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

HCT-04-CV-CA- 0032 OF 2016
(ARISING FROM KAPCHORWA CIVIL SUIT NO. 046 OF 2014)

1. **LABU GEOFREY**
2. **KURUNGO FRED**
3. **CHEMUTAI SIMON**
4. **CHEKWOOTI AUGUSTINE :::::::::::::::::::::::::: APPELLANTS**

VERSUS

CHEROP STEPHEN ::RESPONDENT

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

JUDGMENT

Appellant was dissatisfied with the Judgment and orders of the Magistrate Grade 1 Kapchorwa, his Worship **Matovu Hood** of 1st March 2016.

The appellant raised 6 grounds of appeal namely:

1. The learned trial Magistrate did not properly evaluate the evidence on record and thereby reached an erroneous decision.
2. The decision of the learned trial Magistrate is tainted with fundamental misdirection and non direction in law and facts.
3. The learned trial Magistrate erred in fact and law when he did not consider the period the appellants enjoyed quiet possession of the suit land.
4. The learned trial Magistrate erred in law and fact when he awarded general damages of two millions without any proof thereof.
5. The decision of the learned trial Magistrate was against the weight of evidence.
6. The decision of the learned trial Magistrate occasioned a miscarriage of justice.

The appellants' counsel argued grounds 1, 2, 4 and 5 together, and ground 3 and 6 separately.

Respondents on the other hand argued grounds 2 and 6 together, and the rest separately. I will consider each ground of appeal separately.

As a first appellate court, this court must re-evaluate the evidence; give the evidence a fresh scrutiny and reach its own conclusions thereon.

However caution must be taken while assessing evidence given the fact that this court never listened to, and observed the witnesses.

I do agree with the Respondent's complaint under his background notes in submissions that the way appellants framed his grounds of appeal offends O. 43 R.1 and 2 of the Civil Procedure Rules.

The grounds indeed do not sufficiently bring out the specific point of contention but are vague. However the same was cured by counsel chosing to lamp his arguments into two major complaints (i) on failing to properly weigh the evidence (ii) the failure to consider the period of limitation. Though counsel prayed that the offensive grounds be struck off, he did not suggest which law gives court that right. The case of ***National Insurance Corporation V. Pelican Services CACA N0.5 of 2003,*** did not decide that the offensive ground is mandatory struck but "Liable to be struck off".

For that reason, I do find that since arguments have been made generally on these grounds, court will consider the arguments by counsel and decide the grounds on the basis of such arguments.

Ground 1: Failure to evaluate the evidence

Issues:

The court considered three issues:

1. Who is the rightful owner of the suit land?
2. Whether defendants are trespassers.
3. Remedies.

The evidence before court

PW1- Cherop Steven , said the land is his and he got it from his father **Erifazi Cheptai**, who got it from his father **Chemonges Kamulwa**. PW1 was given the land in 2005. He named the neighbours as west- **Cheptai**, North River Ngenge, and South – a hill. Defendants came on

the land in 2012 and cultivated and even chased away his people. They encroached on 20 acres. **Lasto Siwa** had land near the suit land but not the land in issue.

PW2- Erifasi Cheptai said he gave land to plaintiff in 2005. He also got it from his father **Chemonges Kamulwa** who got it in 1918. **Lasto Siwa** is father of some of the defendants and was on **Petero Cheptegei**'s land, and has no land at suit lands. He said house thereon was constructed when the case was already in court when **Lasto** died on 13.12.2015, he was forcefully buried on the suit land.

PW3- Cheptai John Petero said plaintiff **Cherop Steven** is his neighbor and they share the boundary. He named neighbours as West – **Cheptai Erifasi**, South, **Tyangana Sadik**, North River Kabagirya.

He said **Lasto Siwa** was a clan brother and it was PW3 who gave him land amounting 12 acres. The defendants in 2012 trespassed beyond the land PW3 gave them into **Cherop**'s land.

The house on suit land was recently constructed. When defendants forcefully buried **Lasto Siwa** on the suit land, he warned them about their trespass but they insisted.

PW4- Asadi Mwanga said that plaintiff is a neighbor, and all defendants are close relatives of his. He told court that he and the defendants encroached on plaintiff's land in 2012. They crossed from their land into **Cherop**'s land of about 20 acres. The land was given to them by **Cheptegei Petero** (PW3) and each shared 4 acres. He also said **Lasto Siwa** had no land there at the suit land.

He informed court that he had apologized to **Cherop** and vacated plaintiff's land.

In defence, defendants called; **DW1- Labu Geofrey** who said the land in dispute belonged to **Siwa**/ his uncle). **Lasto Siwa** got it a long time ago while DW1 was still young. The land was vacant when he acquired it.

Lasto gave them the land in 2002 (about 40 acres). He said the land of **Siwa** neighbored that of DW1's father **Ndiwa Enoch**.

He said that there was a dispute of grabbing where **Lasto Siwa** gave evidence against **Erifasi Cheptai** , and **Cheptai** was defeated and was chased from the land.

Cherop entered their land to revenge as a result of that case. They began cultivating it and **Cheptegei Petero** arrested them. Matters went to police which decided for them , and it gave them security.

DW2- Kurong Alfred said plaintiff is a neighbour on the western side.

He said his father **Lasto Siwa** gave him the land in 2002. He did not tell them the acreage. **Lasto** acquired the land with father of PW3 in 1970, and stayed thereon from then.

Plaintiff began claiming the land in 2005 and they reported him to police which intervened.

DW3- Chemutai Simon said plaintiff is a neighbour. He said his father **Lasto Siwa** gave evidence against plaintiff's father in court . There was connivance between PW3 and plaintiff's father to grab their land.

DW4- Chekwoti Augustine said he bought land from Asuman Rotir in 2008 at 1,400,000/= it was 2 acres.

Court visited the locus and made observations.

Counsel for appellant argues that the Respondent's evidence in court showed that they did not know the neighbors to the suit land.

He claimed that court ought to have found that 6 acres of land belonged to **Ndiwa Enoch** out of 20 acres .

Apart from repeating the evidence by defendants as in his submissions. Counsel did not show the actual failure alluded to the trial Magistrate in assessment of evidence. This is because the burden of proof in civil matters is on he who alleges a fact. (Section 101,102,103 Evidence Act.) The defendants made several allegations in their evidence in chief. The plaintiff also made several allegations. The evidence of the plaintiff however was independently corroborated in all material particular. There was evidence of neighbours, the giver of the land, the one who repented of the act of grabbing all contained in evidence of PW1, PW2, PW3 and PW4. At locus there was proof of what PW1 stated (See Judgment).

However each defendant only stated a lone defence, with no proof thereof. That is why the learned trial Magistrate mentioned the failure to corroborate the allegations (e.g DW4 said he bought, but had no proof. He did not produce the alleged agreement of sale.

Defendants alleged conspiracy to deprive them of this land between PW3 and plaintiffs' father (PW2). They did not bring any evidence of such a case in court. They talked of police intervention still did not call any witness to prove these allegations. They claimed a long stay on the land since 1970, but could not bring a single Elder , relative, Chief or document which roots their claim on this land save their own word of mouth in court.

In assessing the evidence by the learned trial Magistrate all the above evidence was considered by him as rightly observed by counsel for Respondents, the judgment by the learned trial Magistrate considered all evidence and weighed it, then concluded as it did.

The court found that the plaintiff had proved the case on the balance of probabilities. I do find the same way. I do not agree with the appellants under ground 1, of their appeal as alleged. This ground therefore fails.

Ground 2: Given the findings in ground 1 above the learned trial Magistrate was right in the assessment of evidence and committed no misdirections or non directions. Ground 2 also fails.

Ground3: Failing to consider period the defendants spent on the land.

The complaint by appellants is that defendants acquired land in 1970 and the court should have found that the doctrine of adverse possession came into play.

The Respondents argued that the arguments above did not affect this matter since the respondents claim use from 2005, and use by the defendants was in 2002.

I notice from the written statement of defence that the defendants did not plead limitation or adverse possession. Secondly in the written statement of defence, defendants referred to the year 2005, just generally in answer to allegations in the plaint, but mention no other period in their pleadings.

It's trite law that parties are bound by their pleadings. The reference to the year 1970, only came in evidence and was subject to proof. After trial court was not convinced that defendant's version

was the truth. It believed the plaintiff's version. The doctrines above were pleaded and court did not error in not considering their effect because they were not relevant to the matters before it.

Alternatively even if one ventured into that exploration, the argument would still fail for reasons as rightly articulated by respondent's counsel in submissions.

The record shows that defendants entered on the land in 2002 as per DW1 &

DW2, and in 2005 as per DW3. It is therefore true that the claim of causation relating to adverse possession was broken by the year 2005. (See exposition on this doctrine in ***Afrad Nebbi& Ezrom Oker V Alex Manano Ajoba HCC 03 of 2005***, which is very persuasive on this topic and I do adopt its arguments.

Basically - " *In the eye of the law an owner of land is deemed to be in possession of the land so long as there is no intrusion… the position is altered when another person takes possession of the land and asserts rights over it and the original owner omits or neglects to take legal action against such person for years…*"

From the facts of this case, the doctrine of adverse possession was therefore not applicable. The learned trial Magistrate was therefore right. This ground also fails.

Ground 4: Award of General Damages

This ground is moot and was not argued. General damages are in court's discretion. ***Ghard V. Pfzier(1965), NLR 182***

See also ***Kamuntu v. AG CS.38/2016 (Land Division)***.

The learned trial Magistrate used the discretion and was in his right. The ground fails.

Ground 5: Evidence against weight of evidence

This court found under ground 1 that all evidence was properly weighed. The conclusions by the learned trial Magistrate were not against the weight. This ground fails.

Ground 6: Miscarriage of justice

There was no miscarriage of justice. This ground fails.

The appellant has failed to prove this appeal. It fails on all grounds. It is dismissed with costs to the respondents.

Henry I. Kawesa

JUDGE

25.05.2017