IN THE HIGH COURT OF UGANDA AT SOROTI

(ARISING FROM KUMI CIVIL SUIT NO. 81 OF 2005)

CIVIL APPEAL NO. 31 OF 2009

OKURUT JOSEPH OKOTA……APPELLANT

V

APORU BENARD ……RESPONDENT

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant appealed the judgment of HW William Tumwine Grade one magistrate , as he then was, sitting at Kumi and dated 14th July 2009 on six grounds summarised below.

1. That the trial magistrate erred in law and in fact when he failed to evaluate the evidence and arrived at a wrong conclusion.
2. That the trial magistrate failed to address himself to the contradictions and inconsistencies in the defence evidence.
3. The trial magistrate relied on the weaknesses of the appellant's case.
4. That the trial magistrate based his decision on speculation and imagination.
5. That the trial magistrate did not test the eligibility of the purchase agreement.
6. That the trial magistrate failed to exercise his powers to call vital witnesses.

The respondent was represented by Mr. Ogire while the appellant appeared in person. The appellant filed a write up while Mr. Ogire filed written submissions . I have examined both the submissions and the write up.

The duty of an appellate court is to re-evaluate the evidence and arrive at its own conclusions bearing in mind that the appellate court had an opportunity to observe the demeanour of the witnesses.

The appellant sued for possession and a permanent injunction for five acres of customary land located in Apama, Oteeten, Ngora district.

His case in the lower court was that the land in dispute belonged to Adakun Noah who died in 2005. That prior to his death , Adakun who was paternal uncle to appellant had appointed him his heir and this was confirmed by the clan in 2005.

On the basis of this authority, the appellant sought to evict the respondent from the land in dispute on the grounds that the respondent had no right to live on it. The other basis for his suit is that Adakun , during his lifetime, unsuccessfully tried to evict the respondent from the land . According to the appellant, the respondent was merely given a place of refugee but he decided to stay.

The appellant also relied on decisions of a clan meeting appointing him heir, PExh. 3. In the minutes of the clan meeting dated 6.2.2005, it is recorded that Adakun left six gardens of land without elaborating the locations of these gardens. He also relied on two letters . The first letter is dated 16.9.2001 and it is signed by one Ongodia Vigilious acting on behalf of Ibakara clan requesting the respondent to meet the clan to discuss the issue of his stay/relationship with Mzei Adakun. The second letter relied is dated

30.9.2001 by the respondent to Adakun agreeing to meet to meet him. It is marked PExh. 2.

He relied on several witnesses including PW 2 Mutoto John Charles . Both this witness and the appellant confirm that at the clan meeting, the appellant was not shown any land belonging to the deceased Adakun .

The respondent on the other hand based his case on sale agreements between himself and Kosai Muron of various pieces of land.

The following sale agreements were relied on:

1. Sale agreement dated 18.7.92 between Okello Yob as seller and respondent as buyer marked DExh.6 . Land sold is described in the agreement and sale is witnessed by several persons. In this agreement, it is mentioned that the land sold originally belonged to Adakun Noah but bought by Okello Yob then re-sold to the respondent.

2. Sale agreement between Adakun as seller and his brother Yob Okello dated 17.1.1990 marked D Exh. 5.

3. Sale agreement between Kusai Muron and the respondent dated 8.12.1997, DExh.4

4. Sale agreement between Kusai Muron as seller and the respondent dated 17.8.1996,D Exh.3

5. Sale agreement between Kosai Muron and respondent dated 7.8.1996, DExh. 1

Kosai Muron was brother to Adakun . The respondent was their maternal nephew, his mother was sister to the two brothers Muron and Adakun. The respondent further testified that he bought a piece of land from one Yobu Otiida Okello who bought it from Adakun in 1992. This sale in fact took place on 17.1.1990 and not 1992. The sale agreement was marked Exh. 5. It seemed that the respondent purchased most of the land from Muron and only one piece could be traced to Adakun and even then, Adakun had sold it in 1992.

By the time of the hearing, Muron Kosai was still alive . The respondent was supported in his evidence by DW2 Okiru Steven and DW3 John Robert Atwanan.

The resolution of this case depended on a balance of probabilities. Whether the appellant proved his claim to the land was the key issue for determination. The trial magistrate found that he failed to prove his claim. I agree with the trial magistrate. By the time of the suit and indeed by 2005 when Adakun died, the respondent was in possession of the land in dispute. This is obvious not only from the respondent's evidence but also from the appellant's case because he sues for possession. In other words, the land was in adverse possession of someone else. At the time of the hearing, Muron brother to Adakun who sold most of the land to the respondent, was alive but he did not testify. As key seller to the respondent, he did not come forth to deny the sales. The sale agreements were not challenged . It appeared as if the appellant claimed land which was not only already sold but which also never belonged to Adakun in the first place, save for one garden sold to Yobu Okello in 1990. A witness to one of the sales, DW 2 Okiru Steven testified to being present when Kusa Muron sold three gardens to Aporu Benard.

Secondly, the basis of the appellant's claim to the disputed land is not tenable. For him to base the claim on the fact that late Adakun had asked the respondent to leave the land is not sufficient to show that the respondent had a dispute with Adakun. The letters PExh 1 and 2 do not disclose any dispute between Adakun and the respondent. Even if they did, there should have been more explicit evidence that there were problems between Adakun and the respondent.

Furthermore, the failure by the clan meeting to describe location of the six gardens identified as property of Adakun in their clan meeting casts doubts on whether Adakun owned any land at the time of his death.

I am inclined to find that the objection to the respondent's purchase of land is because he is a maternal nephew to the two brothers Muron and Adakun and therefore comes from a clan different from that of the appellant. The fact that the respondent is a maternal nephew to Adakun and Muron does not affect the fact that he is a bona fide purchaser for value.

The respondent produced evidence of purchase of the land in his possession. In the absence of credible challenge to the authenticity of these sale agreements, they are evidence of purchase and therefore of ownership of land described in those agreements.

In light of evidence of purchase of land by the respondent, and on failure by the appellant to prove that Adakun owned land immediately prior to his death, i am unable to fault the trial magistrate for dismissing the appellant's claim.

I am in agreement with submissions of counsel for the respondent that by the time of Adakun's death, he had no land to his name and none was shown to the appellant when he was appointed heir by the clan.

With regard to the first ground of appeal that the trial magistrate erred in law and in fact when he failed to evaluate the evidence and arrived at a wrong conclusion. I have re-evaluated the evidence and found that the magistrate properly evaluated the evidence and arrived at a correct conclusion.

The second ground was that the trial magistrate failed to address himself to the contradictions and inconsistencies in the defence evidence. I did not find any inconsistencies in the respondent's case.

The third and fourth grounds are that the trial magistrate relied on the weaknesses of the appellant's case and that the trial magistrate based his decision on speculation and imagination.

The trial magistrate addressed his mind to the evidence as a whole and to the duty of the appellant to prove his case on a balance of probabilities. The trial magistrate did not indulge in speculation or base his decision on imaginations.

The fifth ground is that the trial magistrate did not test the eligibility of the purchase agreements. I find no merit in this ground because a witness to the sale , Okiru, testified in court as DW2.

On the last ground that the trial magistrate failed to exercise his powers to call vital witnesses. The appellant had a duty to prove his case and it was incumbent on him to call all vital witnesses .

In the result, all grounds of appeal fail. The appeal is accordingly dismissed with costs to the respondent.

Before i take leave of this appeal, i wish respond to counsel's submission that the failure by the appellant to extract a decree rendered the appeal incompetent. It is now accepted that technicalities will not be invoked to defeat the ends of justice. Secondly, the current jurisprudence from the Court of Appeal is that such failure is not a basis for striking out an appeal. In **High Court Civil Application 32 of 2013 Haji Musa Hasahya v Owori & Co. Advocates & anor,** the High court sitting at Mbale ,citing **Court of Appeal Civil Appeal No. 46 of 1997 Kibuka Musoke & others v Dr. Apollo Kagwa** , and declined to strike out an application for failure to extract an order. I encourage counsel to utilise the Uganda legal Information Institute , accessible via the judiciary website or via google to keep pace with current jurisprudence .

DATED AT SOROTI THIS…….09……DAY OF……05……2014.

HON. LADY JUSTICE H. WOLAYO