied the relevant pages for ease of reference. Those certified pages in my view are not having the alleged conspicuous additions that the Chief Magistrate read into the document; to the extent of attempting to infer that even the letter "S" was an addition. My scrutiny of the photocopied page on record shows that court certified these pages as authentic and even the trial Magistrate wrote a further confirmation to court vide a letter dated 3rd November 2009 in confirmation that the case existed between the said parties as Civil Suit MT.0032 of 1982.

It was therefore erroneous for the learned trial Magistrate to descend into the arena and attempt to look for evidence "beyond doubt" as proof of this and to allege "one thing is certain the claims of the plaintiff that he was a party in that suit are dismissed with the contempt it deserves. It was all forgery for purposes of a desiring to claim the outcome of that suit to which he had not been a party."

That conclusion was not based on evidence. The learned trial Magistrate made up his own imaginations regarding the plaintiff's evidence and was swayed into conjecture. It was a wrong assessment of evidence and as rightly pointed out by appellants. This ground therefore succeeds.

Ground 4: Learned Chief Magistrate erred in law and fact when he created his own evidence in the proceedings in favour of the defendants.

A critical look at the judgment shows that the learned trial Magistrate evaluated evidence in isolation. He considered the respondents/ defendants' evidence and denied that of the plaintiff/appellant. He for instance said that the documents with reference to the suit of 1982 were a forgery. That the plaintiff wasn't a party to the 1982 suit, thus it secured like the trial magistrate was acting as a witness in this particular case for the defence. He was tainted with bias in his judgment hence occasioning a miscarriage of justice to the appellant/plaintiff.

There is a lot of conjecture in the learned trial Magistrate's assessment of evidence. As rightly pointed out by appellants.

In the case of *Jones v. National Coal Board (1957) 2 QB 55*,

> "*In the system of trial which we have evolved in this country the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large as happens, we believe in some foreign countries... Justice is best done by a Judge who holds the balance between the contending parties without himself taking part in their disputations for by descending into the arena the Judge is liable to have his vision clouded by the dust of conflict*."

The learned trial Magistrate while considering the evidence greatly relied on his personal convictions rather than the evidence before him. This led him to the false practice of descending into the arena in order to look for evidence necessary to patch up gaps in the defence case (as he did at page 5 and 6 of his judgment). While rejecting plaintiff/appellant's evidence for example at page 6 he stated thus:

> "*When I noted that, I called for the register from Kisoko for my inspection and I found the relevant part that had the name of "Ono" had been*

> *carefully torn off, which means this was done later after the photocopy was obtained or when it was learnt that I wanted to inspect the register: one thing is certain it was done after the relevant photocopy was obtained and attached to the letter of the Chief Magistrate. There remained on the register "Z".*

That part of evidence was evidence called by the Chief Magistrate, but it did not form part of the evidence before court. It was not availed to the parties and their counsel to be tested by cross-examination. If plaintiffs came to court with certified copies of documents from Kisoko Court confirming existence of CS No. MT. 0032 of 1982; how could the Chief Magistrate on his own motion collect contrary evidence for the defence and then throw it at them in his Judgment? That is not proper especially as he based on it to further hold:

> "*I agree with defence that the so called suit brought. unsuccessfully by Yekonia Owora against the father of the plaintiff and the plaintiff is a forgery....*"

These statements show a deliberate choice by the learned trial Magistrate to descend into the arena and provide evidence for the defence. I therefore agree with appellants that the learned trial Magistrate erred when he created his own evidence in the proceedings in favour of defendants.
The ground succeeds.

Grounds 2 and 5:
These grounds alleged bias in that the learned trial Magistrate was biased in his judgment when he ordered that land be divided between plaintiff and defendant, and when he generally found for the defendants.

I have read both arguments for appellants and respondents on this issue of bias.

I agree with the case law as stated by appellants in the case of *Hon. Anthony Kanyike v. Electoral Commission and Others (Unreported) Civil App. No.13 of 2006* that bias may be established against a person sitting in a judicial capacity on one of two grounds.

> "*The first is direct pecuniary interest in the subject matter. The second is bias in favour of one side against the other*."

The natural English meaning of 'bias' according to the *Concise Oxford Dictionary of current English (1982 Edn)* is given as: *Lopsided form, inclination, predisposition towards, prejudice, influence*."

The evidence on record on the whole when taken together with the learned trial Magistrate's judgment leads one to no other conclusion save the fact that the learned trial Magistrate's judgment is "lopsided" towards the defence. This is glaringly clear. Throughout the Magistrate's assessment of the evidence he did so in total disregard of the evidence before him. He kept a closed eye on the fact that this matter was *res judicata,* it had been finally determined, and the fact that the defence case wholly rested on the illegalities perpetuated by the RDC in 2009. He instead descended into the area as seen on page 10 of his judgment he noting that;

> "*On remedies available I had during the visit of locus asked the plaintiff to consider amicable settlement of the matter by dividing the land equally which was unclaimed by all defendants..... the plaintiff however wanted to be given time.....*"

This was in a way indicative of the fact that the learned trial Magistrate had made up his mind already before giving judgment or scrutinising evidence that plaintiff ought to share the land with defendants. Respondents argued he did so pro- actively under article 126 of the Constitution.

I wish to differ. A court of law operates on known rules of procedure. It is a cardinal principle of justice that justice must not only "be done" but must "be seen to be done." This principle enjoins the courts to act judiciously. This meant that if court wanted to arbitrate, then parties would have been properly taken through arbitration from the start. It was wrong for court to propose demarcation at locus yet the plaintiff came knowing that it was time for him to clarify to court the evidence he had led in open court. The attempt to ask him to share the land operated as

an indicator to indicate that the learned trial Magistrate had already decided the matter of possession against him- which amounts to bias.

All in law this court has already faulted the learned trial Magistrate for rejecting vital pieces of the appellant's evidence without assessment and for formulating evidence on behalf of the defence in a bid to reject the evidence of the CS MT.32 of 1982.

It is my finding therefore that appellants have proved both grounds 2 and 5 of the appeal.

In the result, this appeal succeeds on all grounds raised. I find that the suit land belongs to the plaintiffs and defendants are trespassers thereon.
The judgment and findings of the trial Magistrate are set aside and replaced with the judgement of this court in favour of the appellant.
Costs here and below are awarded to the appellant. I so order.

Henry I. Kawesa
JUDGE
05.11.2015