THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CA – 0035 OF 2015

(Arising from FPT – CV – CS (LAND) NO. 18 OF 2013)

RWEYORA SILVESTER .....APPELLANT

VERSUS

KYOMUKAMA JACINTA.....RESPONDENT

BEFORE: HIS LORDHSIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUGDE

Judgment

This is an appeal against the decision of His Worship Barigye Said, Magistrate Grade 1 of Kamwenge delivered on the 20th of August 2015.

Background

The Respondent instituted a civil suit against the Appellant and her claim against the Appellant was for a declaration that she was the rightful owner of the suit land, an eviction order be issued, a permanent injunction, general damages and costs.

The Respondent alleged that she got the suit land from her father which she took immediate possession of, built a house and planted bananas thereon. However, that when she got married she left the land behind and the Appellant occupied it. Upon her marriage failing she returned and found the Appellant occupying the suit land and he refused to vacate the suit land even after the involvement of the local leaders and elders.

The Appellant on the other hand denied the allegations and contended that the Respondent had been given ¼ of an acre in 2013 that she duly signed for and there was no other land she claimed from him. And the ¼ acre does not form part of the disputed land.

Issues for determination were;

1. Whether the Plaintiff is the lawful owner of the suit land?
2. Whether the Defendant trespassed onto the disputed land?
3. What remedies are available to the parties?

The trial Magistrate upon hearing the case and visiting locus found that both parties had used the suit land and thus had a stake in the suit land since they had utilized it for long although the Respondent left after some time. The Respondent was entitled to half of the suit land. The Appellant was found not to be a trespasser, however Court ordered that the two parties share

the suit land equally and the Appellant was given three months to harvest his crops. An eviction order was granted and half of the bill of costs to the Respondent.

The Appellant being dissatisfied with the above decision lodged the instant appeal whose grounds as per the Memorandum of appeal are;

1. That the learned trial Magistrate failed to properly evaluate the evidence on record thereby deriving on a wrong conclusion.
2. That the learned trial Magistrate erred in law and fact when he relied heavily on the Respondent and her witnesses disregarding the Appellant's testimony thus causing miscarriage of justice.
3. That the learned trial Magistrate misdirected himself by ordering the equal division of the suit land between the Appellant and Respondent when there was overwhelming evidence showing that the suit land belongs to the Appellant.
4. That the learned trial Magistrate failed to evaluate properly the documents/agreements presented to Court by the Appellant and thus coming up with a wrong conclusion.

Representation

Counsel James Ahabwe appeared for the Appellant and Counsel Deo Kizito for the Respondent. By consent both parties agreed to file written submissions.

Duty of the first Appellate Court:

It is the duty of the first appellate court to re-evaluate the record of the evidence for itself in order to determine whether the conclusion reached upon the evidence by the trial court should stand warning itself of the fact that it never heard or saw the witnesses in the lower Court. **(See: Peters versus Sunday Post, [1958] E.A Page 424.)**

Resolution of the grounds:

I have perused the record of proceedings and the submissions of both Counsel I will resolve Grounds 1 and 2 jointly and Ground 3 and 4 separately as laid out by Counsel for the Appellant.

Counsel for the Respondent raised a Preliminary objection to the effect that Counsel for the Appellant had attached an English translated copy of an agreement dated 10th July 2013 and translated on 1st March 2017. That this is bad in law and an abuse of Court process, that the Appellant in this matter is opening up his case of the lower Court yet it is now on appeal and at the level of writing judgment by filing a new translated copy of the agreement.

And if there was no translated copy tendered in the lower Court, the original document could not be relied upon and the Appellant cannot sneak it in at this level. That Counsel for the Appellant also did not apply for leave of Court to tender in this new evidence.

I disagree with the submission with all due respect. This is no new evidence as the same was already tendered in the lower Court and was received by the same Court on 19th/11/2014. However, Counsel ought not to have obtained a new translation for the agreement since one

had already been obtained by the Appellant and was already on Court record. This also no way prejudices the Respondent since the same was already tendered in the lower Court. The preliminary objection is overruled.

Grounds 1 and 2:

1. That the learned trial Magistrate failed to properly evaluate the evidence on record thereby deriving on a wrong conclusion.

2.That the learned trial Magistrate erred in law and fact when he relied heavily on the Respondent and her witnesses disregarding the Appellant's testimony thus causing miscarriage of justice.

Counsel for the Appellant submitted that it was the evidence of the Appellant that it was upon the death of their (Appellant and Respondent) parents that the children decided to share their parents' land and the Respondent did get her share and an agreement was executed to that effect which the Respondent signed. The agreement was received in Court as exhibit DE1. The Appellant's testimony was corroborated by DW2.

Further that the Respondent's evidence was full of controversies and inconsistencies. That in her testimony she first told Court that she gave her father a jerry can of alcohol in the presence of neighbours and that is when she was given the suit land in 1983.

PW2 on the other stated that the Respondent acquired the suit land by will in the 1990's and not gift *inter vivios*. There were also discrepancies as to the size of the land that belonged to the Respondent.

Counsel cited the case of **Zakaria Onno versus Olando Difasi and 5 Others, HCCA No. 25 of 2013**, where it was stated that grave inconsistencies render the evidence to be rejected. Thus, the evidence was not properly evaluated and a wrong decision was arrived at.

Counsel for the Respondent on the other hand submitted that PW3 a brother to both parties told Court that he and his siblings were given land when they were still young and the Respondent as a woman left her share behind and the Appellant started using it. Upon her return, the Appellant refused to vacate the same. On cross examination he stated that when their father died, he left land behind for their stepmother which was sold and the money was divided and both parties including PW3 got Shs. 400,000/= each.

The Appellant on the other hand told Court that he got the Ndunde (1/4 an acre) out of his father's land and his step mother is alive. He confirmed receiving Shs. after the sale of the land and also stated that he also bought land from his brothers and sisters.

Further that the ¼ an acre for which the Respondent signed for is not in dispute but rather what was given to her by their late father. And during the locus visit Ernest Nkurunungi the Vice Chairperson stated that they as bataka sat and resolved that the Respondent be given her share as was given to her by her late father and thus, the land in dispute was in two different pieces. Thus, the magistrate was right to order that the two parties share the suit land.

In the instant case the Respondent alleged that she was given land by her father in 1983 after giving him a jerry can of alcohol. I have correlated the Respondent's age to the year she was allegedly given the suit land and I find it very unbelievable that she could have done so at a tender age of 6 years. The Respondent's witnesses all stated that the suit land was given to her by her late father and did not add the bit that this was after she had given him a jerry can of alcohol because certainly a 6 year old is not likely to afford one or even possess that knowledge that if she did so she would get land form her father.

There is an agreement I saw on Court record that showed how the land was divided in 1989 and the Respondent and her sister were not given land, only the boys were given land to wit S. Rweyora, Masiko, D. Basiga, Rutaka I., C. Pole, Baguma and P. Rusika were given land.

The Appellant also on cross examination told Court that the ¼ acre the Respondent was given as per exhibit DE1 was the land that was left behind by their father and that was the share the Respondent was entitled to.

I also not that the testimony of the Respondent and her witnesses were full of controversies including a witness at locus who stated that he was present at the time the father of the parties was giving them land which was impossible because at the material time he was 4 years old.

The Respondent also told Court that she occupied the suit land immediately, had developments such as a house and banana plantation. Yet her own witnesses said that she had no developments on the suit land.

The Respondent had two varying stories, from her pleadings she stated that she left the suit land upon getting a job in Fort Portal and yet when giving her testimony she stated that she left the suit land when she got married leaving it in the custody of the Appellant.

I find that the Respondent and her witnesses were not truthful and her evidence had major discrepancies as opposed to that of the Appellant who produced documentary proof that was not disputed buy the Respondent and she did admit that she signed the agreement marked DE1. I am inclined to believe that the Respondent was not given any land by her father but rather got land after the demise of her parents after the siblings shared their father's land. Therefore, she is entitled to the ¼ acre of land which is allegedly not in dispute and the suit land belongs to the Appellant.

These two grounds therefore succeed.

Ground 3: That the learned trial Magistrate misdirected himself by ordering the equal division of the suit land between Appellant and Respondent when there was overwhelming evidence showing that the suit land belongs to the Appellant.

Counsel for the Appellant submitted that the Appellant's evidence in regard to the distribution of land whereof the Respondent got ¼ an acre was not challenged and this was done in the presence of the local leaders and all the siblings on 10th/7/2013. The Respondent in this agreement agreed that she had no grudges over land with the Appellant anymore after receiving this piece of land. Thus it was wrong for the Magistrate to order for the equal

division of the Appellant's land with the Respondent yet she had already gotten her share of the land that was left by their parents.

Counsel for the Respondent on the other hand submitted that the evidence of the Respondent in regard to the fact that their late father gave her land was unchallenged by the Appellant and cited the case of **Habre International Co. Ltd versus Ibrahim Alarkhia Kassam & Others, SCCA No. 4 of 1999 (unreported) at Pg 108-09** where it was held that;

"Where a party fails to challenge evidence, that evidence is accepted as true."

From the Resolution of the above Grounds, I find that it was wrong for the trial Magistrate to order that the two parties share the suit land equally yet the Appellant's land is not the land that was given to the Respondent by their father. Though all the Respondent's witnesses stated that the suit land belonged to the Respondent, they each had different accounts of the story which made their evidence unreliable for lack of consistency. To cite one of the testimonies is that of Kampikaho Evaristo who testified at locus and lied under oath that he found the Respondent on the suit land in 1980, a year which according to the Respondent's testimony she had not yet been given the land by her father. The Respondent is restricted to ¼ an acre that was given upon division of their father's land and the same was confirmed to be the share of the Respondent by Nkurunungi Ernest the LC1 Vice Chairperson a locus witness who was present during the division of this land.

This ground therefore succeeds.

Ground 4: That the learned trial Magistrate failed to evaluate properly the documents/agreements presented to Court by the Appellant and thus coming up with a wrong conclusion.

Counsel for the Appellant submitted that the Respondent at the time DE1 was being tendered in Court did not object to the agreement, she even stated that she signed it and therefore had no objection. That the trial Magistrate in his judgment held that the Respondent signed this agreement because she was not able to read and write yet the Respondent did not lead evidence to deny signing the agreement or knowing its content. The agreement was also signed by PW2, PW3, and DW2 the Chairperson of the area. Thus the trial Magistrate failed to properly evaluate the document presented to him which was an error on his part.

I do concur with the above submission; the Respondent never contested the contents of DE1 nor denied ever signing the same. It was also in this agreement that the Respondent admitted her content after being her share of the land. I find that the trial Magistrate erred in neglecting the contents of DE1 which were not objected to by the Respondent.

This ground succeeds.

In a nut shell, I find that the Appellant is the owner of the suit land and the Respondent was given her share of the family land which signed for in the presence of her brothers, the local leaders and other witnesses. This land measures ¼ an acre. The Respondent should therefore occupy her share of the land and leave the Appellant to enjoy his land.

This appeal succeeds on all grounds and the decision of the lower Court is set aside. Costs awarded in this appeal and in the lower Court.

Right of appeal explained.

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OYUKO. ANTHONY OJOK

JUDGE

20/09/2017