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

HCT-04-CV-CA-0086 OF 2014
(ARISING FROM KAPCHORWA CIVIL SUIT NO. 44/2013)

KISSA BOSCO :: APPELLANT

VERSUS

GRACE CHESANG :: RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The appellant was dissatisfied with the judgment of Magistrate Grade 1 Kapchorwa of 22nd May 2014 by her Worship **Aisha Nabukera**.

The appeal was premised on 4 grounds of appeal namely:-

1. That the learned trial Magistrate erred in law and fact when she held that appellant was a trespasser and that Respondent had proved the case on the balance of probabilities.
2. The decision by learned trial Magistrate was against the weight of evidence.
3. Learned trial Magistrate failed to evaluate the evidence properly.
4. The decision is tainted with fundamental misdirection and non-direction in law and fact thus leading to a miscarriage of justice.

The duty of this court as a first appellate court is to re-evaluate the evidence, make fresh conclusions and take caution that it did not have chance to observe or listen to the witnesses.
The appellant argued grounds 1, 2 and 3 together, and ground 4 separately. Respondent followed the same order of arguments.

Grounds 1, 2 and 3 (a) Trespass

The appellant argued that the learned trial Magistrate was wrong to impute trespass on the defendant/appellant who took possession of the land in 1999 and planted crops thereon, yet the plaintiff filed the suit 14 years later.

Appellant argued that trespass to land is a tort against possession and not against ownership, thus the owner who is not in possession cannot sue a trespasser. That is the proper statement of the law.

However from the plaint under paragraph 3 and 4, the cause of action is for vacant possession of half an acre of land at Cheptilayal. The prayers under paragraph 3 however included general damages for trespass, among others reliefs sought.

I do not therefore find where the issue of trespass took center stage in the proceedings. In the judgment the learned trial Magistrate did not grant any damages for trespass and hence no misdirection was committed on this point of law by the learned trial Magistrate. I find its being raised on appeal as being moot.

(b) Evaluation of evidence .

The appellant complains that the case of plaintiff was not backed up by any evidence of donation (no deed of donation). Counsel referred to PW1's evidence in cross-examination that the land belonged to her late husband.

It was his argument that this land remained undivided and undistributed.

He referred to evidence of DW1, DW2, DW3 showing that PW1 had letters to the Estate of his late father **Soyeko Torito**, and complained that learned trial Magistrate ignored the evidence of DW1, DW2, DW3.

The respondent's counsel argued that the plaintiff gave consistent evidence that she married in 1982, and her father-in-law gave them the land with her husband.

I have examined the evidence on record. I find it for a fact that the evidence from PW1, PW2 and PW3, consistently shows that before the death of PW1's husband (**Chesang**), he had been given the land in issue by his late father. He took possession and lived there until 1991 when he died. Before death they had shifted to Sosio village, and continued cultivating the land until 2002, when defendant grabbed the land.

I have seen on record evidence of a letter exhibited as PE1 showing that defendant was aware of this fact of possession of the suit land by **Chesang**.
Evidence by DW1,DW2 and DW3 was to the effect that the land was part of the estate of the late **Soyekwo Toreto** (undistributed) and that DW1 holds letters of Administration to the same .

Evidence of DW3 however is very revealing and sharply contradicts D1 and D2 on the question of ownership. DW3 stated that the suit land is hers (in her own right).
She kept on insisting throughout the trial that the Suitland belonged to her. This contradicted DW2 who said the land is for **Soyekwo Toreto**. DW.1 said the land is "his" and was given to him by his mother. He said the room/land where **Chesang** was living belonged to his father. He said his mother gave him land which belonged to his father not **Chesang**'s land.
The evidence adduced by the defendants on this question of ownership was inconclusive, contradictory and confusing.
DW1 did not with certainty inform court why he repossessed the land occupied by PW1 who was the widow of his brother.
DW3 explained that PW1 refused to be inherited so she could not be allowed on the land. It appears from the evidence that the fact that DW1 holds letters of Administration gave him a leeway to attempt to repossess the portion of land which had already been given out by the late **Soyekwo** to PW1's husband. (See evidence of PW1, PW2, PW3 PE1 and PE2 and PE3).

Given the evidence as it is on record I do find that the plaintiff led sufficient evidence to prove the suit. The learned trial Magistrate's assessment of the evidence was right. I do agree with the learned trial Magistrate that the defendant/appellant does not deny the fact that Respondent and her late husband (a brother) were married, and lived and cultivated crops on the suit land. I do believe that PE1(the document where defendant agreed to give land in exchange , for what he grabbed) is good evidence for the plaintiff in support of her claims.

For reasons above, and those argued by Respondent's Counsel I find no merit in these grounds of appeal and they all fail.

Ground 4;

Misdirection on facts and law

The matters cited by counsel as constituting misdirection and non-direction by the court were;

i) Assessment of evidence.

ii) Withdraw of letters of Administration.

iii) Failure to visit locus.

On the fact of assessment of evidence, I have already found that the learned trial Magistrate correctly evaluated the evidence.

Secondly on withdrawal of letters of Administration, I have found that this was just a letter(PE2) written by the widow (PW1) and others complaining on the way DW1 was mismanaging the estate. It was written to the Grade 1 Magistrate of Kapchorwa and it concludes with a request that **Kissa Bosco** ceases to hold the letters of Administration (when it was tendered as an exhibit). Court in its Judgment referred to the letter as evidence adduced by the plaintiff in proof of her case.

I do not find the above holding offensive as it was admitted as "a letter". Counsel for appellant referred to the process of revocation of the letters of administration which is correct. However court never held in its Judgment that appellant's letters of administration were revoked, it only referred to the fact that such a letter was on record as part of the evidence adduced by the plaintiff. There was no error committed therefore in admitting PE2 on record by the learned trial Magistrate. All that this evidence shows is that though defendant holds letters of Administration, the family lost confidence in his Administration.

Failure to visit locus

Visiting locus is desirable in all deserving cases. In the quoted case of ***Osire Moses V Syaluka Florence HCCA 79/2009***, court held that the practice is to visit locus and failure could be fatal.

In the case of ***Waikubi Asuman Muzaale & Anor V. Kigaye Samson HCCA 0057/2017 (Mbale)*** (unreported) this court held that locus visits are necessary but in deserving cases. I held that deserving case is where after hearing the evidence the court finds it necessary to move out of court, to the scene of disputes so that the witnesses clarify their evidence regarding

peculiar matters like grave yards, boundaries, neighbors, landscapes, rivers etc. The visit to locus is never aimed at filling in gaps of evidence.

It is true that in this case the learned trial Magistrate did not visit the locus. I do however do not think that the visit would have changed much, since all the witnesses were agreed that the portion claimed by PW1 was being occupied by the defendant.
What was at stake was, "whose land was it?" This question could be resolved by evidence on record even without a visit at locus. The failure to visit locus in this case was therefore not a fatal omission. This ground therefore succeeds in part to the extent that there was failure to visit the locus, though it was not fatal.

In the result, I do not find merit in this appeal. It fails on grounds 1, 2 and 3. It partially succeeds on ground 4.
In the result, the appeal is dismissed with costs to the Respondent.

Henry I. Kawesa
JUDGE
05.05.2017