THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0023-2015

(ARISING FROM KAPCHORWA CIVIL SUIT NO. 0009 OF 2014)

KOKOP CHEROP……..……..……..APPELLANT

VERSUS

1. **NDIWA CHERES**
   suing thru his Attorney
   CHEPTEGEI AUGUSTINE
2. **SIMOTWO CHEROP……...…….……RESPONDENTS**

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

JUDGMENT

Appellant being aggrieved and dissatisfied with judgment and orders of **His Worship Kedi Paul** Magistrate Grade I Kapchorwa of 5th March 2015, appealed to the High Court raising four grounds namely:

1. That the learned trial Magistrate erred in law and fact when he did not properly evaluate the whole evidence on record.
2. The learned trial Magistrate erred in the visit to the locus.
3. Learned trial Magistrate did not consider the appellants' witnesses and neighbours at locus.
4. The decision occasioned a miscarriage of justice.

The duty of a first appellate court is to re-evaluate the evidence, give it a fresh scrutiny and come to its own conclusions. The case of ***Pandya v. R (1957) EA 336*** refers.

In this case the appellant was sued by the Respondents in the lower court for a declaration that they were the rightful owners of the suit land measuring 40 acres situate at Kapkware village. The appellant contended that the land belonged to her having inherited it from her deceased husband.

Evidence in the lower court was as herebelow:

PW.1 Simwoto Cherop who said land was for his late father **Charles Tede** who died in 1964 and was buried on the suit land. His grandfather **Kiboyi** was also buried on the suit land. He named neighbours as **Nathan Sikorit, Masai Twingyo**, **Nangorok, Ngeywo, Bukose** and **William Roto**.

He said there were no common boundary features.

PW.2 Cheptegei Augustine on behalf of **Ndiwa Cherres** said **Ndiwa Cherres** was his father but is sick and elderly at home. The first plaintiff was his uncle (brother of his father). The defendant forcefully entered their land in 2010. Land used to be for his grandfather **Cherres Tete** who gave it to **Ndiwa Cherres** - his father in 1916. They left the land in 1964 due to insecurity caused by the Karimojong, and returned on it in 2004.

It was in 2010 when defendant's son went and attacked him claiming the land.

PW.3 Cherop Silas said land was for the plaintiff who acquired it through their father. He was a neighbor to the land on the upper side. Other neighbours were **Kapcheserey**, **Ngeywo, Twingyo Masai**. There are graves on the land belonging to plaintiff's grandfather and relatives.

Defendants entered forcefully on the land in 2010.

PW.4 Bukose Milton, confirmed that suit land belonged to plaintiffs and there are old homesteads thereat.

PW.5 Kokop Labu told court she knew the land. **Cheres** gave them land to build a borehole which was still there.

She informed the lower court that they were behind Kapchere's land and were surrounded by neighbours like **Chemonges, Kaptila, Kweboia** who were still there.

PW.6 Yosani Siraji said he knew the plaintiffs and confirmed that the land was for the plaintiffs.
PW.7 Ayeko David confirmed that plaintiff's own the land.

On the other hand the defendant's case was as follows: **DW.1 Kokop Cherop** said she did not know the plaintiffs until when she saw them in court. She said that she was living on the land with her late husband **Kapkulany alias Mwenya**.

DW.2 Reuben Barteka said he used to be a neighbor to the defendant as a headmaster in 1965, and knew the land as that for the defendant and her late husband **Mwenya.**

DW.3 William Chelibei said that he knew the plaintiff as a neighbor at Sindet Primary School in the 1960s. He said that on the upper side was **Kapkure**, West was River Sundet and west was **Arap Labores Chemonges**. She further said that she did not know the neighbours to the suit land but only the neighbours to the school.

DW.4 William Kapkwomwe said that he knew defendant as a neighbor in the village. He said that the land was for her late husband **Mwenya**, who was buried in Sindet village. She named the neighours as **Chesurey, Kapsiret, Chemonges** and a river. She stated that the defendant left after the Karimajong raid and returned in 2011.

In cross-examination this witness revealed that the land used to belong to **Cheserey,** she said that **Mwenya** grew up in **Chesesery**'s home and was later given the land.
DW.5 William Ruto said he was a neighbor to plaintiff and shared a boundary with the defendant.
From there court visited the locus. The record indicates that the defendant refused to attend the locus proceedings. The record also indicates that court proceeded to conduct the locus and plaintiffs showed court the locations of the suit land, and its neighbours.

At close of the evidence court on basis of that evidence found that the land belonged to the plaintiff and defendant was liable in trespass.

Assessment of evidence in a civil trial is on a balance of probability. The Evidence Act places the burden on he who asserts a fact to prove it in court. (See 101 Evidence Act).
The plaintiffs had the burden to prove that the defendant was a trespasser on the land. They also had to prove that the suit land belongs to them.

From the evidence from the plaintiffs it is clearly shown that the land in dispute used to belong to PW.1's late father **Cherres Tete**, who died and is buried on the land. Their grandfather **Kiboyi** was also buried on the said land. Plaintiffs named the neighbours as **Nathan Sikorit, Masai, Nangorok Ngeywo** and **Ruto**. This evidence is corroborated by PW.2 to PW.7. The witnesses all testified that plaintiffs left this land due to cattle rustlers and returned in 2010, when the defendants chased them away.

The evidence was consistent in naming the location of the suit land, the common features being the graves and the borehole, and old homesteads.
The defendant's evidence on the other hand was contradictory and inconclusive. For instance DW.1 in evidence in chief says she has been on the land continuously and that in 2010 **Cheptegei** requested for land from her but she refused to give him and they entered an agreement to that effect on 29.4.2011. However this contradicts paragraph 4 of her written statement of defence in which she averred that she leant out the land and made an agreement to that effect annexed as P.1. This agreement which was attached shows that she indeed lent out the land named in that document. This contradiction was not explained; giving a doubt in the viability of her evidence.

Furthermore the defendant's witnesses were inconsistent and unsure of their facts. For example DW.2 testified of the facts as in 1965 but said he did not know who currently was in occupation of the suit land. His evidence was therefore not helpful.

DW.3 told court he did not know the neighbours to the land in dispute and only knew about the school land. His evidence was therefore of little evidential value to help court to know issues around the suit land.

DW.4 gave adverse evidence to defendant when he confessed during cross-examination that the suit land used to belong to **Cherusay**'s and the one called **Mwenya** (defendant's husband) grew up in **Cheserey**'s home; and was given the land later. He did not explain how **Mwenya** got the land from **Cheserey**. It is important to note that DW.1 had testified that she knows nothing about the claims by plaintiffs. However DW.4 told court that plaintiff's sons chased defendants from the land in 2011. He even testified they forced plaintiffs to sign an agreement on 29.04.2011.

DW.5 testified the defendant was "contracting the suit land".
The court visited the locus to clarify on the evidence. The record indicates that the defendant refused to attend. It is noted that the date for visiting locus was indicated by court, and formal summons issued. It is also clear court took initiative to physically send a Court Clerk to summon the defendant but she chose to be absent. The locus was then visited in her absence and the court noted the land as described by plaintiffs in presence of the public.

The sum total of all the above findings is that there was overwhelming evidence on record showing that the plaintiffs proved their case on the balance of probability that the land in issue belonged to them by customary tenure. They lived there until 1964 when they fled. They returned there in 2010 but were chased away by the defendants. This evidence is believable, given the consistency with which it was led on record. The defendant's evidence on the other hand was inconsistent and contradictory. I therefore find that with that type of evidence the learned trial Magistrate reached the right conclusion on the evidence.

I have to comment on the style of writing judgment which the learned trial Magistrate adopted; especially in the comments on the behavior of the defendant and her sons. This was unnecessary detail and could have been misinterpreted for bias. This is however made less fatal by the fact that the learned trial Magistrate made the same comments on the proceedings at the locus when

detailing this episode. It is clear that he was displeased with the defendant's behavior. I do not however find that it biased his concern on the evidence since I have also come to the same conclusion.

I however take exception to the learned trial Magistrate's failure to make specific findings on each point of his decision giving points and reasons for the findings as required under the MCA. A judgment must be properly written with proper decisions on each issue and reasons for each issue. (Section 136 MCA)

The appellant argued all grounds 2, 3, and 4 together, and ground 1 separately.
I however find that all grounds relate to assessment of evidence, which evidence I have concluded was properly evaluated.
I therefore find no merit in all grounds of appeal as argued.
I find that:

Ground 1: The learned trial Magistrate committed no error in evaluating the evidence on record. The ground is not proved.

Ground 2: The learned trial Magistrate did not error in visiting the *locus in quo*. This ground also fails.

Ground 3: There was no need for the witnesses and neighbours to testify at locus. This ground fails..

Ground 4: The decision of the learned trial Magistrate never occasioned a miscarriage of justice. This ground also failed.

The conclusion is that there is no merit in the appeal. It is not proved and is dismissed with costs to Respondents.

Henry I. Kawesa

JUDGE

01.11.2016

Right of appeal explained.

Henry I. Kawesa

JUDGE

01.11.2016