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

HCT-04-CV-CA- 0006 OF 2016
(ARISING FROM BUKWO CIVIL SUIT NO. 060 OF 2015)

CHEPTEKA SAMUEL :::::::::::::::: APPELLANT

VERSUS

MANGUSHO SHADRICK :::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal from the Judgment and decree of the Magistrate grade 1 Bukwo **Opio James** dated 12th Jan 2016.

The appellant sued the Respondent for a declaration of ownership of the suit land. He claimed that it used to belong to them in 1940s until when they were displaced by the insecurity.

The respondent also laid claim to the land in that it belonged to his family as ancestral land.

The appellant raised 4 grounds of appeal.

The duty of a first appellate court was laid out in the case of ***Fr. Narsensio Begumisa and 3 Ors V. Eric Kibebaga SCCA No. 17 of 2002*** (unreported): thus:

> "*The legal obligation of the 1st appellate court to reappraise the evidence is founded in the common law rather than rules of procedure. It is a well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses*."

The above principles will guide this court in the determination of the grounds of appeal as herebelow;

All grounds generally raise issue with the assessment of evidence. I will therefore consider all grounds together as argued by the appellant.

Appellant's counsel in submissions points out that the plaintiff's evidence was enough and it met the required legal standard of proof in civil matters. Appellant complains that the learned trial Magistrate was wrong when he found that:

i) The land belonged to respondent inspite of evidence to the contrary from plaintiff especially evidence of the LC1 judgment and findings of the elder's committee.
ii) Appellant was a Kenyan; yet defence witnesses showed that appellant's family was in the area by the 1950's and that appellant's father owned many cows/cattle a sign that he was rich and was settled in the area.
iii) The learned trial Magistrate just narrated the evidence of the Respondent and ignored the evidence of the LC1 and the Elders and neighbors to the suit land.
iv) The appellant only understands the language but does not speak "is illegal and court should not sanction an illegality.
v) The suit land was measured and found to be 198 acres was a misrepresentation given evidence on record from plaintiff/ appellant
vi) That at locus court measured the land yet the Judgment does not reflect what was done at the locus.

In response the Respondent opposed all the arguments above, contending that the learned trial Magistrate properly evaluated the evidence .

He went through the defendant's evidence at trial, and pointed out Respondent acquired the land in the 1920s. Appellants came to Uganda after being chased from Kenya. They were allowed temporary settlement by the Resettlement Committee, but declined to leave. The defence showed by oral and documentary evidence the above facts. All his arguments are noted.

The learned trial Magistrate in his Judgment from page 1 to page 5 of typed Judgment reviewed the evidence on record. At pages 5-6 he resolved the issues by applying the evidence to the facts and the law. He then found for the defendant.

My own analysis of the evidence on record indicates that, the record of the LC1 Judgment referred to by PW1- **Samuel Chepteka**, was noted by court as "Annexture A" and court marked it as PE1.

However this exhibit PE1 does not appear on record. The learned trial Magistrate also never based his findings on its contents. However the Respondent in submissions referred court to the fact that the decision of the LC1 court of 2011, referred to would be a nullity. I do agree. The LC1 court of the area (as alleged) for 2011, in view of the case of ***Rubaramira Rurangaranga v. Electoral Commission & Anor. Const. Petition No. 21 of 2006-2007*** would amount to a nullity in law, and hence the learned trial Magistrate was right to ignore the same.

On the question of whether the learned trial Magistrate was wrong to base his evidence on the respondent's evidence , it is the law under section 101, 102, 103 of the Evidence Act that facts are proved by he who asserts.

Bearing the burden of proof in mind, there is on record evidence to support the proposition that a one **Kapchaka** settled on the area around 1920 under customary hereditary system (see evidence of (DW1) at page 10 of typed proceedings and DW.2 at page 12 of pleadings shows that the land was for **Chepsikor Kapachanga**. "The Grandfather of the defendant. In 1958 **Chepteka** (Grandfather of plaintiff) went to their home as a relative from Kenya since Pokots had chased them. He settled in **Kapchekwony**'s home. He is his Grandfather. In 1959 when the Grandfather fell sick, upon a ritual of witchcraft, **Chepteka** was chased away, and he left. In 2007 peace returned, and **Chepteka**'s family returned first, and he encroached on the suit lands(see page 12 of proceedings).

DW3- Cheboi Kabra confirmed DW2's evidence above that plaintiff's father came and stayed at **Kapchekwony**'s home in 1958- and left in 1959 following a misunderstanding and only returned in 2010. (See page 13 of proceedings). Also **DW4- Rofina Kurongo** at page 14 of proceedings confirmed that plaintiffs came in 1958 at **Kapchekony**'s home, and left after a misunderstanding .

This evidence when considered along with PW1 who said his father acquired the land in the 1940's and left it in 1962, due to the Pokot raiders. He came back from Kenya in 2007. PW2

names plaintiff's father being on the land between 1961-62, with **Lawendi** as a neighbor; divided by a stream(see page 5 of pleadings)

PW3- Chemakwila Edward, a neighbor claimed that **Chepteka** was using it between 1940 to 1962 when pokots chased them.

PW4- Borowoi Lazaro claimed **Chepteka** family lived on the land. He saw them since 1953 to 1962 when pokot chased them.

The evidence of the plaintiff when weighed with that of the defendant brings into play the principle of "first in time, first in title." The defence places their rights as far back as the 1920s. Even if it is true, this is against the evidence of plaintiff which begins their story from the 1940s (see plant paragraph 4(d) and evidence of PW1.

However the defendants through their evidence show that the plaintiff's acquisition came by way of invitation thereon in 1940s as explained by the evidence on record.

From that evidence, there is reasonable evidence to believe the defence since they were able to trace their original title from **Mzee Kapchanka** by 1920 as opposed to plaintiff's title traced from **Chepteka** by 1940. The evidence of DW3- showing how **Chepteka** came on the land temporarily & corroborated by DW1, DW2 and DW4- was not controverted.

From the analysis of the evidence on record therefore I agree with counsel for the Respondent's submissions that the defendant's documentary evidence was good evidence and as per ***Habre International Co. Ltd V Ebrahim & Others SCCA No.4/ 1999*** (unreported) the law is that where a party fails to challenge a particular piece of evidence, it is taken as true.

The complaint that the father of the defendant's failure to testify was fatal is ill conceived. As rightly pointed out by the Respondent's Counsel, **Mr Lawendi William** the Respondent's father executed a power of Attorney (which is on record) in favour of the Respondent. The Respondents therefore had locus before court.

Regarding the LC1 Judgment, the Defendants specifically pleaded in their written statement of defence under paragraph 3(f) that the same was illegal. The plaintiff did not lead evidence to

show that this position had changed. However court as already held was right to ignore the same for being a nullity.

Regarding the learned trial Magistrate's relaying on the documents produced by the defendants, in further proof of their case, I agree with the decision in ***Karmali V Shah (2000)2 EA 342***, as quoted by Respondent's counsel that documents produced by a party if not challenged by the other party can be a basis for Judgment in favour of the party producing them.

There was such documentary evidence to prove that the plaintiff is a Kenyan. There is also evidence of various inquiries into this matter which led to the learned trial Magistrate's finding that indeed plaintiff is a Kenyan.

I agree with the Respondent's counsel that the discrepancies pointed out in evidence are minor. These related to acreage which defendants in their pleadings under paragraph 3(a) approximated to be 120 acres situated at Kuliro village. Therefore the defence witnesses gave opinions as to the size of the land which did not greatly depart from the pleadings.

Following the authority of ***Alfred Tajar V Uganda (EACA) CA N0 167/196***

I hold that these contradictions were explained away and were minor and did not point to deliberate falsehood. In any case the visit to the locus was conducted and the matter was judiciously settled.

Finally regarding the visit to the locus, there is no justification for the complaint that the learned trial Magistrate did not do so correctly.

As held in ***Deo Matsanga V Uganda(1998) KALR***, and also in ***John Siwa Bonin V John Arap Kissa (HCCS) No. 58/ 2007*** following ***De'souza V U (1967) EA***, a visit to the locus only aims at seeking clarifications of evidence already assembled in court. If it is not a fishing expedition for fresh evidence.

A trial court which visits locus conducts a full trial at locus.

It records the proceedings and notes the explanations, that parties give to the court. There is no fresh evidence of witnesses but all witnesses who testified in court are required to explain what

they said in court. The Court of course reserves the right to seek explanations that enable it to conclusively determine the matter.

All the above rules were set down in Practice Direction No. 1 of 2007 as issued by **CJ Odoki** (as then).

The record indicates that the learned trial Magistrate conducted the locus proceedings in accordance with the principles above. All this is clearly set out on page 16-17 of the record.

Having found as above, there is no misdirection or non direction amounting to a miscarriage of justice on record. In the words of the case of ***Mutego Mohammed V Zubairi Malyaka & Anor HCT-04 CA-0151-2012***, regarding incidents which amounts to a miscarriage of justice.

The principle is following ***Matayo Okumu V Fransico Amude [1979] HCB 229***, that:

> "*miscarriage of justice occurs where there has been misdirection by the trial court on matters of fact relating to the evidence tendered or where there has been unfairness in the conduct of the trial resulting in an error being made.*"

None of the above has been proved in the case before me.

I therefore find that the appellant has failed to prove any of the grounds raised in this appeal. This appeal fails on all grounds raised and is dismissed with costs to the Respondent.

Henry I. Kawesa
JUDGE
21.03.2017