THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT 04-CV-CA-0131-2012

SUMOTWO KAPLEMBE TALEMWA VS SOYEKWO PETER & ANOTHER

BEFORE

BEFORE: HON.JUSTICE HENRY.I.KAWESA

JUDGMENT

This is an appeal brought by appellant SUMOTWO TALEMWA KAPLEMBE, challenging the judgment and decree of his worship Kobusheshe Francis the learned Chief Magistrate where he dismissed his case and found in favor of PETER SOYEKWO and SOYEKWO KAPLEMBE, the respondents in this appeal.

The memorandum of appeal has three grounds which I have reproduced as here below:

1. That the learned magistrate erred in law and in fact when he held that the disputed land had not been distributed during late Soyekwos lifetime.
2. The learned trial Magistrate erred in law and in fact when he failed to evaluate the evidence before him and as a result reached a wrong decision.
3. The decision of the learned trial Magistrate is tainted with fundamental misdirection and non direction in law and in fact and as a result has led to a miscarriage of justice.

He prayed that the appeal be allowed, the judgment and the orders of the lower court be set aside, and costs be allowed for appellant here and below.

When the matter came for hearing, appellant was represented by Counsel Okwinyi Tony. The respondents informed court that they would represent themselves. They agreed with counsel for the appellants to file and exchange written submissions.

In his submissions counsel for the defendant argued the grounds in the order he had presented them in the memorandum of appeal; while the respondent gave a general rebuttal of the same.

I have carefully gone through the lower court record. I have also carefully addressed my mind to the submissions raised by each party in this appeal. I have duly informed myself of the duty of the first appellate court. I have duly reviewed and evaluated the evidence on record. I have come to the following conclusions:

GROUND ONE:

That the learned trial Magistrate erred in the law and fact when he held that the disputed land had not been distributed during late Soyekwo's lifetime.

While arguing this ground it was stated for appellant by counsel in submissions that it was appellant's case that he was given the suit land by his late father, one SOYEKWO KAPLEMBE in 1960, in the presence of his brothers, who are the two respondents in this matter, Pw2, and other family members. He maintained that the respondents were each allocated their portions and they took possession. He also took possession of his portion. He referred to page 5 of the proceedings, which I have examined and found at par with his assertions above. He further argues that this evidence was

not discredited by cross examination. He maintained that this evidence was well collaborated by that of Pw2.
Pw2s evidence is found on page 6 of the proceedings.PW2, Noibei Owoya, stated that he is a neighbor to the appellants land. He was present during the handover of the land to the appellant, as a neighbor. He confirmed that appellant's father died in 1980, in Bunambutye but was brought and buried there. He
Also saw appellant divide his land between his sons in the presence of both defendants. He witnessed the clan meeting and the LC meeting called to resolve the dispute. On the issue of ownership, and possession of this land by appellant, Pw3 THOMAS KAPLEMBE, AND Pw4, MANGUSHO MICHAEL, give similar accounts of events as related by appellant and Pw2.
The respondent on the other hand attacked this evidence his submission pointing out that each party was allowed to call witnesses whom court evaluated and found the appellant and his witnesses unreliable. He invited this court to come to the same conclusion.
The lower court record shows that the defendants told court through Dw1 PETER SOYEKWO that the Land belongs to their late father; SOYEKWO KAPLEMBE.He said that it was 9 acres in size.He also confirmed that it was the appellant utizing the land, that his father was buried there. He confirmed that the father distributed some land to them during his life time but never gave out the land in dispute. He told court that in 2007, they had held a clan meeting aimed at distributing this land but the appellant had frustrated the exercise. During cross examination, he confirmed that he was present when appellant got his share of the f land.
Dw2 SOYEKWO KAPLEMBE stated that though the land is occupied by the appellant, by the time their father died, he had not

given the land to anybody. He also said that the attempt to distribute it by the clan was thwarted by the appellant. He revealed during cross examination that the land appellant was given borders his in Shosho village near the land in dispute.

Dw3 KABUR JOHN stated that he was the chairman of LC1Cheptaburbur village and the chairman of the Kapkwendui clan. He confirmed that a meeting of the clan was held to resolve the dispute but abandoned the exercise when appellant disrupted the proceedings. In cross examination he concedes that the appellant had participated in showing the boundaries of the land of his father.

The evidence as it is on record from all parties' shows that it is a fact that the late SOYEKWO, during his life time gave out land to his sons. The evidence in my view points at a probable inference that the deceased could have given the disputed land to the appellant. This because all the witnesses told court that appellant Was the one in possession and he was actively using the land for a long time. The evidence of the witnesses called by the appellant was in my view enough to satisfy the standard of proof in civil cases as in MILLER VS MINISTER OF PENSIONS(1947)2ALLER 372.The standard of proof according to lord Denning,is a reasonable degree of probability but not so high as in criminal cases. Going by the evidence on record, this standard was satisfied by the plaintiff/appellant. As rightly argued by counsel for the appellant, if the magistrate had properly evaluated the evidence he would have reached a similar conclusion.

Counsel made mention of the irregularity of the proceedings at the locus. The typed record does not show what transpired at the locus. However even the hand written record on file shows that that at the locus court did not move around the land or if it did no record of this is on record.Also,other independent evidence of neighbours,etc was not taken. Commenting on proceedings at the locus in JAMES NSIBAMBI VS LOVISA NANKYA (1980) HCB 81, J ODOK I (as he then was) pointed out that all parties, and their witnesses, must adduce evidence at the locus. Clearly the aim of conducting proceedings at the locus was lost out in this case.

The sum total of all this; is that, the court was not able to benefit from the proceedings at the locus and therefore the conclusions the Magistrate made on the question of the deceased having not distributed this land were fatally flawed and not borne out by the evidence in court or at the locus

In conclusion, I entirely agree with the arguments on this ground as raised by counsel for the appellant, and I find that this ground succeeds.

GROUND TWO

The learned trial Magistrate erred in law and in fact when he failed to evaluate the evidence before him and as a result reached a wrong decision.

While determining issue 1, I have reviewed the evidence and found that had the trial magistrate properly evaluated it he would have reached a different conclusion. The weaknesses pointed out by the appellants counsel in support of this ground are therefore taken as the right position in the law, as propounded in HABRE INTERNATIONALCO LTD VS

EBRAHIM AND OTHERS SCCA NO4 OF 1999, that where a party fails to challenge that evidence that evidence is taken as true.

It has been found that the evidence led by the appellant and his witnesses was reliable. That evidence shows that the land had been given to the appellant by his late father.

This ground therefore also succeeds.

GROUND 3

That the decision of the learned Magistrate is tainted with fundamental misdirection in law and in fact and as a result has caused a miscarriage of justice

It is the law that a miscarriage of justice occurs where there has been misdirection by the trial court in a matter of law or fact relating to the evidence given or where there has been unfairness in the conduct of the trial. (Halsbury's laws of England, Volume10 page 583) On this ground, the appellant has argued that the trial magistrate made conclusions that were not based on evidence, that, the proceedings at the locus were greatly flawed, and that the assessment of the weight of the evidence was wrongly done. I agree. The basis for the finding that the fact that the grave of the deceased being on the land is proof that he did not distribute it is not tenable The attempt by the magistrate to use the law of succession to make legal conclusions was also an exercise in futility because it was based on a wrong assumption that the deceased had not given out his land. That the All in all I find that the trial magistrates findings are tainted with misdirection in law and in fact and as a result caused a miscarriage of justice.

This ground also succeeds.

In the result therefore these appeal succeeds as prayed.

The lower court judgment and orders are hereby set aside, and judgment entered for the appellant, with costs here and below.

H.I.KAWESA

JUDGE

03.10.2013