

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT GULU

CIVIL APPEAL NO. 0010 OF 2014

(Arising from Judgment of His Worship Abubakar)

OKECH P'WILSON:.....APPELLANT

VERSUS

ODONG BALAM:.....RESPONDENT

BEFORE HON. LADY JUSTICE MARGARET MUTONYI

JUDGMENT

1. Okech P'Wilson hereinafter referred to as the Appellant filed an Appeal against the judgment and order of His Worship Nakibinge Latiff Abubakar Magistrate Grade One then of Patongo delivered on 23-01-2014 in CS. No. 0001/2013.
2. The Respondent is Odong Balam.
3. The Appellant was the defendant in the lower suit.
4. The grounds of Appeal are the following:
 - (1) That the learned trial magistrate failed to properly evaluate the evidence on record and they arrived at an erroneous decision against the appellant thereby occasioning a miscarriage of justice.
 - (2) That the learned trial magistrate erred in law and fact in following the wrong procedure in conducting the locus in quo when he conducted the same in the absence of the appellant and his witnesses. The Appellant therefore prayed for the appeal to be allowed and declare the appellant the lawful owner of the suit land. He also prayed for costs of the suit.
5. Counsel Dongee Sylvester from Donge and Company Advocates represented the Appellant while the Respondent was represented by Counsel Ochaya-Achellam Paul from Ochaya Achellam Paul and Co. Advocates.
6. The brief background of this case is that the Respondent sued the Appellant vide CS No. 001/2012 at Patongo Grade 1 court. The parties were not represented by counsel at Patongo.

The suit was in respect of land measuring about 3 hectares situated at Pyegweng village omongo Parish Agago District as per the plaint dated

21/12/2012. The Respondent/Plaintiff prayed for declaration of the suit land (I believe to be his). Permanent injunction restraining the defendant and his relatives (I believe from using the land). Costs of the suit and general damages and any other alternative relieve court deems fit.

The defendant/Appellant on the other hand claimed the land was his having acquired it from his ancestors. In short he claimed it was his customary land. The plaintiff also claimed it was his customary land. The plaintiff claimed he left the land during insurgency and when he returned, in 2010 the defendant refused him to repossess his land which had been taken by UPDF. The trial magistrate heard the case interparties save for the evidence at the locus in quo and decided the case against the defendant hence this Appeal.

7. As the first Appellate court, I have the duty to evaluate the evidence on record, exhibits if any and come up with my own decision of course at this stage or level, I miss out the opportunity of evaluating the demeanour of witnesses. I will therefore rely on the evidence on record to form an opinion.
8. Both learned counsel filed written submissions in support of their cases. I will not reproduce the submissions but will refer to them as and when necessary to let me turn to the,

RESOLUTION OF ISSUES: The first being whether the learned trial magistrate failed to properly evaluate the evidence on record and thereby arriving at an erroneous decision against the Appellant thereby occasioning a miscarriage of justice.

Counsel for the Appellant submitted that the trial magistrate failed to evaluate all the evidence together so as to make an informed and proper decision.

Needless to mention the main work of a judicial officer is adjudication of disputes between the parties. Adjudication entails studying the case, taking and evaluating evidence, studying exhibits, and applying the law to the evidence and finally coming up with a decision based on the law and evidence before court.

In civil matters like the instant case, the burden of proof rested on the plaintiff and the standard of proof is light. It is on the balance of probabilities.

Where the Appellant claims the trial magistrate did not evaluate the evidence properly, the appellate court has to study the whole record of the lower court to come up with an informed decision.

The trial magistrate framed the following issues:

1. Whether the plaintiff is the lawful owner of the suit land.
2. Whether the defendant is a trespasser thereon.
3. What are the remedies available to the parties.

According to S.10 (1) (2) of the Evidence Act cap.6 Laws of Uganda,

- (i) “Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts, which he or she asserts must prove that those facts exist.
- (ii) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

S.102 of the Evidence Act goes on to provide that “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side and S.103 provides that “the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that proof of that fact shall lie on any particular person”

In the instant case, the burden of proving that the land in dispute belonged to the plaintiff was on the plaintiff. (See S.110 of Evidence Act).

The plaintiff also had the burden to prove that the defendant was a trespasses.

All the above facts are proved by way of evidence adduced by the plaintiff by oral evidence or documentary.

The land in dispute is said to be customary land and both the defendant and plaintiff are claiming it.

This court is to find out whether the trial magistrate arrived at his decision after proper evaluation of evidence. This court has to establish whether the plaintiff /resp... discharged his burden of proof on the balance of probabilities.

This can be done by looking at the evidence on record PW1 Odong Balam a male adult who was aged 74 years at the time he testified informed court among others that “I have brought him (defendant) before court because of my father’s land. He does not want me to go back to my father’s land.

The land is in pyergweng central village, Omongo parish, measuring approximately 3 acres. The land is divided by the road from Lira Palwo to Omot Sub-county on the eastern side 2 acres and 1 acre on the Western side. There are two mango trees on the Western part of the 1 acre and a musambya trees on the 2 acres. There is no features. Its first used for cultivation.

On the one acre, the neighbours are: North-Mwaka Walter, South- Omel Jebinina West- defendant, East the road/Owera abi.

I was born on the suit land in 1938, I grew up on the suit land, when I become a teacher, I was posted to another District, after retirement in 1995, I came back home and settled on the suit land.

When I was away my son Ongom Charles was settled on the land and even during the allocation of the plots by the LC 3 of Lira Palwo, my son was on the suit land. When we were displaced to the camp, that is when we left the suit land. In 2010, we tried to come back to settle on the land, the defendant refused us. I am still settled in the camp with all my family. That is all”.

According to PW2 Omel Jebinino 88 years old the plaintiff father Zakayo Omeda borrowed alnd from Binayo Omara who was the landlord in Lira Palwo.

He went ahead to say, the defendant is disturbing the plaintiff because its only his brother who surrounds the suit land. Even his brother is on my land it was

allocated to him by the sub county chief. That he complained and they gave him (the sub county chief) 200,000/= and he chased him away.

Before that he informed court in these words "Binayo Omara was also on the land. He was a father to Mwaka, Mwaka is still living on Binayo's land"

Finally he said *"All I can say is that the suit land does not belong to the defendant nor his grandfather but Mwaka's father. The defendant's land is in Wenyopok that is all"*

In cross examination, he said he saw a new building on the land but did not know who is in possession.

This witness in a nutshell claimed the land belongs to the estate of Binayo Omara the father to Mwaka. He did not say anywhere that the plaintiff owes that land. He said, the plaintiffs father Zakayo Omeda borrowed land from Binayo Omara:

He did not give any evidence to prove that the borrowed land was later owned by the borrower, the plaintiffs father. PW3 Mwaka Walter Okot 75 years old narrated how both the plaintiff and defendant were chased away from that land by the Government in 1986 to build a barracks.

On the issue of ownership, he said "My father used to own all the land and even in the trading centre, from the trading centre into the further village. I am about 80 acres. When I was born, I found the defendant and plaintiff all there. I don't know how they came to own land. But my father told me, that was our land" He concluded by saying; All I can say is that the defendant likes

grabbing people land, when I went to Tanzania, his paternal uncles took over my land and he is in possession of it upto date. That is all.

This witness did not know how both the plaintiff and defendant came to own land. He was biased witness who looked at the defendant as a land grabber. He did not inform court in very clear terms why he was supporting the plaintiff. He did not inform court how the plaintiff came to own the land. He did not know how the plaintiff came to own the land.

PW4 Okumu Nacaneri was a very useless witness. He claimed he knows the suit land very well and said it was 6 acres where as the plaintiff was claiming 3 acres.

PW5 who was recorded as PW4 was Kocho Alfred Oryem. His evidence of working on the land after contracting with the plaintiff to make bricks in 1997 is not sufficient evidence of ownership of land by the plaintiff. In cross examination he told court he did not know how Balam (the plaintiff) got the suit land.

From the testimony of the above witnesses for the plaintiff none of them actually informed court how the plaintiff owned the land or acquired it.

On the other hand, the defendant Okech P"Wilson 75 years old informed court inter alia that the plaintiffs father stayed at their home as a tenant and never owned land there. That his father Bodo Matayo owned the land and left it with his younger brother Jurobabel Odoch. That the defendant took over possession of the land in 1998 and there was no problem until 2010 when the plaintiff claimed the land. DW2 Akot Janeth's evidence was not relevant.

DW3 Erica Lagen 93 years old informed court the land belonged to Matayo Bodo, the defendants father. He said Matao lived on the land and left it to the defendant who has used it since then.

DW4 Okot Amos 72 years old informed court that the land in dispute has always belonged to the defendants father. That the plaintiff has never utilized or occupied it but he just wants to grab the land. This witness informed court, the defendant father gave him some portion of the suit land to construct on and he stayed on the land up to 1976 when he left the land. That all that time the plaintiff or his relatives were never on the land.

As mentioned earlier, the burden of proof in this case rested on the plaintiff. He had to prove on the balance of probabilities that the land in dispute was his. Evidence at locus was disastrous there was nothing like plaintiff sharing his land and no map was drawn.

As the appellate court, I have the obligation to evaluate the evidence and come up with my own inference.

I agree with the Appellants counsel that the magistrate failed to evaluate the evidence. Had he applied the evidence to the law, he would have come up with a decision dismissing the suit because the plaintiff failed to prove that indeed the land belonged to his father. He failed to adduce evidence that he owns the land.

In the result, the Appeal is allowed, and the defendant declared to be the lawful customary owner of the land in dispute.

The judgment of the lower court and all its orders are set aside.

Costs follow the event. Costs of this Appeal and the lower court are awarded to the defendant/appellant.

I so order.

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Hon. Lady Justice Margaret Mutonyi
Judge

13-03-2015 at 10.15am

Appellant present

Respondent present

Geoffrey Akena for Appellant present

Ocaya Achellam for respondent present

Anna Alengo for clerk.

Court: The judgment read in the presence of the above.

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Hon. Lady Justice Margaret Mutonyi
Judge

Right of appeal explained.

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Hon. Lady Justice Margaret Mutonyi

Judge

13-03-2015

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O R D E R

THIS Appeal coming up this **13th day of March 2015** for final disposal before **Hon. Lady Justice Margaret Mutonyi**, Judge of the High Court Gulu, in the presence of the Appellant and his Counsel **Akena Geoffrey** and in the further presence of the Respondent and his Counsel **Ochaya Achellam Paul**.

IT IS HEREBY ORDERED AS FOLLOWS:-

1. That the Appeal is allowed and the Appellant is declared the lawful customary owner of the land in dispute.
2. The judgment of the lower court and all its order are set aside.
3. Costs of the Appeal and the lower court are awarded to the appellant/defendant.

GIVEN under my hand and the seal of this Honourable Court thisday of2015.

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HENRY TWINOMUHWEZI
ASSISTANT REGISTRAR

EXTRACTED & FILED BY:

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