

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

**HCT-04-CV-CA-0153-2014  
(ARISING FROM TORORO LAND SUIT NO. 002 OF 2013)**

**ONYANGO JOSHUA OKUMU** ..... **APPELLANT**  
**VERSUS**  
**1. OFWONO PETERO ABOTH**  
**2. MARK OCHWO** ..... **RESPONDENTS**

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

**JUDGMENT**

Appellant being dissatisfied with the Judgment and orders of the learned trial Magistrate **Ocen Simon** of 2014 in CS. 002/2013 appealed to this court against the Judgment and orders on grounds that:

1. The learned trial Magistrate erred both in law and fact when he judicially failed to properly evaluate the evidence on record and came to a wrong conclusion hence occasioning a miscarriage of justice.
2. The learned trial Magistrate erred in law and fact when he held that the defendants were not licensees on the suit land and hence occasioning a miscarriage of justice.
3. The learned trial Magistrate erred in law and fact when he held that the Plaintiff/Appellant had failed to prove the suit against the defendants/Respondents on the balance of probabilities.

All grounds were argued together.

The duty of a first appellate court is to re-evaluate the evidence on record and to come up with its own conclusions thereon as held in *Kifamunte Henry v. Uganda SCCR App. No. 10 of 1997*.

The evidence was as follows in the lower court.

The Plaintiff called 4 witnesses who testified briefly as follows.

**PW.1 Onyango Joshua Okumu** said he sued defendants who are his neighbours for trespassing on his land and destroying his trees in 2008. The land is 1 ½ acres and he inherited it from his father. He named the neighbours as **Okongo Desderio, Tanga Oluse, Obbo Olurn**, Abududa stream, **Okello Bisansio, Ofamba Kachoro** and **Othieno Domiciano**.

During cross-examination he stated that defendant encroached on the land and that plaintiff's father never saw defendant cultivating the land. He also said that his father never sued defendants.

**PW.2 Desderio Okongo**, nephew of plaintiff stated that D.1 used to care take the land for the plaintiff in Iyomiya zone. D.1 requested the father of plaintiff to give him where to dig and plaintiff's father gave D.1 approximately 1 ½ acres to cultivate. When the plaintiff's father died plaintiff wrote a letter to stop D.1 from cultivating the land- D.1 stopped but D.2 again started cultivating.

**PW.3 Alowo Jonovira** said she married plaintiff while she was 20 years old. She found him cultivating the land with his father. Her in law **Okoth Ogamba** gave plaintiff land to cultivate in 2000. He was stopped by plaintiff but then D.2 went back to the land and cultivated.

**PW.4 Yowana Ofwono** said he does not know about the dispute.

**DW.1 Ofwono Peter Aboth** said the land is 1½ acres. He inherited it from his parents, his father **Owino Obido** in 1945. He has been cultivating it till now. He said he shares a common boundary with the plaintiff's father until his death. His father died in 1933, while plaintiff's father died in 2000. They had no disputes on the land till death of plaintiff's father when plaintiff began claiming it. He said D.2 is his son and was the one cultivating the land. He said plaintiff never cultivated on that land.

**DW.2 Ochwo Mark Ofwono** said D.1 is his father. He found his father cultivating the land upon birth. The father allowed him to cultivate in 1997. In 2008 plaintiff began disputing for

the land claiming defendant's father claimed for the land from plaintiff's father. He sued to LC and to the courts of law but failed.

**DW.3 Boniventure Were** said that the land is for D.1, who started using it in 1945. He is a saza chief of Amori Kaguru clan. He confirmed that D.1 has cultivated the land for 68 years. He also said he knew plaintiff as a son of **Okoth Okumu**, and his father never gave defendant's father this land to cultivate as alleged.

**DW.4 Lawrence Owere Lebbo** a cousin of plaintiff and D.1 is his brother-in-law and D.2 is his nephew. He told court that he had never seen plaintiff cultivating the said land for the 30 years he knew plaintiffs.

Court visited locus and made observations.

The submissions from counsel for appellants in essence fault the learned trial Magistrate for wrongly assessing the said evidence and for having wrong conclusions as contained in the grounds of appeal.

I have carefully gone through all the evidence. The law of evidence is in effect premised on the legal burden of proof. In civil matters the burden of proof is on the balance of probability. The evidence Act under sections 101-103 provides, is in essence to the effect that he who alleges a fact has the burden to prove it.

The burden to prove all the allegations of facts stated in the plaint was upon the plaintiff. The evidence which counsel discusses was weighed by the court. The only problem with that evidence as contained in the testimonies of PW.1, PW.2, PW.3 and PW.4 is that it was rebutted by the evidence of DW.1, DW.2, DW.3 and DW.4.

The court was faced with the allegations by PW.1 that the defendants were trespassers unknown to him. Even in cross-examination he confirmed that his father had never seen defendants

cultivate that land. This was crucial in that when PW.2 and PW.3 later told court that the father of PW.1 is the one who allowed defendants (D.1) to cultivate the land it becomes a contradiction. The burden to prove the fact that DW.1 was a licensee therefore remained unsatisfied since PW.1 never said so, and yet PW.2 and PW.3 said so.

However all defence witnesses denied this fact and gave cogent evidence establishing the fact of possession of the land uninterrupted since 1945.

DW.3, a saza Chief of the Amori Kaguru clan and who knew all the parties confirmed the fact that the defendants were not trespassers to the land but actually were on the land as of right since 1945.

The evidence on record from the plaintiff was not sufficient to prove that the land belonged to the plaintiff/appellant.

The learned trial Magistrate visited the locus and commented that while defendants were able to identify the boundaries easily the plaintiffs contradicted themselves and were challenged by the neighbours.

From the evidence on record therefore, I do not find the evidence necessary to support the grounds of appeal.

On ground 1- I find that the learned trial Magistrate properly and judicially evaluated the evidence.

On ground 2- I find that there is no evidence to support the proposition that defendants were licensees on the suit land.

On ground 3- I do not find merit in the arguments that the learned trial Magistrate erred in law and fact to conclude that plaintiff/appellant failed to prove his case. All arguments are not tenable. The Magistrate's reference to departure from pleadings is well grounded in law. The attempt by PW.2 and PW.3 to lead evidence on a matter not specifically pleaded was irregular

though not fatal. However in assessing all the evidence still their evidence was not helpful. I therefore find no merit in this ground as well.

Having re-evaluated the evidence, am of the opinion that the learned trial Magistrate reached a right conclusion.

This appeal fails on all grounds raised. It is dismissed with costs to the Respondents.

I so order.

**Henry I. Kawesa**

**JUDGE**

**10.11.2016**