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

HCT-04-CV-CA- 0193 OF 2015
(ARISING FROM BUKWO CIVIL SUIT NO. 0064/2015)

SIWA CHRISTOPHER CHEMAYIN:::::::::::::::::: APPELLANT

VERSUS

CHELIMO YAIRO :::::::::::::::::::: RESPONDENT

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

JUDGMENT

The appellant was dissatisfied by the judgment of Magistrate I- Bukwo of 23rd December 2015.

The Respondent sued the appellant for vacant possession of the suit land, damages and costs. Respondent/Plaintiff alleged that the said land was for his grandfather having acquired it in 1926 and that the Respondent later took possession of the said land. Appellant/defendant contended that the suit land belonged to his grandfather who acquired the land in the 1830s.

The learned trial Magistrate found in favour of the Respondent hence this appeal. He raised 4 grounds of appeal.

As a first appellate court, this court has a duty to reappraise or re-evaluate evidence, as a whole and come to its own conclusion bearing in mind that it has neither seen or heard the witnesses and should make due allowance in that regard. (See: ***URA v. Rwakasaijja Azarious & 2 Ors CACA 8/2007***).

I now consider the grounds of appeal with that principle in mind, in the order they were listed in the memorandum of appeal.

Ground1: The learned trial Magistrate did not evaluate the evidence on record properly or at all as a result of which he reached a decision which is unsupportable in the circumstances.

The appellant's complaint as contained in the above ground and submissions is that the plaintiff did not prove his case on the balance of probability. He stated that all evidence from PW.1, PW.2, PW.3 and PW.4 was hearsay, contradictory and full of discrepancies. Appellant notes that these witnesses gave varying testimonies regarding who stayed on the land.

However counsel for the Respondent in submissions referring to the case of ***Karisa v. Solanki EA 320***, and ***Uganda Breweries Ltd v. Uganda Railways Corporation SCCA 06/2001***, argued that the appellate court can only interfere with findings of facts by the lower court upon proof of exceptional circumstances. He argued that appellant did not show any such exceptional circumstances that warrant the appellate court's interfering with the learned trial Magistrate's findings of fact herein.

I have examined the evidence and the pleadings on record. I have also considered the learned trial Magistrate's judgment. I do not find that the learned trial Magistrate failed in any way to assess the evidence before him.

The judgment at page 1 to page 5 sets forth the evidence and issues. At page 6, the learned trial Magistrate analyses the evidence and notes that PW.1 claimed acquisition and utilization of the land by his grandfather as early as 1926. (This is true as per page 3 of typed record).

He also found as a fact that the grandmother **Kokop Mariamu** lived there temporarily and left (found also at page 4 of the typed copy of proceedings).

He found corroboration for those findings in evidence of PW.2, PW.3 and PW.4.

(PW.2 at page 6 confirms that the first on the land was Yairo and PW.3 at page 8 says:

> "*The grandmother of defendant was staying at Yairo's place…. PW.4 at page 8 said that the land was for his father Yairo and at page 9 says defendant's grandmother, one of my Aunt fell sick and Kokop Mariamu was called to come and treat her…..*"

The learned trial Magistrate also considered the defence at page 7 and noted that DW.1 told court that it was his grandfather who offered land to plaintiff's grandfather for settlement at about 1946. (This is contained at page 13 of the record. It is recorded thus:

> "*We stayed peacefully until 1945 when the grandfather of the plaintiff came to the land in 1945….*"

The learned trial Magistrate also considered evidence of DW.2- DW.5 at page 7 of his judgment then made deductions based on the evidence above and findings at locus.

I agree with those deductions, and I find that they amount to a correct analysis of the evidence before court.

The evidence shows that according to the plaint under paragraph 4(g)- the case for plaintiff was that plaintiff was in possession of the land since 1996-2012 when defendant entered thereon cultivated and sold off part of it.

This was denied in the written statement of defence paragraph 3 (b) which showed that the grandfather of defendant possessed the land since 1830, and left during insecurity in 1962 where after defendants re-occupied in 2007.

The law is that parties are bound by their pleadings. The evidence when reviewed shows that through PW.1-PW.4 the plaintiff was able to prove on a balance of probability the facts as pleaded in the plaint (paragraph 4(g) above).

However, the defence was at variance with their pleadings in written statement of defence where paragraph 3(b) was that the suit land was acquired by late **Chesania Bukose** in the 1830s.

However in court at page 13 of the record **DW.1 Siwa** told court that the grandfather **Chesaya** got the land in the 1930s differing from the statement in the written statement.

He also claimed the plaintiff's grandfather entered in 1945 on the land and confirmed that **Yairo** grew up on the land and produced plaintiff's father thereon in 1946 (page 14).

DW.2 Anguria on the other hand contradicted this testimony saying the father of the plaintiff and grandfather of the plaintiff are not related!
He then stated that he knew nothing about the history of the land. His evidence had no corroborative value.

DW.3 Wanyala further contradicts D.1 when he stated that the grandfather of the plaintiff and that of the defendant divided the land between plaintiff and defendant in his presence (page 16). Yet D.1 had said at page 13 that by the time grandfather of the plaintiff came in 1945.

> "*He found my grandfather in the land when he had divided it already between my father and uncle.…*"

DW.5 Swoyte contradicts the evidence of DW.1, DW.2 and DW.3 by categorically saying that it was only the grandfather of the defendant who lived on the land.

From all the contradictions and discrepancies noted from the defence case and the evidence from plaintiff. I do agree with the learned trial Magistrate, that on the balance of probability the plaintiff proved his claim as against the defendants. There is no merit in ground 1 of the appeal. This finding also settles ground 2, of failure to consider the defendant's evidence.
This ground also fails.

Grounds 3 and 4: Misdirection, non-direction and miscarriage of justice
Following the authority of ***Matayo Okumu v. Fransisko Amudhe (1979) HCB 229***; It was Held 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*."

I have analyzed the evidence and do not find any misdirection or non-direction occasioned by the decision.

On the question of trespass the law is "first in time is first in title.." the evidence shows that the first in title was the plaintiff's grandfather who entered in 1926.
The grandfather of the defendants was alleged in written statement of defence to have entered in 1830, then in court said to have entered in 1930, but evidence from plaintiff showed he entered in 1946. Evidence also shows that plaintiff re-entered the land in 1996, as opposed to defendant's entry in 2006. All evidence shows that there was constructive possession of the land by the plaintiff by the time defendants entered thereon. The question of trespassed was therefore well settled. (See cases of ***Sheikh Mohammed Lubowa vers Kitara Enterprises Ltd CA No. 4/1987 (the CAE)*** and ***Kalinga v. Kalumwana (1990) EA 137)***

On the question of locus, the quoted cases are on the point. A visit to the locus is not a hunting expedition for evidence. It aims at clarifying what was said in the evidence in court. (See ***John Siwa Bonin v. John Arapkissa HCC. 0058/2007***, following ***Desouza v. Ug (1967) EA 78***).

I am satisfied that the learned trial Magistrate followed the principles necessary for visiting locus. The learned trial Magistrate, went at length to show at page 19 of the typed proceedings that the aims of the visit to the locus were:

"- To know the size of the disputed land
- To know the boundary of the land/neighbours.
- Who is occupying the land?
- Where is the valley that divides the leonita.

The Magistrate took notes, drew a map and all this is captured on record. The proceedings at locus were all well captured.

I therefore do not find any justification for the appellant's complaints regarding the conduct of the locus proceedings.

I do not find any evidence of miscarriage of justice.

The grounds of appeal above are not proved and they fail.

In conclusion this appeal fails on all grounds. It is dismissed with costs to Respondent.

Henry I. Kawesa

JUDGE

03.04.2017